

Offering Refuge is Better than Refusing

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Abstract

Historically, there is a long tradition of granting vessels in distress a place of refuge, particularly for humanitarian reasons, but more recently there has been a growing apprehension of coastal states to grant refuge. This apprehension has mostly centred upon the risk of pollution damage. The liability of the shipowner for damage to third parties, the existing liability regimes and the sufficiency of the existing compensation mechanisms, particularly bearing in mind the shipowner's right to limit liability are reviewed. Against this background the paper analyses different options of decision making regarding whether refuge is granted or not. The conclusion is that the interests of the coastal state and the vessel need to be balanced against each other and that that balance in the majority of situations should result in granting a place of refuge.

Keywords

Places of refuge; liability, limitation, compensation; marine insurance

1. Introduction

The issue of places of refuge for vessels in need of assistance is very wide in scope. The vast majority of shipping movements in the world proceed normally and without major incidents getting in the way of normal operations so that the vessel can complete its voyage without taking extraordinary actions. At the same time it is a fact that every vessel from time to time encounters 'problems', i.e. occurrences in which it needs assistance of some sort from authorities or other external parties. For example, if a crew member is injured or falls ill, it may be necessary to get that crew member under medical care, which may entail airlifting the person to shore or the vessel putting into port to disembark the crew member and, possibly, to embark a replacement. Although such a vessel definitely needs assistance from various authorities, such a situation would be perceived as relatively 'normal' and uncontroversial and the port or coastal state would provide the needed assistance without hesitation, even despite the fact that the crew member would probably not have a valid visa for that country. The situation could potentially be very different if the need for refuge arose due to an outbreak

of an epidemic onboard the vessel, which could pose a serious threat to public health in the place of refuge, but even such situations do not appear to have prevented ships from entering port, as has been evidenced by numerous outbreaks of Norwalk virus on cruise vessels, although they have been subjected to quarantine restrictions.

Similarly to the assumption above that most vessels on most occasions do not encounter difficulties, which put the vessel in danger, the assumption is that most ships are 'normal', meaning vessels managed and operated in international trade by bona fide commercial companies in accordance with reasonable industry practices. Such a vessel would substantially meet international safety requirements, at least to the extent that it has been allowed to continue to sail when it was last inspected by port state control, would be 'in class', i.e., inspected and approved by a recognised classification society, and would have a full complement of officers and crew carrying valid certificates of competency. It would also mean that it has standard insurance cover, meaning at least hull and machinery insurance and protection and indemnity insurance. Not all vessels in international trade fulfil these criteria, but the definition of 'normal' is intentionally wide enough to include all ships except the very worst cases of ships, which are operated in such a manner as to consciously try to minimise all costs for maintenance and operation, including the cost of insurance premiums. This assumption is also important in the sense that a vessel, which does not fulfil these basic criteria, may lose the benefit of its insurance cover.

The International Maritime Organization's (IMO) Guidelines on Places of Refuge for Ships in Need of Assistance¹ uses the wide term 'ship in need of assistance', but narrows the definition to mean "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." This definition can be seen as meaning a 'ship in distress', which is the term used in EU Directive 2002/59² and which puts the present issue in better focus, i.e. a vessel which in dan-

¹ IMO Assembly Resolution A.949(23), adopted on 3 December 2003, IMO Doc. A23/Res.949, 5 March 2004 (hereafter 'the IMO Guidelines').

² Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC.

ger of suffering damage or, more likely, already has suffered damage. Furthermore, the vessel may already have caused damage to property (for example, to another vessel in a collision) or to the environment (for example, through pollution). More importantly still, it may pose an imminent risk of causing more damage and it is the prevention or mitigation of additional physical or environmental damage, which is the main objective of granting a place of refuge to a ship in distress. For the present purposes, therefore, the focus will be on ships that have suffered an accident and/or are exposed to adverse weather conditions and, as a result, face serious danger at sea and need shelter.

