An analysis of the European Regulation on ship recycling

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Introduction

On the 30th December 2013 the European Union brought into force the European Regulation on ship recycling (thereafter referred to as the ER) to regulate the safe and environmentally sound recycling of European flag ships, and also to require, in a few years time, the carriage on-board of inventories of hazardous materials for all ships visiting European ports. The entry into force of the ER is a significant event that will not only change the way ships under its scope are recycled, but also promises to bring changes to the contractual relations between Cash Buyers, shipowners and recycling yards. GMS, as the world's leading Cash Buyer, has followed closely the development of the ER and has a good understanding of its provisions. With this article GMS shares its expertise, so as to facilitate the application of the new European requirements.

Background

The new Regulation evolved from text, originally proposed by the European Commission on 23 March 2012, through lengthy internal negotiations amongst the 27 Member States of the European Council, as well as through the deliberations of the European Parliament’s Environment Committee. Thereafter tripartite meetings were held between the Council, the Parliament and the Commission and at their third trilogue meeting, on 27 June 2013, an agreement was reached on a final compromise package. This agreement was formally adopted by the plenary of the European Parliament on 22 October 2013 and by the European Council on 15 November 2013. It was published on 10th December 2013 in the Official Journal of the European Union and on the 30th of December 2013 the new “European Regulation on Ship Recycling” (the ER) entered into force.

The outcome of the European initiative and negotiations is that the ER is very similar to the Hong Kong Convention (hereafter, the HKC), encompassing most of its mechanisms, and, with one potential exception, containing no contradictory provisions that could create an impediment to the prospects of the HKC’s entry into force. In fact, it is very possible that the ER could significantly accelerate the date when the HKC becomes the global standard for regulating the recycling of ships.

The original text proposed by the European Commission had numerous problematic provisions, probably proposed without a full appreciation of the commercial realities of international shipping. Also, some key policies of the European Parliament were based on a naive understanding of the recycling industry and appeared to have been pursued without regard to their consequences to the shipping industry, to the recycling industries, to the prospects of the HKC, and even to the enforceability of the ER. Knowledgeable and focused technocrats from the Cypriot and the Irish Presidencies negotiated a final text that is workable and supportive of the HKC, having overruled most of the unworkable and counterproductive proposals. The result of the lengthy and complex negotiations produced text that is difficult to read, with frequent and convoluted cross-references. Admittedly, this is a small price to pay for having been spared an unworkable piece of legislation.

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Scope

The types and sizes of ships that come under the scope of the ER are the same as under the HKC, except the ER being restricted to European Union flag ships, with an additional requirement for ships of other flags visiting EU ports to be provided with an inventory of hazardous materials (IHM).

Control of hazardous materials and IHMs

With regard to the control of certain hazardous materials and the need to compile and carry on board a ship-specific IHM, the ER is structured in the same way as the HKC, requiring the three-part IHM to be compiled taking into account the guidelines of the HKC. Like the HKC, the ER now differentiates between existing ships and newbuildings, with existing ships having to identify “at least” those materials on board that are listed in ER’s Annex I, while newbuildings are being prohibited to be fitted with materials listed in Annex I and also being required to identify (location and approximate quantities) materials listed in ER’s Annex II.

One important difference between the ER and the HKC, is in the inclusion of one extra hazardous material, which is already banned in European Union law, in Annex I of the ER (Perfluorooctane sulfonic acid and its derivatives, or PFOS, the main application on board ships being in some fire fighting foams), and another one in Annex II (Brominated flame retardant, or HBCDD, the main application on board ships being in expanded polystyrene used for cryogenic insulation, such as for liquefied gas tanks but also for refrigerator areas). A relevant footnote in Annex I to the ER states that PFOS “is not applicable to ships flying the flag of a third country”, while the HBCDD, being a material of Annex II, strictly speaking need only be included in IHMs of newbuildings, plus in any retrofits involving changes to structure and equipment of existing ships. As the ER treats all ships flying the flag of a third country as existing ships, regardless of their date of built (see ER’s Article 12(1), referring to Art. 5(2)), it follows that inclusion of information on the HBCDD will not be required of IHMs of non-EU flagged ships, unless HBCDD has been installed during a retrofit. Conversely, IHMs compiled for EU flagged ships after the date of application of the ER will fully satisfy the requirements of the HKC.

Note that good descriptions of the properties and typical uses of PFOS and of HBCDD can be found in a Norwegian submission to IMO in 2008 (document MEPC 57/3/19) proposing their inclusion as controlled hazardous materials under Appendices 1 and 2 respectively of the HKC. The Norwegian submission was rejected by IMO at that time.

Requirements for shipowners

The scopes of three mandatory and one voluntary surveys and the maximum interval between renewal surveys in the ER are the same as in the HKC.

