

COASTAL STATES RESPONSIBILITY WITH REGARD TO PLACES OF REFUGE FOR SHIPS IN DISTRESS

Axel Luttenberger, Ph.D., Associate Professor

University of Rijeka
Faculty of Maritime Studies Rijeka
Studentska 2, 51000 Rijeka, Croatia
axel@pfri.hr

3

ABSTRACT

Under international law, coastal State can exercise authorities in taking responsive action in the case of damaged or disabled ships within its area of responsibility due primarily to the potential for environmental damage. The paper elaborates legal problems in implementing rules on places of refuge for ships in need of assistance, maritime assistance services, vessel traffic monitoring and information system. It deals with the obligation of the coastal State to draw up plans whereby ships in distress may be given refuge, including the provisions for assistance, salvage and pollution response. The author outlines the risk that the coastal States may be held liable for, having contributed to the damage through its own decisions and conduct during the operation, in balancing the interests of affected ships with those of the environment. In authors' opinion the event of the accident at sea calls fore proper legal framework for all the parties involved thus contributing significantly to the effectiveness of operations by competent coastal State authorities.

Key words: places of refuge, responsibility, environmental damage, salvage

1 INTRODUCTION

Coastal State authorities face a dilemma when a ship in distress requests refuge. The relevant authority may accede to request; allow the ship to take refuge and risk damage to the coastal environment, the possibility of a legal action by those affected by any pollution generated and responsibility of financing any required clean up. To avoid these problems the relevant authority could turn the ship away but in doing so runs the risk of exposing the ship, crew and cargo and any salvors involved to the increased danger with no guarantee and that an environmental disaster will not take place offshore where it may be more difficult to contain and control.

2 LEGAL FRAMEWORK FOR PLACES OF REFUGE

2.1 Common applicable rules

According to the **United Nations Convention on the Law of the Sea (UNCLOS), 1982** nothing shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the

actual or threatened damage to protect their coastline or related interest, including fishing from threat of pollution following upon a marine casualty or acts relating to such casualty which may reasonably be expected. Marine casualty means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to vessels or cargo.

States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

The provisions of UNCLOS regarding the responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

The **International Convention on Salvage (Salvage Convention), 1989** provides that a State party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need to co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

Granting access to a place of refuge could involve a political decision which can only be taken on case-by-case basis with due consideration given to the balance between the advantage for affected ships and environment resulting from bringing the ship into a place of refuge and the risk of environment resulting from the ship being near the coast.

2.2 Rules on oil pollution by tankers, hazardous and noxious substances and bunker oil

The **International Convention on Civil Liability (CLC), 1969** was adopted to ensure the adequate compensation is available to person who suffers oil pollution damage resulting from maritime casualties involving oil-carrying ships and places the liability for such damage on the owner of the ship from which polluting oil escaped or was discharged. The CLC Convention requires ships covered by it to maintain insurance or other financial security in sums equivalent to the owner's total liability for one accident. **The Protocol of 1992** widened the scope of the CLC Convention to cover pollution damage caused in exclusive economic zone or equivalent area of a State party. It covers pollution damage as before but environment compensation is limited to the cost incurred for reasonable measures to reinstate the contaminated environment. Furthermore, it allows expenses incurred for preventive measures to be covered even when no spill occurs, provided there was a grave and imminent threat for pollution damage.

The purposes of the **International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1971** are to provide compensation for oil pollution damage to the extent that the protection afforded by the CLC Convention is inadequate, as well as to give relief to shipowners in the respect of the additional financial burden imposed on them by the CLC Convention, such relief being subject to conditions designed to ensure compliance with the safety at sea and other

conventions. **The Protocol of 1992**, as was the case with the Protocol of 1992 to the CLC Convention, was to modify the entry into force of requirements and increase compensation amounts in line with the Protocol of 1992 the CLC Convention.

The **International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996** is based on two-tier system established under CLC and Fund Convention and it covers not only pollution damage but also the risk of fire explosion, including loss of life or personal injury as well as loss of or damage to property. The HNS Convention introduces strict liability for the shipowner and a system of compulsory insurance and insurance certificates, with a list of substances included in various IMO Conventions and Codes.

The **International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker), 2001** is modelled on the CLC Convention with key requirement being the need for the registered owner to maintain compulsory insurance cover and direct action allowing a claim for compensation for pollution damage to be brought directly against the insurer. Pollution damage means loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil bunker oil from ship, whenever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to the cost of reasonable measures of actually undertaken or to be undertaken; and the cost of preventive measures and further loss or damage caused by preventive measures.