When a vessel is in distress, not only the vessel, but many other property interests are also at risk, such as the cargo on board. However, particularly when pollution or the risk of pollution is involved, the contentious issues tend to be third party interests – property and business interests ashore and the environment in general. Therefore, the focus of this paper is primarily on the risks that such third party interests are exposed to and the liabilities towards them.

2. Compensation Issues

2.1 Damage to the Vessel

Any analysis of risk, liabilities and compensation when the amounts in question inevitable are large, boils down to the available insurance cover. The instrumental types of insurance in the context of places of refuge are the hull and machinery (H&M) and protections and indemnity (P&I). The former is primarily a property insurance, which aims to cover the value of the vessel itself or the cost of repairing it, i.e., it protects the shipowner's investment. When a vessel is in distress and needs assistance, the property most directly at risk is the vessel itself. It was noted above that the vessel probably has suffered some damage already, which puts both vessel and its cargo at risk. In the context of a vessel in distress and in need of a place of refuge, the insurance of the property itself is of relatively little interest, as it only concerns the relationship between the property insurer and the assured and the fact that the vessel seeks a place of refuge does not raise particular issues in this respect.

2.2 Damage to Third Parties

The main concern here, therefore, is not the damage the vessel has sustained but the damage that the vessel may cause to third parties in and around the place of refuge and the vessel's liability for such damage. Firstly, the vessel may cause physical damage, which has the potential of being very extensive, especially damage as a result of a fire or explosion occurring on or caused by the vessel inside a port of refuge or in its immediate vicinity. One often cited example is the explosion of the 's/s Grandcamp' in Texas City and the subsequent explosion of the 's/s High Flyer', which left 468 people dead with another 100 people missing, 3,500 injured

and one third of the houses and much of the town's infrastructure destroyed ("The Texas City Disaster April 16, 1947"). This is an extreme example which, incidentally, had nothing to do with places of refuge as the initial fire started during normal cargo operations when loading a cargo of ammonium nitrate, but it is a striking illustration of the potential magnitude of damage. Secondly, the resulting damage could also disrupt business in a port of refuge. Thirdly, disruption could also result from the stricken vessel sinking in the port or its entrance effectively closing the port for an extended period of time. Finally and most importantly in the public perception, the vessel may be leaking and cause pollution and damage to the environment in the coastal waters or inside a port. This does not only concern oil tankers as all vessels carry fuel oil as bunkers and many other substances, which would cause serious pollution if they were spilled. In fact, practically any cargo lost into the sea would constitute a problem – and a liability – if the quantity is in the hundreds or thousands of tons. P&I insurance covers claims against the shipowner arising out of liabilities to third parties and which are not covered by H&M insurance. The predominant providers of P&I cover are mutual insurance associations, or P&I Clubs, and in particular the 13 Clubs that are members of the International Group of P&I Clubs, which provide cover for over 90 percent of the world's merchant fleet.

2.3 Fixed and Floating Objects

When a vessel in distress seeks a place or port of refuge, its ability to manoeuvre is often impaired by the damage it has suffered previously. Therefore, the risk of striking fixed structures in a port is probably of greater relevance than the risk of an actual collision with another vessel. When a moving vessel hits a wharf, quay, pier, breakwater, bridge or other object, the incident is not defined as a collision but is referred to as an 'allision', in marine insurance terms also referred to as damage to fixed and floating objects (FFO). The risk is not limited to damage to the infrastructure of the port but also damage to the superstructure, such as cranes and other equipment, as well as disruption of operations of the port and its terminals and even industry relying on goods shipped through the port. Standard hull insurance conditions in the United Kingdom, the United States and Japan only cover the vessel's liability arising from a collision with another vessel. Liability for damage to fixed and floating objects, as well as damage to other property, including infringement of rights, falls under P&I cover, if it is not already covered by the hull policy, which is the case in many other markets, such as, for example, Scandinavia, France and Germany, where hull insurance conditions do include cover for damage to fixed and floating objects.