The ER maintains the spirit and the letter of the HKC in its requirements for port State control, and for what are, and importantly for what are not detainable deficiencies. Worth noting that failure of ships flying the flag of a third country to have on board a statement of compliance together with an IHM when calling at a port or anchorage of an EU State is to be enforced through a warning, dismissal, detention, or exclusion (Art. 12(5)).
Shipowners of EU flagged ships will have to ensure that ships destined for recycling are only recycled in facilities that are approved (and included in the “European List”, see below). These ships will have to hold a Ready-for-Recycling Certificate issued after the receipt of an explicitly or tacitly approved Ship Recycling Plan by the competent authorities of the recycling State, i.e. the same as with HKC.

The ER requires tankers to arrive at the recycling facility with cargo tanks and pump rooms ready for certification for safe-for-hot work, whereas HKC requires that they are safe-for-entry, or safe-for-hot work, according to the domestic requirements of the recycling State. Furthermore, the ER states that the recycling facility may decline to accept a ship for recycling if its condition does not correspond substantially with the particulars of the IHM. It is difficult to see how (or whether) such a provision could be enforced in practice.

It is worth noting that both the ER and the HKC simply define the Cash Buyer as a shipowner. In doing so, the regulators avoided to specify distinct responsibilities for the operating shipowner and for the Cash Buyer. Had the legislation tried to address separately their obligations, this would have either resulted into impractically complex regulations, or into inflexible and restrictive arrangements. Nevertheless, the consequence of merging and not separating the roles of the operating shipowner and the Cash Buyer is that the sale process is not defined in the regulation. The author discusses this issue in a separate article.

Requirements for Recycling Facilities

Recycling Facilities authorised to recycle ships under the scope of the ER will be expected to produce a ship-specific Ship Recycling Plan on the basis of information provided by the shipowner (IHM, ship’s plans and manuals), taking into account the guidelines of the HKC. Recycling Facilities will also be required to produce and operate in accordance to a Ship Recycling Facility Plan that is developed taking into account the relevant guidelines of the HKC.

To be authorised, recycling facilities will have to comply with the provisions of the HKC and also with the following three additional requirements (Art. 13): (1) “operate from build structures”; (2) demonstrate “the control of any leakage, in particular in intertidal zones”; and (3) ensure “the handling of hazardous materials, and of waste generated during the ship recycling process, only on impermeable floors with effective drainage systems”.

These three requirements are products of the negotiations between the European Council and the Parliament. A key policy of the Parliament was to achieve an outright ban to beaching. The Council succeeded in deleting many of the demands made by the Parliament’s Green Party Rapporteur, including all direct references to banning beaching. The second and third of the above three provisions prescribe requirements that will have to be met regardless of the recycling method used, while the first requirement for operating “from build structures” is imprecise and ambiguous and is a compromise devised to accommodate political sensitivities in the negotiations.

Since the conclusion of the negotiations, the Rapporteur of the Parliament has chosen to treat the outcome as confirmation of a ban to beaching. He issued in July 2013 a celebratory press release, stating: “These standards effectively mean the end of beaching where ships are simply taken apart on a beach, with scant regard for human health or the environment. ... The new law will make it compulsory for ships to be recycled from built structures only and in such a way that all hazardous materials are fully contained. As this is impossible on a beach, the practice of
beaching is de facto forbidden”. More recently, on the occasion of the formal adoption of the ER by the Parliament on 22/10/2013, a further press release stressed that: “Plans agreed with EU ministers to end the scrapping of old EU-registered ships on third-country beaches …”, and also: “During the negotiations, Parliament strengthened the proposed requirements, inter alia by obliging ship-recycling businesses to operate in built structures …”.

Reportedly, the European Council seems to have understood that it would be an absolute blunder to exclude the South Asian ship recycling market from the ER and from the options available to European shipowners. Moreover, ship recycling experts are very clear that there is no contradiction between good quality beaching, safety and protection of the environment. Apparently, it was for these reasons that the Council refused to agree to ban beaching. Such a ban would lead to a new massive evasion of the ER by owners, and probably to a total disinterest by South Asian countries to consider acceding to the HKC, thus torpedoing its prospects of entry into force. Ironically, the ban for which the Greens are fighting, would only serve the commercial interests of sub-standard recyclers and of the Shipbreaking Platform, who, in this way, will continue to have something to do.

The European Commission will implement the ER and will be required to put to practice its requirements. The ER provides the option to the Commission to issue technical guidance notes so as to facilitate the certification of recycling facilities (Art. 15(4)). The Commission is expected to develop such guidance in 2014 and in so doing to interpret the meaning of “from build structures”.