The Convention on Limitation of Liability Maritime Claims (LLMC), 1976, as amended by the **Protocol of 1996** does not as such establish or regulate liability; it merely lays down the right of owners and other party to limit their liability and specifies the extent of that limitation. Those questions are to be answered on basis of the relevant law of the State concerned.

3 THE INSURANCE COVERAGE

The IMO Resolution A.898(21) **Guidelines on Shipowners' Responsibility Maritime Claims, 1999** is urging shipowners to maintain liability insurance similar to that offered by leading P&I Clubs. Namely, insurance for the third party is normally provided by the P&I Clubs which are based on the principle of mutuality. The leading P&I Clubs belong to the International Group of P&I Clubs, within this Group, the clubs share a number of risks and are therefore required to have similar rules.

By entering a P&I Club the shipowner will obtain marine insurance cover losses sustained to third parties caused by the ship, for which he might be found liable. The cover includes liabilities for cargo interests, liability for crew and loss of life, injuries or repatriation and liability for pollution damage and wreck removal, the two last-mentioned being particularly important for place of refuge situations. The exposure of P&I Clubs is obviously limited by the right of shipowners to limit their liabilities.

4 GUIDING PRINCIPLES FOR ACTIONS EXPECTED OF COASTAL STATES

The IMO Resolution A.949(23) **Guidelines on places of refuge for ship in need of assistance, 2004** are intended for use when a ship is in a need of assistance but the safety of

life is not involved. Where the safety of life is involved, the provisions of the SAR Convention should continue to be followed.

Ship in need of assistance is defined as a ship in a situation, apart from one requiring rescue of persons on board that could give loss of the vessel or an environmental or navigational hazard. Place of refuge means a place where a ship in need of assistance can take actions to enable it to stabilize its conditions and reduce the hazards to navigation, and to protect human life and environment.

The purpose of the Guidelines is to provide member governments, shipmasters, companies and salvors with the framework enabling them to respond effectively and in such a way that, in any given situation, the efforts of the shipmasters and shipping company concerned and efforts of the government authorities involved are complementary.

A coastal State has an obligation to require the shipmaster or company to take appropriate action within a prescribed time limit with a view to halting a threat of danger. In cases of failure or urgency, the coastal State can exercise its authority in taking responsive action appropriate to the threat.

The Guidelines recommended that coastal State institutes procedure by which to receive and act on request for assistance with a view to authorizing, where appropriate the use of a suitable place of refuge. The coastal State should, for each place of refuge, make an objective analysis of the advantages and disadvantages of allowing the ship in the need of assistance to a place of refuge, taking into considerations environmental and social factors, natural conditions, contingency planning and foreseeable consequences of the different scenarios envisaged with regard to safety of persons and pollution, fire, toxic and explosion risks.

The coastal State should ensure that an appropriate system for information sharing exists and should establish communications and alert procedure, as appropriate. The event-specific assessment includes analysis factor and expert analysis with a comparison between the risks involved if the ship remains at the sea and the risks that it would pose to the place of refuge and its environment.

Once permission to access a place of refuge is required, there is no obligation of a coastal State to grant it, but the coastal State should evaluate all factors and risks in a balanced manner and give shelter whenever possible. The coastal State shall in decision-making process allow or refuse admittance, coupled where necessary with practical requirements.

The action of the coastal State does not prevent the company or its representative from being called upon to take steps with a view to arranging for the ship in need assistance to proceed to a place of refuge. If the place of refuge is a port, as a general rule, a security in favour of the port will be required to guarantee payment of all expenses which may be incurred in connection with its operations.

A Resolution A.950(23) **Maritime assistance services (MAS), 2004** recommends that all coastal States should establish a maritime assistance service with principal purpose to receive various reports, consultations and notifications required in a number of IMO instruments, monitoring the ship's situation if a report disclose an incident that may cause the ship to be needed assistance. The role of a maritime assistance service is to serve as the point of contact between the master and coastal State if the ship's situation requires exchanges of information

between the ship and the coastal State but is not a distress situation that could lead to search and rescue operation. Moreover, the aim is to serve as point of contact between those involved in a marine salvage operation undertaken by private facilities at the request of parties having a legitimate interest in the ship and the coastal State.