2.4 Wreck Removal

Offering a vessel a place of refuge provides no guarantee of saving the vessel or for successful salvage and even if the vessel has contracted the best professional salvors, when a vessel is in distress there is also a real risk of it becoming a wreck. The cost of wreck removal

is often very high so it represents a significant liability. In this connection it should be noted that what applies to removal of the wreck applies equally to removal of its cargo. From an insurance perspective, the question of when a vessel has become a wreck can be quite complicated, but an in depth analysis of issues such as actual or constructive total loss, the owners giving notice of abandonment to its H&M underwriters and divesting themselves of property rights to the vessel, whether or not the underwriters accept such abandonment, and whether owners by abandonment can also divest themselves of the liabilities that follow from ownership cannot be undertaken here, but it is safe to assume that even when the hull underwriters would be willing to pay out compensation for a constructive total loss, they would be very hesitant to take over unknown liabilities through ownership of a sunken ship, which would have to be raised, especially if the ship/wreck is polluting or there is a clear threat of causing pollution (Gold, 2002). From the shipowner's point of view, it is possible that his insurances overlap depending on whether the damaged vessel is still an object of salvage efforts or has been designated as a wreck (Force, 1999). However, wreck removal is not a 'named peril' and, therefore, is not covered under English H&M insurance conditions and it is specifically excluded from the collision liability cover. On the other hand, P&I insurance clearly does provide cover for wreck removal obligations, provided that the raising or removal of the wreck is a compulsory obligation by law or the costs for removal are legally recoverable from the Owner, which would normally be the case. For the present purposes it is enough to assume that any obligation to remove the wreck would fall upon the registered owner and the owner in turn would have a right to be indemnified by his P&I insurance. The Draft Convention on Wreck Removal, which is expected to be adopted in May 2007, contains a clear definition to the effect that it is the registered owner, meaning the owner at the time of the casualty, who will have the obligation to remove or pay compensation for the removal of a wreck, which constitutes a hazard.

States have a general responsibility for safety of navigation in their coastal waters, including marking, raising or destroying wrecks, which may be a hindrance or threat to safe navigation. It is obvious that any vessel, which has sought a place of refuge and sunk in an approach channel, a port entrance or inside a port, would constitute a hindrance and, therefore, would have to be removed or destroyed. Taking into account the risk of pollution from remaining bunkers onboard, it is unlikely that the wreck would be ordered or allowed to be destroyed, even if the wreck were not lying in a navigation channel and would not constitute an actual obstruction to navigation – the risk of immediate or future pollution would be sufficient motive for the authorities to demand the removal of the wreck. In most cases, coastal state authorities have statutory power to require the owner to raise or remove the wreck and/or its cargo or to have them removed at the shipowner's expense.

The Draft Convention on Wreck Removal, when adopted and in force, will improve the situation further by making it compulsory for a vessel to have insurance

covering the wreck removal liability and will also allow claimants to take action directly against the insurer. The Convention, as currently drafted, would apply to wrecks in the Exclusive Economic Zone (EEZ) but ratifying states will be free to apply the same provisions to their internal waters and territorial sea, where most wrecks, particularly those that are a hindrance or hazard to navigation, are normally found.

The conclusion, therefore, is that although the obligation to raise or remove a wreck may be onerous, the shipowner does have insurance cover for this liability.

2.5 Passenger Liabilities

The liability of a vessel towards its passengers is based on the terms of the contract of carriage but also on mandatory provisions in the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 (Athens Convention). When a passenger vessel seeking a port of refuge there may be instances of loss of life, illness and personal injury, loss of or damage to luggage and once the vessel is in the place of refuge there are additional costs for catering to passengers ashore and for making alternative travel arrangements to their destination, if the vessel cannot complete its scheduled voyage. The carrier/owner might also be liable for the delay caused to passengers and their luggage. The owner's liability to pay damages and compensation are generally covered under his P&I insurance, but compensation payable to passengers for forwarding and maintenance ashore are only covered when they arise as a consequence of a casualty, which may or may not be the case. If a cruise vessel were to be in distress, taking care of maybe 2,000–3,000 passengers that have to disembark would be a massive undertaking. Despite the potential inconvenience for the port of refuge, it is difficult to imagine that refuge would not be granted to such a ship in need of assistance. However, if the need for assistance is due to an outbreak of an infectious illness on board, it is quite conceivable that actual entry into a port of refuge could be refused. The vessel might be directed to another safe place instead and be placed in quarantine, causing the owners further losses and expenses. The normal P&I cover provides for additional quarantine and disinfection expenses, as well as additional costs for fuel, insurance, port charges, wages, stores and provisions, i.e. expenses over and above the costs that it would have incurred in the normal course of operations. However, the additional liability for delay of passengers who have not themselves become ill does not appear to be covered, but that would hardly cause concern for the port of refuge.

