PLACES OF REFUGE FOR SHIPS IN NEED OF ASSISTANCE – an international overview

Patrick Holloway
Summary of the international liability and compensation regime

- Compensation for pollution damage caused by spills from oil tankers is governed by an international regime under the auspices of the IMO
- Original framework was – 1969 Civil Liability Convention and the 1971 Fund Convention
- Original regime was amended by 2 Protocols – 1992 Civil Liability Convention and the 1992 Fund Convention (in force as of 30 May 1996) – provide higher limits and an enhanced scope of application
- 2005 – Supplementary Fund Protocol entered into force – covers those cases where full compensation cannot be obtained under the CLC
- The Civil Liability Conventions govern the liability of owners for oil pollution damage; apply the principle of strict liability and create a system of compulsory liability insurance. The amount of liability is linked to the tonnage of the ship
- The Fund Conventions established a regime for compensating victims when, for one or another reason, the CLC is inadequate (damage exceeds owner’s limit of liability; owner is exempt from liability; owner incapable of paying and insurance insufficient)
A summary of the international liability and compensation regime - continued

An owner may limit liability under certain conditions – those limits of liability are:

- **1969 Convention** – the lower of > 133 SDR ($204/R1,672) grt or 14 million SDR ($21.48m/R176 m)

- **1992 Protocol** – after 1 November 2003 (when initial limits were increased):
  
  - up to 5000grt - 4 510 000 SDR = ($6.9m/R56m)
  - 5000 > 140 000 units of tonnage - 4 510 000 SDR = ($6.9m/R56m) + 631 SDR p/grt
  - 140 000 or over - 89 770 000 SDR = ($137m/R238580m)
  - > up to a maximum of 203 m SDR = ($311m/R2552m)

- **The Supplementary Fund Protocol 2005**
  
  - 750 m SDR = ($1070 m/R942907m)
South Africa - Limitation of liability and comparison to the international liability and compensation regime

Ito the Marine Pollution (Control and Civil Liability) Act an owners liability is limited to:

- **R1,672 per ton**, or
- **R176 million**, whichever is the lesser

Compared to the possible maximum allowed ito the **1992 Fund Convention** increase on 1 November 2003 to:

- **R2552 million (difference R2 374 000 000)** and

the potential optional 3rd tier total of **R942 970 million (difference R942 794 000 000)** available from 3 March 2005 ito the 2003 Protocol which established the **International Oil Pollution Compensation Supplementary Fund**
South Africa - liability of different parties - a summary

- **Vessel owner**’s limitation is determined into the *Marine Pollution (Control and Civil Liability) Act* –

  +R1,672 per ton or +R176 million, whichever is the lesser

- **Merchant Shipping Act** extends liability to a *charterer, manager, operator or person in possession* of the vessel who may, provided they satisfy the requirements to limit (1957 Brussels Convention), limit to –

  +R600 per gross ton (gross less accommodation space)

- **Cargo owner** - unlimited liability
Current South African position

Currently a would be claimant is in the perilous position that a ‘vessel’ owner may limit liability based on the outdated and grossly inadequate limitation figures of the 1976 Protocol to CLC69 and there is no prospect of claiming a top-up from the 1992 Fund

(Holloway, Athens, 2004)
Summary

The current SA position, while extending strict liability to a broader range of claims than those covered by the international Conventions and against all types of vessel polluter, severely limits the amount recoverable compared to the unlimited claim, which might otherwise have been recovered under the common law, particularly in non-CLC type incidents; or the 1992/2003 Protocol limits.

This situation will persist until the anticipated legislative changes are implemented and the 1992 Fund and Liability Protocol enter into force.
Prevention and intervention measures

United Nations Convention on the Law of the Sea ("UNCLOS")
- is the background against which legislation and regulations should be read
- to the Convention, South Africa, as a coastal state, may the EEZ adopt laws and regulations relating to innocent passage through the territorial sea for the "prevention, reduction and control of pollution from vessels"

UNCLOS provides that:
- coastal states have the right to regulate access to internal waters
- innocent passage through territorial seas must be continuous and expeditious, although anchoring in times of distress is permissible
- there is a duty on coastal states to protect the marine environment
The Salvage Convention 1989

- There is no international legal requirement for a State to provide a place of refuge for a ship in distress
- Parties are obliged, when considering a request for a place of refuge, to take into account the need for co-operation

“Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations”

“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 for 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”
IMO Guidelines for actions expected of coastal states

• “Under international law, a coastal State may require the ship’s master 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” (3.1)

• “It is therefore important that coastal States establish procedures to address these issues, ...” (3.2)
In October 2001 the CMI set up a working group, which prepared and distributed a questionnaire on the legal issues raised by the question of Places of Refuge.

