

Subcommittee on Merchant Shipping (Control of Harmful Anti-fouling Systems on Ships) Regulation and Merchant Shipping (Prevention and Control of Pollution) (Fees) (Amendment) Regulation 2015

Follow-up to the Last Meeting on 21 April 2015

This note provides information on a list of issues, as set out in the ensuing paragraphs, in respect of the Merchant Shipping (Control of Harmful Anti-fouling Systems on Ships) Regulation ("the AFS Regulation") which sought to implement the International Convention on Control of Harmful Anti-Fouling Systems on Ships, 2001 ("the Convention"), pursuant to Members' requests at the last meeting on 21 April 2015.

- (i) **the definitions of "warship", "naval auxiliary" and "ship owned or operated by a government and used only on government non-commercial service" ("collectively known as exempted ships") referred to in section 3(2) of the AFS Regulation**

2. "Warship" and "naval auxiliary" mentioned in section 3(2) of the AFS Regulation refer to "military vessel" in general which belong to the naval establishment. "Ship owned or operated by a government and used only on government non-commercial service" can be understood by its ordinary meaning. As explained by the Administration at the Subcommittee meeting of the Air Pollution Control (Marine Light Diesel) Regulation (vide LC Paper No. CB(4)476/ 13-14(01)), when enforcing the legislation concerned, the relevant departments would consider the following factors in determining whether the vessels are military vessels –

- (a) whether the vessels belong to the armed forces of a state;
- (b) whether the vessels bear external marks that distinguish the nationality of such ships; and
- (c) whether the vessels are under the command of an officer commissioned by the government of the state.

These considerations are consistent with international practices and the same

factors will be applied in determining whether the concerned vessel is a military vessel in the context of section 3(2) of the AFS Regulation.

- (ii) whether the anti-fouling paints used by exempted ships in Hong Kong contained organotin compounds or otherwise; and**
- (iii) internal guidelines promulgated or measures adopted by the governments of parties to the Convention, including those of Hong Kong Special Administrative Region (HKSAR), the People's Republic of China and the United States of America, on the use of anti-fouling paints by the exempted ships, and actions to be taken by the Hong Kong Government to ensure exempted ships flying non-Hong Kong flags, including those under the custody of the Hong Kong Garrison, would follow the internal guidelines or take the adopted measures before or at the time of entering Hong Kong waters**

3. All ships owned or operated by the HKSAR Government have complied with the Convention by using anti-fouling systems that do not bear any organotin compounds. As a matter of policy, only compliant anti-fouling materials are used in the construction and maintenance of vessels by the HKSAR Government. In respect of other exempted ships in Hong Kong waters, we have no information on their compliance with the Convention since, due to their exempted status under the Convention and the AFS Regulation, they do not fall within our regulatory remit. We have written to our contacts at the International Maritime Organization (“IMO”) of the respective governments to enquire whether they have promulgated internal guidelines or adopted measures on the use of anti-fouling paints by their exempted ships, and are awaiting their response. In the absence of legal authority, the HKSAR Government is not in a position to take any actions to ensure compliance with such internal guidelines or measure, if any, by the exempted ships of these governments whilst they are in Hong Kong waters.

- (iv) **whether the following provision in paragraph (2) of Article 3 of the Convention would be appended to section 3(2) of the AFS Regulation to ensure that the Hong Kong Government would monitor the exempted ships complying with the Convention –**

"[H]owever, each Party shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, with this Convention."

4. The above provision in paragraph(2) of Article 3 of the Convention is not to empower jurisdictions to monitor the performance of other parties to the Convention in respect of the use of anti-fouling paints by their exempted ships. It only seeks to set out the obligation of individual parties to ensure, so far as is reasonable and practicable, that their exempted ships act in a manner consistent with the Convention. Whether and how far the exempted ships of a party to the Convention have complied with the Convention as required by paragraph (2) of Article 3 is outside the regulatory authority of other parties under the Convention. Such being the case, it would not be appropriate to include the above provision in the AFS Regulation.