In this connection it should also be noted that the P&I insurance also covers costs, expenses and liabilities in connection with having on board refugees or persons saved at sea, although they are strictly speaking not passengers. Rescuing people found in danger at sea has always been a duty of every seafarer and is a specific obligation of every master according to SOLAS,³ Chap-

³ The International Convention for the Safety of Life at Sea, 1974, London, 1 November 1974, 1184 U.N.T.S. 2, as amended (hereafter 'SOLAS').

ter V, Regulation 33. If the people have been rescued from another ship in distress, i.e. they are *bona fide* seafarers, there would seldom be a problem, but they could also be refugees, whose vessel, or rather craft, has proven to be insufficiently seaworthy for the adventure. This has become far too common an occurrence and this category of persons onboard a ship has proven a contentious issue for prospective port of refuge. In recent years there have been several examples of ships being turned away from ports when they have wished to land persons who have been rescued at sea. The *Tampa* incident some years ago received a lot of publicity, but more recently there have been other incidents in the Mediterranean. In these situations the vessel seeking entry is not in immediate physical danger itself, having a large number of people, possibly hundreds, onboard a ship, which is not equipped for catering to any number of extra people could very quickly put the vessel in jeopardy. Food and water supplies would quickly be depleted and the rescued persons could become desperate (if they were not already) and threaten the safety of the ship and its crew. In such situations, the vessel is clearly in need of a place of refuge, but experience has shown that there is much room for improvement among coastal states in their way of handling these situations.

2.6 Pollution Liabilities

The most daunting aspect of a vessel seeking a place of refuge and the one that apparently worries the authorities of the coastal state and the intended place of refuge the most is the risk of pollution. If a vessel needs a place of refuge due to a technical failure of the vessel's engines, steering gear or the like, and such reasons surely represent a majority of cases, the risk of pollution is probably not very great. However, if the vessel has suffered structural damage, the risk is obviously more tangible, particularly if the vessel is carrying oil (or other hazardous cargo), as was the case with the '*Cas-tor*', '*Erika*' and '*Prestige*', all of which were refused a place of refuge.

Liability for pollution damage is regulated through a number of international conventions such as the International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC Convention), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (FUND Convention), the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (Supplementary FUND Convention), the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention), and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention). The main apprehensions seem to have focused on oil pollution risks, in particular from tankers, and in this respect pollution liability is quite well regulated since the CLC and FUND conventions are in force with relatively good geographical coverage (over 100 ratifying states). However, there are still gaps in these liability regimes, since the international conventions

only apply where they have been ratified and given effect in ratifying states and in respect of the HNS Convention and Bunker Convention, which have not entered into force yet, Røsæg and Ringbom (2004) found the situation unsatisfactory. This is true, of course, but the situation would have been different if the members states of the European Union had ratified them, but at present only a few have done so. It would appear that the process of ratification by European Union member states has been hampered by issues relating competence over matters of jurisdiction.

The liability regime set up in the three pollution liability conventions (CLC, HNS and Bunker Convention) is not completely harmonized, which Røsæg and Ringbom (2004) found particularly problematic regarding the Bunker Convention they do have a few important common aspects: they all impose strict, albeit limited, liability on the registered owner of the vessel. Making the owner of the ship liable regardless of fault enables claimants to claim and receive compensation quickly, without being forced to go through lengthy litigation first to establish negligence on the part of the shipowner. Furthermore, the conventions require the vessel to have compulsory insurance or other financial security to cover the liability it may incur, up to the respective limits of liability defined in the various conventions. Finally and particularly relevant from the compensation point of view, they provide for direct action against the insurer. Although 'other financial security' is an alternative to insurance, in the vast majority of cases the shipowner would wish to include it in his P&I insurance cover, and the P&I Clubs do include it in the scope of their cover. The P&I Clubs limit their liability towards the assured for oil pollution claims and this limit is set at US\$1 billion for each event or accident, an amount that, however, exceeds the limits of the shipowner's liability in the respective conventions.