The establishment of the group was as a result of issues raised by the sinking of the “Erica” and refusal by the authorities of many Mediterranean countries to allow the “Castor” to be brought into a sheltered place of refuge. Salvors eventually carried out a ship-to-ship transfer of the cargo of gasoline aboard the “Castor” on the high seas after towing the ship over 2000 miles.
Issues identified by CMI

The CMI committee identified the following issues:

- Obligation to offer a place of refuge to a ship in distress
- Insurance and financial security
- Designation of places of refuge
- Mechanism of decision making
- Civil liability
- Are there monetary incentives which can be offered by way of compensation schemes for ports accepting ships in distress
- Penal liability
- Reception facilities for ships in distress
Questions raised

• Is there an obligation on a coastal state to offer a place of refuge to a ship in distress?
• Is the existing insurance/ financial security regime sufficient, or should additional insurance /security be established? What should it cover? Should it be a condition of entry?
• Should places of refuge be designated in advance or not? If so, should they be published?
• Should states establish in advance a mechanism for objective decision making about: e.g. allowing or refusing entry / determining a place of refuge?
• Who has liability for damage caused by a pollution incident after a place of refuge has been granted or refused?
  Will the ship be responsible for damage caused and under what conditions once a place of refuge has been granted?
  Will the state be liable, if it (a) allows, or (b) denies entry?
  What are the responsibilities of salvors?
• Should states designate areas within a place of refuge where a sinking ship can be beached?
IMO Guidelines

One of the positive achievements of the committee’s work was the adoption by IMO on 5 December 2003 of the

Guidelines On Places Of Refuge For Ships In Need Of Assistance

The purpose of the guidelines is to provide a framework enabling governments, shipmasters, companies and salvors to respond effectively, in any given situation, in a complementary fashion.

They do not have the force of law.
IMO Guidelines - Definitions

“Ship in need of assistance” means a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to 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 action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment.”
IMO Guidelines - Background

• “There are circumstances under which it may be desirable to carry out a cargo transfer operation or other operations to prevent or minimize the damage or pollution. For this purpose, it will usually be advantageous to take the ship to a place of refuge” (1.8)

• “Taking such a ship to a place of refuge would also have the advantage of limiting the extent of coastline threatened by damage or pollution, but the specific area chosen may be more severely threatened. Consideration must be given to the possibility of taking the affected ship to a port or terminal where the transfer or repair work could be done relatively easily. For this reason the decision on the choice and use of a place of refuge will have to be carefully considered” (1.9)

• “The use of places of refuge could encounter local opposition and involve political decisions. The coastal States should recognize that a properly argued technical case, based on a clear description of the state of the casualty, would be of great value in any negotiations which may take place” (1.10)
IMO Guidelines - Objectives of providing a place of refuge

• “Where the safety of life is involved, the provisions of the SAR Convention [search and rescue] should be followed. Where a ship is in need of assistance but safety of life is not involved, these guidelines should be followed” (1.1)

• “The issue of “places of refuge” is not a purely theoretical or doctrinal debate but the solution to a practical problem: What to do when a ship finds itself in serious difficulty or in need of assistance without, however, presenting a risk to the safety of life of persons involved. Should the ship be brought into shelter near the coast or into a port or, conversely, should it be taken out to sea?” (1.2)

• “When a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers; and to repair the damage. Such an operation is best carried out in a place of refuge” (1.3)

• “However, to bring such a ship into a place of refuge near a coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation” (1.4)
IMO Guidelines - Objectives of providing a place of refuge (contd)

• “While coastal States may be reluctant to accept damaged or disabled ships in their area of responsibility due primarily to the potential for environmental damage, in fact it is rarely possible to deal satisfactorily and effectively with a marine casualty in open sea conditions.” (1.5)

