

Current Alert

Legislative & Regulatory Issues of Contemporary Import to the U.S. Marine Transport Industry

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HAZARDOUS CARGOES

Soon To Be Put Under A Stronger Microscope?



Every so often the marine transportation community here in the United States (and elsewhere) experiences what can only be described as fits of “temporary sanity”, wherein its focus is directed (usually by a regulatory agency) towards the industry’s longstanding affliction with undeclared and/or mis-declared hazardous materials moving as cargo. By implication then, is it perhaps reasonable to say that a “general insanity” of sorts prevails during the balance of time when our focus is not as circumspect as it should be?

In last Friday’s **Lloyd’s List**, a piece appears which chronicles the ongoing work of the UK’s Marine & Coast Guard Agency (MCA) in sorting out all issues relating to the grounding of the container vessel *MSC Napoli*. In that piece, the lead-off sentence is instructive:

Every container removed from the beached MSC Napoli is being weighed, opened, and the contents examined as investigators search for evidence of undeclared or misdeclared hazardous cargo.

Further, the article continues, criminal sanctions are possible for those individuals or entities who choose to flaunt the relevant UK law. Finally, the article quotes a long-time colleague, Mike Compton of Ports Safety Organisation, as he portrays this particular HazMat issue as being within “the dark side” of containerized shipping. I couldn’t agree more.

The Problem(s)

There is a financial incentive for shippers (consignors) to mis-declare dangerous goods (HazMat). HazMat cargoes are subject to transport fees that are somewhat higher than other, general cargoes. Such increased fees are entirely appropriate, given the special consideration such HazMat cargoes must be accorded. Some HazMat cargoes, for instance, require on deck stowage only; some require below deck stowage; some must be carefully segregated from other types of HazMat cargoes; some must be stowed away from any sources of heat; some cannot get too cold; etc.; etc.

All of the foregoing sensitivities and implied proclivities, however, are not guaranteed as to outcome. That is to say, if conditions don’t get too terribly egregious a mild HazMat cargo which

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becomes, for instance, “Dangerous When Wet”¹, may well be able to survive quite well within a container stowed above deck on a trans-Atlantic voyage. On the other hand, if conditions get a little dicey, that container’s cargo becoming wet may cost a few lives; maybe a ship and its entire crew. When dangerous goods react, independently or in concert with one another, the results can be quite dramatic, very costly and decidedly catastrophic.



Above Left, C/V *Hyundai Fortune*, ablaze in the Gulf of Aden [March 21, 2006]. The combined cost of vessel replacement and cargo claims is estimated at approximately US \$300M.

Left, C/V *Hanjin Pennsylvania*, as cargo explodes at No 6 Hatch while in the Indian Ocean [November 15, 2002]. The vessel was rebuilt at a cost of approximately US \$44M. Cargo insurance pay-offs were rumored to be in the US \$60M range.

¹ A Class 4.3 HazMat cargo.

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The *Hyundai Fortune* and *Hanjin Pennsylvania* events described above are not isolated instances. In the recent past, container vessels have been exploding/burning at a relatively alarming rate. What's more, HazMat cargoes figure prominently (irrespective of such cargoes' proper declaration and documentation) in these events.

At Right, C/V *CMA Djakarta* [July 1999] burning off the Mediterranean Coast of Egypt. The vessel is abandoned after two deck stowed containers loaded with calcium hypochlorite (Hazard Class 4.3) ignited and then exploded.

Calcium hypochlorite is also the suspect antagonist in the extreme fire casualties experienced by C/V *Sea Elegance* [Oct 2003-off Durban - photo at bottom Right]; C/V *Sealand Mariner* [April 1998, off Crete], C/V *DG Harmony* [Nov 1998-off Brazil] and CV *Aconcagua* [Dec 1998-off Equador – photo at bottom Left].



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Notwithstanding such dire consequences, shippers (sometimes, it is rumored, with the aid, assistance and/or suggestion of cargo brokers and ocean carrier booking agents) purposely mis-declare HazMat cargoes as something less innocuous and consequently benefit from a cheaper freight rate. Over the long term, such a “plundering of rates” could result in some very substantial savings of course. The word on the street, historically, has been that cargo bookers distribute such illegal largesse as a benefit for high volume/long-term clients. In theory, such a benefit could be viewed as a sort of frequent-flyer perk. One in which a good client (or one that needs a little incentive to help fill up a ship) is rewarded with a *gratis* upgrade. A nod and a wink is all that could possibly memorialize such a transaction. In an adverse situation, such as when a government agency (like MCA or the US Coast Guard) discovers the illegal result of such a deal, the booking agent simply has to state that he/she knows nothing about any alleged conspiracy and that the consignor/shipper is solely and independently guilty of carrying out a rate-saving exercise through subterfuge. Until governments begin initiating HazMat sting operations at that point in the cargo transport timeline, we can expect to continue hearing of rumored and actual events along those lines.

