PORTS OF REFUGE
SOUTH AFRICA

September 2012
The right of ships in distress to enter a port of refuge

Prof. E. Van Hooydonk in his article titled “The Obligation to Offer a Place of Refuge to a Ship in Distress” identified four approaches on whether a ship in distress has the right to enter a port of refuge, or, alternatively, whether a port authority has the right to refuse a ship in distress.

These approaches are:

- The absolute right of access
- The absolute right of refusal
- Balancing Interests
- Good management on the basis of the right of access
First Theory – The absolute right of access

- Ships in distress always have the right to enter any port of refuge regardless of the cause of the distress.
- Old rule of international customary law.
- Right of access in the event of maritime distress overrides normal powers of the state.
- Focuses on objective situation of the distress.
- Ignores the environmental risks.
- The maritime distress must be “real and irresistible”.
- Absolute right of access theory confirmed by various international, European and legal rulings.
- Criticism - Does not conform to the modern day practice of states - Ships frequently being denied entry
Second Theory – The absolute right of refusal

• Port authorities have a right to refuse ships entry no matter the distress.
• Supported by a minority of international law specialists.
• Argument based on the following main points:
  o State sovereignty
  o The right of self-protection of states
  o International Statute of Maritime Ports provides for deviations
  o *Fortiori* – if intervention on high seas allowed, then refusal of entry also allowed
  o Guaranteeing access no longer exists
  o Right to refuse ships in distress recognized in, *inter alia*:
    • London Intervention Convention of 29 November 1969; and
    • European Directives on Port Control and Traffic Monitoring
Second Theory – The absolute right of refusal (continued)

Criticism

• A blatant disregard for legal doctrine
• Sovereignty not grounds for refusal of access
• The right of access in case of distress a general and independent rule of law
• Right of innocent passage
• Refusal of access does not necessarily imply that there is no right of access
• Initiatives by IMO, CMI and EU directed towards restoring access
• The interests of the environment better served by granting access
• The “not my front pond syndrome” approach
Third Theory – Balancing Interests

• A balance between the interests, rights and/or risks concerned.
• Access refused if interests, rights or risks of the coastal state greater than those of the ship.
• In practice this approach often does not differ from the second approach because the risk balancing and weighing up is not done by an independent neutral decision-making body.
Fourth Theory - Good management on the basis of the right of access

• Builds on the third theory.
• Two additional components
  • (i) The assumption that access exists and
  • (ii) The principle of good decision-making
• The right of access still the point of departure.
• Reasons –
  o Best way to prevent an environmental disaster
  o Salvors may be discouraged
  o Right of access still exists
  o Refusal is an *ultimum remedium*
Fourth Theory - Good management on the basis of the right of access (continued)

• Access must be the norm and refusal the exception.
• The right to access must only be refused if it is shown that there are insuperable objections.
• Burden of proof must be borne by the authorities.
• Preferable that only a single neutral expert decision-maker should have the power and ultimate responsibility to decide on access and reception of ships in distress.
• Should consult with various industry bodies and must take regional and international interests into consideration when making a decision.
• This theory is however still an ideal.
11. Functions of Authority

(1) The main function of the Authority is to own, manage, control and administer ports to ensure their efficient and economic functioning, and in doing so the Authority must ...

(g) regulate and control -
   (i) navigation within port limits and the approaches to ports;
   (ii) the entry of vessels into ports, and their stay, movements or operations in and departures from ports;
   (vi) pollution and the protection of the environment within the port limits;
   (vii) the enhancement of safety and security within the port limits;

(2) The Authority may...

(c) provide any service, including a port service or the operation of a port facility, which is required for the safe, efficient and orderly operation or management of a port;

(d) perform such other functions as may be necessary in order to achieve the objects of this Act;
12. **Aims of Authority**

The Authority must, in all its activities, aim to -

(a) ...  
(b) ...  
(h) promote and undertake the necessary measures to enhance safety and security of life and property in ports;

69. **Protection of environment**

(1) The Authority must in the performance of its functions ensure that a fair and reasonable balance is achieved between the protection of the environment and the establishment, development and maintenance of ports.