2.7 Abandoned Vessels

A particular area of concern for ports is the problems they face when a vessel is abandoned by its owner. Notice of abandonment is a term with a specific legal meaning in connection with a vessel becoming a wreck as a result of a constructive total loss, but, there are situations as well when owners of ships actually and literally abandon their vessel, their crew and their creditors. This may, of course, coincide with the owner having also given notice of abandonment to his hull underwriters, but it happens on other occasions as well, particularly when the owner is in financial difficulties and port dues, bunkers, supplies, crew wages and other debts incurred in the operation of the vessel exceed the value of the vessel. If the vessel has had to seek a port of refuge, the risk of the vessel being abandoned increases due to the anticipated cost of necessary repairs, especially when such repairs are brought on by a breakdown due to ordinary wear and tear rather than particular average, i.e., damage as a result of a fortuitous event, because the H&M insurance does not cover repair of damage caused by deterioration from wear and tear.

An abandoned vessel is always a problem for the port in

which it lies. Often the members of the crew have not been paid their salaries for some time and they continue to incur cost in the form of wages, sustenance and repatriation. The port is, naturally, not liable for any debts incurred by the owner or operator of the ship, but there may be other considerations. The port may feel obliged to cover some of the continuing costs for humanitarian reasons, but also in order to secure necessary services for the safety of the ship, including costs for necessary bunkers, water and other supplies to preserve the vessel. At the same time, the vessel causes disruption to port operations by occupying berth space without the port being able to collect payment for port charges. There is generally no insurance cover for any of these costs as they are costs that arise in the ordinary course of operation, although in quite extraordinary circumstances. There is a clear difference in the fact that the other types of liability arise when the vessel has caused loss or damage fortuitously, whereas abandonment of a vessel is intentional on the part of its owner, and no insurance covers loss caused intentionally.

If the vessel has suffered an accident and as a consequence has become an actual or constructive total loss, then the owner's liability to repatriate and compensate crew members for the loss of their employment would be covered by the P&I insurance, but this would not include previously incurred but outstanding wages. And even in this situation, it must be remembered that the insurance is designed to indemnify the assured shipowner rather than to protect third parties, i.e., the shipowner can claim against the insurer for reimbursement of his actual expenses. But if the owner has abandoned the vessel, the point is that the owner would not have paid anything. In such a situation, the port can only try to enforce its claims by arresting the vessel and then recover from the residual value of the vessel, which could be very low if the vessel is in damaged condition. The port's claim would probably enjoy priority rights by virtue of a maritime lien, but so would the crew's claim for wages and possibly some of the other claims. At the end of the day it is uncertain how much, if anything, the port would be able to recover.

In summary and with some generalisation it could be said that *if* the shipowner is liable, his liability *is* covered by his standard insurances policies. However, it is also important to note that insurance is about indemnity, i.e., the shipowner has protected his economic position so that, if he has to pay compensation for a liability he has incurred, his insurer will indemnify him, but an injured party can usually not claim directly against the insurer. This is called the 'pay-to-be-paid' principle and will be discussed later.