Plausible, also, is the “dazed and confused” defense. Anyone initially attempting to navigate through the incredibly complex (and often revised) requirements set out within the International Maritime Dangerous Goods Code (IMDG)² or any of the domestic regulations giving that Code meaning within the context of nation-specific laws, knows full well that an individual who is unpracticed in ciphering is at a distinct loss. While the lack of knowledge argument has a genuinely believable basis, it is, in the final assessment, non-compelling. If an individual or entity engaged in such a trade doesn’t know how to cipher through the technical aspects of international HazMat transportation, the best advice is to find someone reliable who can. Doing so may result in modestly increased costs, but sometimes staying on the right side of the law requires such an investment. Left unsaid of course, is the moral obligation a consignor/shipper of HazMat cargo has to all members of society who may have an occasion to be in proximity. Figuring prominently within that group of individuals are road/rail transporters; longshoreworkers; seafarers and soccer moms.

Equivocal Efforts Internationally

Spot checks, such as the MCA’s foray into the HazMat cargoes aboard *MSC Napoli*, are symptomatic of the occasional efforts embarked upon by national agencies in their modest efforts to keep the system honest. In the United States, there are regionally-conducted vigils within which various Federal and State agencies will swoop down upon a given port (*en masse*) and will inspect containerized shipments for various aspects of regulatory compliance. Moreover, individual USCG Captains of the Port will dispatch container inspection teams with varying degrees of regularity. In looking at HazMat penalty statistics, however, it appears clear that adverse results

² IMDG flows from the requirements of the International Maritime Organization-administered Safety of Life at Sea (SOLAS) Convention.

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are somewhat spotty. For instance, in FY 2005³ a grand total of 15 USCG-initiated HazMat violations were recorded by PHMSA, with proposed fines totaling US \$71,000.

Notwithstanding, HazMat regulatory enforcement still ambles along. Last week, for instance, the USCG and fifteen other Federal, State and Local agencies (assembled into a “multi-agency strike force operation”) put the Port of Boston, Massachusetts under some intensive HazMat scrutiny. The result, out of eighty five containers inspected zero (none) were found to be improperly documented or packed. Three of the eighty five, however, were determined to be structurally unsafe.

There is no indication as to what criteria the “strike force” utilized in making their determinations relative to structural integrity. There was a time wherein the USCG relied upon the repair and inspection standards developed by the International Institute of Container Lessors (IICL). Such reliance (in our view) is probably poorly placed, inasmuch as such industry-developed criteria have no basis in law and no standing within the Code of Federal Regulations. In getting themselves properly aligned to better enforce intermodal container carriage of HazMat cargoes, it would be reasonable for USCG to use as their own the Container Safety Convention-adopted ISO Freight Container standards or, alternatively, to undertake a complete Administrative Procedure Act rulemaking within which the value and veracity of another criterion (such as IICL’s) could be fully explored and debated.

What Can Be Done?

With vessel owners, cargo owners, vessel and cargo insurers, mariners, stevedores, longshoreworkers, regulatory agencies and international governmental bodies all keenly aware of the difficulties and dangers associated with the movement of dangerous goods as ocean cargo, one would think that the problem of undeclared/misdeclared HazMat would have been solved a long time ago.

- It’s reasonable to effectively and comprehensively train all workers and managers in the seagoing and shorebased trades regarding basic HazMat awareness. Included in this population, would be all workers and managers responsible for the packing of intermodal shipments and it should be mandatory that those particular individuals are fully trained in the art and theory of container packing, blocking and bracing. US Dept of Transportation (PHMSA) regulations require some aspects of the foregoing, but whether or not such training is being widely accomplished is a matter of some conjecture;

³ The last year for which the Pipeline & Hazardous Materials Safety Administration (PHMSA) has published data. [<http://hazmat.dot.gov/pubs/reports/penalty/phmsa05.pdf>]

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- It's reasonable to require a higher level of technical training (including all stowage, documentary & placarding aspects and the basis and interpretation of the IMDG Code/relevant domestic laws and regulations) to all workers and managers who have any direct connection with the administrative receipt and delivery of such cargoes;
- It's reasonable to expect that IMO will insist that all nations becoming signatory to SOLAS will give proper meaning and full effect to every provision of that Convention and to each of its Annexes and Codes, and that necessary incentives and sanctions should be formulated and exercised;
- It's reasonable to expect that signatory nations will perform honorably in adhering to SOLAS and to each of its Annexes and Codes, and that they will provide the necessary oversight and enforcement mechanisms incumbent upon any serious competent authority;
- It's reasonable to expect that cargo owners, brokers and carriers will each be completely honest and aboveboard in the offering and accepting of HazMat cargoes for ocean transport, and that they will each make every effort to understand and comport with the relevant domestic regulations and international requirements.

Failing that, particularly in these times of shifting venues of chemical production, the ever-enlarging nature of container vessels and the seemingly explosive volumes of trade coming to ports, we should expect to experience more serious and more frequent HazMat incidents and with them the unacceptable economic and human price that must be paid in exchange for that experience.

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