• “In some circumstances, the longer a damaged ship is forced to remain at the mercy of the elements in the open sea, the greater the risk of the vessel’s condition deteriorating or the sea, weather or environmental situation changing and thereby becoming a greater potential hazard.” (1.6)

• “Therefore, granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis with due consideration given to the balance between the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge and the risk to the environment resulting from that ship being near the coast.” (1.7)
IMO Guidelines - Hypothetical situations

The guidelines address 4 hypothetical situations to be considered:

the ship –

1) remains in position
2) continues on her voyage
3) reaches a place of refuge
4) is taken out to sea
IMO Guidelines - Decision-making process for the use of a place of refuge

• “When permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible” (3.12)

• “In the light of the outcome of the assessment provided for above, the coastal State should decide to allow or refuse admittance, coupled, where necessary, with practical requirements” (3.13)

• “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 of assistance to proceed to a place of refuge. As a general rule, if the place of refuge is a port, 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, such as: measures to safeguard the operation, port dues, pilotage, towage, mooring operations, miscellaneous expenses, etc” (3.14)
CMI Draft Instrument On Places of Refuge

• The International Working Group of the CMI prepared a draft instrument, as it was clear to them “... that the existing international conventions do not establish a sufficiently clear framework for legal liability arising out of circumstances in which a ship in need of assistance seeks a place of refuge and is refused, or is accepted, and damage ensues.”

• The instrument recognises that the legal framework should take into account the interests of all concerned parties.

• The final draft was presented at the CMI Conference in 2008 in Greece and although it was approved by a majority at the Plenary session, it was not unanimously accepted, with two clear camps – coastal States in one camp and shipping interests in the other.

• The instrument was received by the IMO in January 2009.
Objectives of the CMI

The objectives which the CMI set out to achieve in producing the instrument were:

• to emphasise the position under customary international law of a presumption of a right of access to a place of refuge for a vessel in distress
• to make the presumption rebuttable by the coastal State if it can show that it was reasonable to refuse access
• to give immunity from suit to a State which grants access to a place of refuge to a vessel in distress
• to give more force to the IMO Guidelines, which CMI recognises as playing a significant role in assisting to define the ambit of “reasonableness”, when considering the behaviour of both ship owners (and their masters) and States (and port authorities)
• to clarify the position regarding the issue of letters of guarantee to secure claims of a port or coastal State, which grants access to a ship in distress
• to require coastal States to designate places of refuge in advance, although not necessarily to publicise them.
Current situation

Although the Legal Committee of the IMO determined that the subject of Places of Refuge was very important, it agreed that there was no need to draft a Convention dedicated to the subject.

It identified a more urgent priority as being to implement all the existing liability and compensation Conventions.

The CMI Executive Counsel took the view that there may well be the need for such a convention, as there is still a long way to go before existing conventions have worldwide acceptance and even if they all do, there is no convention which expressly requires States to act reasonably in carrying out assessments of the condition of ships which are in need of assistance and seek that assistance.
Questions

• South Africa has been considered to be a world leader in adopting a robust and positive approach to dealing with ships in need of assistance. Has this changed and if so, why?

• What is the approach adopted by SAMSA and the TNPA when assessing a ship in need of assistance?

• What resources are available to SAMSA to prevent and combat pollution of the sea and the environment, compared to the situation in the mid 1970’s and the years that followed when two tugs and 5 oil abatement vessels were on standby?

• What steps have been taken to incorporate the international Conventions into our law? When can we expect legislation to be passed which will protect the tax payer from potential losses which may occur, should there be a major casualty along the coastline?
BOTSWANA
BURUNDI
ETHIOPIA
KENYA
MALAWI
MAURITIUS
MOZAMBIQUE
RWANDA
SOUTH AFRICA
TANZANIA
UGANDA
ZAMBIA

www.webberwentzel.com

JOHANNESBURG
10, 16 & 18 Fricker Road,
Illovo Boulevard,
Johannesburg, 2196, South Africa
T +27 11 530 5000

CAPE TOWN
15th Floor, Convention Tower,
Heerengracht, Foreshore,
Cape Town, 8001, South Africa
T +27 21 431 7000