5 COASTAL STATE OBLIGATIONS FOR SHIPS IN NEED OF ASSISTANCE

A place of refuge is a protected area of coastline where a ship in distress may seek shelter from swell and wind. By sheltering in such a place it would be hoped that there would be better chance of saving the ship itself or at least contain any pollution that may result. It should be noted that the place of refuge does not necessarily mean a port of refuge. That is, it will not always be appropriate to allow the ship in distress enter into a port when all that is required are waters sheltered from heavy weather.

Non-availability of a place of refuge may have serious consequences in the event of accident at the sea. States should therefore draw up plans whereby ships in distress may, if situations so requires be given refuge in their ports or any other sheltered area in the best condition possible. Where necessary and feasible those plans should include the provision of adequate means and facilities for assistance, salvage and pollution response. Port accommodating ships in distress should be able to rely on prompt compensation for any cost and damage involved in the operation.

The lack of ability of the international community to agree on a decision-making course of action has resulted in a quandary of a coastal State to resolve the problem. As an outcome, coastal states have tended to resolve place of refuge request in an ad hoc manner that fails to pay due regard to what is the best way to ensure the safety of ships crew and prevent the pollution of the marine environment.

The risk is relatively high that the coastal State may be held liable for having contributed to the damage through its own decisions and conduct during the operation in balancing the interests of affected ships with those of the environment. For that reason, there is need to examine the possibility for introducing the adequate system of compensation for ports or places accommodating the ship in distress and the feasibility of requiring the ship to be adequately insured.

6 CONCLUSIONS

The operation of bringing a ship into a place of refuge may also endanger a coastal State, economically and environmentally, and local authorities and population may strongly object the action. Hence in granting refuge, port authorities are exposing themselves to a wide range of potential liability. Therefore granting a ship refuge may not be an attractive proposition and a port operator would be seeking indemnity from the shipowner before deciding to grant refuge.

The coastal State should be encouraged and supported in decisions made on sound technical-environmental grounds for the place of refuge situation and to discourage the opposite. At any rate, liability and compensation rules should not have the effect of discouraging the accommodation of ships in distress by entailing sizeable financial risks for coastal State.

Regardless of the existence of a variety of relevant international rules, the liability of coastal State in a place of refuge situation will ultimately depend on national law of the State where the case is decided. International law does, however, place certain limitations on how far national laws can go in avoiding the liability of a State.

There is a coastal State fear that the existing liability and compensation regimes are insufficient to cover potentially considerable financial and legal exposure which may accompany their acceptance of polluting ship into its waters.

In author's opinion, the legislation reducing the exposure of coastal State liability will benefit the procedure of assessment of places of refuge measures of coastal states accompanied with a proper insurance cover offered by the shipowner on P&I mutuality basis.

REFERENCES

1. Official text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Convention on the Law of the Sea, Introductory Materials on the Convention and Conference, United Nations, New York, 1983
2. International Convention on Salvage (Salvage Convention), 1989, www.imo.org
3. International Convention on Civil Liability (CLC), 1969, as amended by Protocols, www.imo.org
4. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1971, as amended by Protocols, www.imo.org
5. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996, www.imo.org
6. International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker), 2001, www.imo.org
7. Convention on Limitation of Liability Maritime Claims (LLMC), 1976, www.imo.org
8. Protocol of 1996 to Amend the Convention on Limitation of Liability Maritime Claims, 17 February 2004
9. Guidelines on Shipowners' Responsibility Maritime Claims, IMO Resolution A.898(21), 1999
10. Guidelines on places of refuge for ship in need of assistance, IMO Resolution A.949(23), 5 March 2004
11. Maritime assistance services (MAS), IMO Resolution A.950(23), 26 February 2004

Biography

Axel Luttenberger was born in Opatija (Croatia) in 1957. After completing his secondary education in Opatija, he studied at the University of Rijeka, where he got a degree in Law in 1980. Having completed his apprenticeship at the District Court in Rijeka (1981-1982), he worked as a legal attorney for a marine insurance company (1983-1993) and passed the Bar Examination (1986). He specialized in Law of the Sea and Maritime Law at the University of Split, where he received the Master Degree (1983) and Ph.D. (1993). His academic carrier begun at the University of Rijeka, Faculty of Tourism and Hospitality Management in 1993, where he works as lecturer, assistant professor and presently, as an associate professor. From

1993 to 2001 he was also a Mayor of Opatija, and from 1997 to 1997 Member of the Croatian Parliament and its Law Committee. As from 2002 he is an assistant professor and from 2006 associate professor of Maritime law and chairs a Maritime Law and Social Sciences Department of the Faculty of Maritime studies in Rijeka.