- (v) **detailed procedures involved in the inspection, examination and investigation of (a) Hong Kong ships and (b) non-Hong Kong ships for the purpose of ascertaining whether the AFS Regulation had been or was being complied with, with references to paper work and/or in-situ inspections involved in each step; as well as actions to be taken for those ships which was found non-compliance**

5. Under section 13 of the AFS Regulation, a Government surveyor may inspect any ships within the waters of Hong Kong, and make any examination and investigation as are considered necessary for the enforcement of the AFS Regulation. In conducting inspection of either Hong Kong ships or non-Hong Kong ships, the Marine Department ("MD") will follow the "2011 Guidelines for Inspection of Anti-Fouling Systems on Ships" ("the Guidelines") adopted by the IMO, with the key steps set out in paragraphs 6-7 below.

6. According to the Guidelines, MD would check the validity of the IAFS Certificate or Declaration on Anti-Fouling Systems, and the attached Record of Anti-Fouling Systems, if appropriate. Since the only practical way to apply paint to the ship's bottom (underwater part) is in a dry dock, MD would check the date of application of paint on the IAFS Certificate by comparing the period of dry-docking with the date on the certificate. If the paint has been applied during a scheduled dry-dock period, it has to be registered in the ship's logbook. Furthermore, MD can verify this scheduled dry-docking by checking against the survey record and the endorsement date on the Safety Construction Certificate. In case of an unscheduled dry-dock period, MD can verify it by the registration in the ship's logbook, and by the endorsement date on the Hull Certificate, the dates on the Manufacturer's Declaration or by confirmation of the shipyard. MD would also verify that the survey for the issuance of the current IAFS Certificate matches the dry-dock period listed in the ship's logs.

7. MD will carry out a more detailed inspection and request for and examine further information when there have been clear grounds¹ to believe that the ship does not meet the requirements of the AFS Regulation. For the purpose of ascertaining whether there has been any contravention of the AFS Regulation, the Government Surveyor may –

- (i) require the ship-owner, master and crew of the ship and / or operator of the dockyard, etc. to provide further information about the anti-fouling system;
- (ii) inspect additional documents such as the initial survey report prepared by the recognised organisation and the dry-docking report; and
- (iii) conduct sampling and analysis of the ship's anti-fouling system based on scientific testing procedures.

8. If the results of sampling indicate that the ship's anti-fouling system contains organotin compounds in violation of the AFS Regulation, MD may

¹ Examples of clear grounds may include: the painting date shown on the IAFS Certificate does not match the dry-dock period of the ship; the ship's hull shows excessive patches of different paints, etc.

cancel its IAFS Certificate where the ship involved is a Hong Kong registered ship. In respect of a local vessel which is not required to carry an IAFS Certificate, MD may cancel its operating licence. In both cases, the ships concerned cannot proceed to sea until the problems have been rectified and new certificates are issued on satisfactory completion of survey. In respect of non-Hong Kong ships which are found to be in breach the AFS Regulation, MD will notify the relevant authorities of the ship's flag state for them to take necessary enforcement actions.

9. In all cases where there is sufficient evidence to show that the ship concerned (whether it is a Hong Kong ship or non-Hong Kong ship) has breached the AFS Regulation while it is in Hong Kong waters, MD will initiate prosecution actions against the owner and master of the ship. If the ship concerned has left Hong Kong waters, MD will put the ship on its monitoring list and take necessary enforcement actions when it enters Hong Kong waters again.

(vi) the administrative procedures involved if a holder of an International Anti-Fouling System Certificate complained against the decision of the Director of Marine for cancelling his/her Certificate under section 9 of the AFS Regulation

10. Under section 9 of the AFS Regulation, the Director may cancel the Certificate only if he has reasonable grounds to believe that the Certificate was issued or endorsed on the basis of false or erroneous information. To establish whether such reasonable grounds exist, MD will, as part of the due process, conduct sampling and analysis of the ship's anti-fouling system to ascertain if it contains any organotin compounds contrary to the information provided in the Certificate and in the Record of Anti-Fouling Systems held by the ship. MD will cancel the Certificate only if the results of sampling indicate that the ship's anti-fouling system contains organotin compounds in contravention of the AFS Regulation. Any complaints lodged by the ship-owner or ship master against the Director's decision will be considered by MD as part of its investigation process in deciding whether to initiate prosecution actions against the ship-owner and the ship master. MD will respond to the complaints as appropriate without jeopardizing the legal process.