74. **Safety of navigation and shipping in ports**

(1) Subject to the provisions of this Act, the Authority must, for the purpose of ensuring safety of navigation and shipping in ports -
(a) control marine and other traffic in each port;  
(b) control the entry, stay, movement and operations of vessels in ports, and the departures of vessels from ports;
(3)(a) The Harbour Master is, in respect of the port for which he or she is appointed, the final authority in respect of all matters relating to pilotage, navigation, navigational aids, dredging and all other matters relating to the movement of vessels within port limits.

(b) For purposes of paragraph (a), the Harbour Master may give such written or verbal instructions as may reasonably be necessary for-

(i) promoting or securing conditions conducive to the ease, convenience or safety of navigation in the port;

(ii) regulating the movement or mooring and unmooring of a vessel in the port;

(v) the detention of a vessel reasonably suspected of causing oil pollution and ensuring that the total cost of the pollution clean-up operation is recovered, or acceptable guarantees are provided, prior to the vessel being given permission to leave the port;

(vi) carrying into effect the provisions of this Act.
Port Rules

Port Rules were developed in terms of section 80(2) of the National Ports Act "for the control and management of ports and the approaches thereto and for the maintenance of safety, security and good order in the ports".

60. Vessels in need of assistance

(1) If a vessel is in need of assistance and requests permission to enter into a port, the Harbour Master may consult with SAMSA and any other relevant statutory body.

(2) In considering whether to allow the vessel into a port, the Harbour Master takes into account the following factors -

(a) safeguarding of human life at sea;
(b) the ports industrial and urban environment;
(c) the risk of pollution and damage to the environment;
(d) the evaluation of consequences if a request is refused, including the possible effect to neighbouring states;
(e) the risk of disruption to the port’s operations;
(f) the seaworthiness of the vessel, in particular its buoyancy, stability, means of propulsion and power generation, and its docking ability;
(g) the nature and condition of the cargo, stores and bunkers, especially if there is any hazardous cargo;
Port Rules (continued)

(h) the preservation of the hull, machinery and cargo of the vessel in need of assistance,
(i) the distance and estimated transit time to a SAMSA allocated place of refuge;
(j) whether the master is still on board;
(k) the number of crew, salvors and other persons on board and an assessment of human factors, including fatigue;
(l) whether the vessel in question is insured or not insured;
(m) where the vessel is insured, identification of the insurer, and the limits of liability available;
(n) provisions of financial security in favour of the Authority to guarantee payment of all expenses that may be incurred in connection with its operations;
(o) whether the owner and master of the vessel have agreed to the proposals of the Authority and/or salvor to proceed or to be brought to a place of refuge;
(p) commercial salvage contracts already concluded by the master or owner of the vessel;
(q) information on the intention of the master and/or salvor;
(r) the designation of a representative of the owner of the vessel in the Republic,
(s) the risk of disruption to the Authority’s operations taking into account the IMO guidelines; and
(t) any other relevant considerations.
South African ports approach to refuge

• The balancing of interests theory is the most preferred of all the above mentioned approaches.

• South African approach appears to fall within this theory.

• Port Rules list various factors that the Harbour Master needs to consider when deciding whether to allow a vessel in need of assistance into a port.

• This theory is easily susceptible to abuse as the act of balancing of interests is done by the coastal state in question.

• The Port Rules partially addresses this issue in Rule 60(1) which states that the Harbour Master may consult with the South African Maritime Safety Authority and any other relevant statutory body when making its decision regarding a vessel in need of assistance.
Reception Facilities

• Why reception facilities
  o Necessity
  o Decision making
  o Responsibility and liability of pollution

• What reception facilities
  o large land or floating docks
  o designated areas within a place of refuge for beaching of sinking or unstable ships

• Funding
  o International level
  o Shared by the shipping industry, the oil industry, insurers and coastal states.
  o Subsidies