The ER, like the HKC, requires the recycling facility to formally report its readiness for the commencement and also the completion of recycling of each ship under ER’s scope. Interestingly, whereas the HKC requires the facility to report to its competent authority, ER requires the facility to report to the administration of the flag State, as Europe has no jurisdiction over competent authorities of recycling States outside the European Union.

There is one further important, but understandable, difference between ER and the HKC. Whereas according to the HKC the authorisation of recycling facilities is a matter for the competent authorities of the recycling State, the ER could not expect the authorities in countries outside the European Union to enforce the ER, and for this reason it has developed the new mechanism of the “European List of ship recycling facilities”.

Facilities located in a European Member State will be authorised by the competent authorities of that Member State who will then notify the Commission of the facilities that it has authorised. The Commission will then include these facilities in the European List that will establish and publish in the Official Journal and on its website no later than 36 months after the ER’s entry into force. On the other hand, facilities located in third countries will have to apply individually to the Commission for their inclusion in the European List. Together with their application, they will provide evidence showing that they meet the requirements of the ER. The compliance of individual facilities “shall be certified following a site inspection by an independent verifier with appropriate qualifications”. Furthermore, the facilities will have to “accept the possibility of being subject to a site inspection by the Commission or agents acting on its behalf”. The renewal of the certification and inclusion in the European List will take place every five years, subject to a mid-term review confirming compliance (Art. 15(4)).
Penalties and the amendment of Regulation on Shipments of Waste

The ER requires Member States to make provisions in their law for effective, proportionate and dissuasive penalties for infringements (Art. 22). Interestingly, the ER requires that the Commission shall assess and report by 31 December 2014 which infringements of the ER should be brought under the scope of Directive 2008/99/EC (on the Protection of the Environment through Criminal Law), requiring Member States to impose criminal penalties for serious breaches of EU environmental legislation (Art. 30(1)). The intention of the assessment is to achieve equivalence between the ER and Regulation 1013/2006 (on Shipments of Waste), i.e. the EU implementation of the Basel Convention and the Ban Amendment. It is thought that this is meant to bring a balance following the exclusion of ships from the scope of the European Regulation on Shipments of Waste (Art. 27).

Request for action

Natural or legal persons “affected, or likely to be affected, or having sufficient interest in environmental decision making” can request the Commission to take action with respect to a breach, or imminent threat of a breach, of the requirements for including recycling facilities located in third countries in the European List. The Commission shall receive and consider any such requests, information and data. It shall give the recycling facility the opportunity to respond, and it shall inform those alleging a breach whether it will accede or refuse the request for action, and the reasons for it (Art. 23).

Entry into force and date of application

Unlike the HKC, ER makes a distinction between the date of its entry into force and the date of its application.

The ER entered into force on 30th December 2013, twenty days after its publication in the Official Journal of the European Union (Art. 31).

“Date of application” is the date after which ships under the scope of the ER will start having to have an IHM, to be surveyed, to be certificated, and to be recycled in line with the requirements of the ER. The ER shall apply (Art. 32) from the earlier of the following two dates, but not earlier than 2 years after entry into force:

(a) 6 months after the date that the combined maximum annual ship recycling capacity of the ship recycling facilities included in the European List constitutes not less than 2.5 million LDT†; or
(b) 5 years after entry into force.

It follows that the earliest ER can apply is 2 years after its entry into force, and the latest is 5 years after entry into force.

Some provisions of the ER shall apply from different dates:

One (1) year after entry into force the following will apply (Art. 32 (2)(a)):

• the establishment of the European List (Art. 16);

† Note on the required capacity of 2.5m LDT: Turkey’s 21 yards currently have a combined capacity of 930,000 LDT. Four or five big yards in China could provide the remainder.
• the requirements for ship recycling facilities, so that facilities can apply to be included in the European List (Art. 13);
• authorisation of ship recycling facilities located in a Member State (Art. 14);
• inclusion in the European List of ship recycling facilities located in a third country (Art. 15);
• once the European List is published (at the latest 3 years after entry into force, but quite possibly earlier), ships going for recycling will need to have an Inventory of Hazardous Materials (but will not need to be recycled in line with ER before the date of application) (Art. 5(2), 2nd subparagraph); and
• Member States may authorise prior to the date of application of the ER the recycling of ships in facilities included in the European List, in which case the European Regulation on Shipments of Waste shall not apply (Art. 26).

Three (3) years after entry into force, the Commission shall submit to the European Parliament and Council a report on the feasibility of a financial instrument to facilitate safe and sound ship recycling, and if appropriate shall accompany it by a legislative proposal (Art. 29).

For the following matters the date of application will be seven (7) years after entry into force (Art. 32 (2)(b)):

• (all) existing ships shall comply with requirement for the IHM (Art. 5(2), 1st and 3rd subparagraph); and
• ships flying the flag of a third country will be required to have an IHM when calling at a port or anchorage of the European Union (Art. 12).