3. Limitation of Liability

We have seen in the previous sections that when a vessel has caused loss or damage, the owner's liability is generally covered by his insurance, primarily his P&I Club. The general principle of law is that when someone has caused loss or damage through negligence, he is obliged to put the injured party in the same position as

he would have been without that wrongdoing, i.e., the negligent party has to pay full compensation to those who suffer from his negligence. In maritime law, however, this principle does not always apply, and there is a long history, codified as early as the 17th century, of allowing shipowners to limit their liability for loss of or damage to cargo, but also more generally for many kinds of third party liabilities (Gold, 2002). This exception from the general rule of liability aims to set the liabilities of shipowners' and their underwriters' at levels, which they can bear without risking bankruptcy and is based on public policy considerations. This principle was clearly expressed by Dr. Lushington in *The Amalia* case: "The principle of limited liability is, that full indemnity, the natural right of justice, shall be abridged for political reasons"⁴ and later by Lord Denning, in *The Bramley Moore* case, who said, "... limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience"⁵. This public policy evidences a close connection between limitation of liability and marine insurance in so far as the aim and justification for setting the limits of liability has been to ensure the "commercial insurability at a reasonable cost" (Hazelwood, 2000) of the liability exposure of shipowners.

A full account of limitation of liability is not possible here but we can basically distinguish between two types of limitation. Firstly, there is the general limitation of liability based on the vessel's tonnage, also called global limitation. Secondly, there are the specific limitation regimes applying to individual claims of a particular type, such as the Hague, Hague-Visby and Hamburg Rules, which apply to cargo liability in carriage of goods by sea, the Athens Convention, which regulates the carrier's liability for passengers and their luggage and the previously mentioned CLC, HNS and Bunker Conventions regarding pollution liability.

3.1. Tonnage Limitation and Specific Limitation Regimes

The general tonnage or global limitation sets, as the names imply, a limit in relation to the tonnage of the vessel and the limit applies 'globally' to all claims, which arise out of any one incident or occurrence, except to claims which are specifically excluded from the scope of limitation. There are three international tonnage limitation conventions in force; from 1924, 1957 and 1976, respectively. Between them they cover substantial parts of the world, but in geographical terms the coverage is not 'global'. The United States, for example, has not ratified any of the international conventions, but instead applies national legislation, namely the *Limitation of Shipowners' Liability Act of 1851*, which substantially differs from the international conventions, while the Canadian *Marine Liability Act of 2001* is more in line with the international regime (Gold, 2002).

⁴ *The Amalia* (1863) 1 Moore N.S. 471 (P.C.) Revised Reports 138, at 591

⁵ *The Bramley Moore* [1963] 2 Lloyd's Rep. 429.

Concisely, global limitation means that all liabilities incurred by a vessel on any one occasion from a specific incident are limited to one total amount, and if the total claims exceed the limit, the various claimants will only receive partial compensation in proportion to the size of their valid claim.

Only a few types of claims are specifically excluded from the application of the global limitation. The excluded claims are, firstly, claims for salvage and contribution in general average, so they do not present a problem. Secondly, the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1976) excludes claims for oil pollution, as defined in the CLC Convention, i.e. claims for oil pollution from tankers are covered by the CLC Convention and not the LLMC. This is important as the limits of liability in LLMC 1976 are generally lower than in the CLC 1992 and, even more importantly, such claims will not have to compete with other types of claims for the global limitation amount. The owner's liability under the CLC Convention is still limited, but there will be a separate amount of money for these claims, supplemented by a further amount from the International Oil Pollution Compensation Fund. Oil pollution claims under the CLC Convention are excluded from the scope of the 1957 Limitation Convention as well by virtue of Article XII of the CLC Convention, according to which the CLC Convention supersedes any existing international convention that is in conflict with it (IMO, 1996). The third specific exclusion relates to claims by members of the crew and servants of the owner, which is an important exception in principle, but probably not particularly significant in the current context.

In addition to the specifically excluded claims, the global limitation regime allows for two further exceptions. Firstly, when ratifying the conventions, states have been allowed to make a reservation to the effect that claims relating to 'raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned' are excluded from the scope of global limitation and the same applies to raising or removal of the cargo of the ship. A majority of the current state parties to the 1957 Limitation Convention have made this reservation, but less than one fifth of the states that have ratified the LLMC 1976 have made this reservation (CMI 2005). Since the costs for wreck removal can be very substantial, and often the wreck removal cost alone will exceed the global limit, it is perhaps surprising that more states have not taken this opportunity to maximize the shipowner's liability. If the ship owning company actually fulfils the removal obligation itself, the cost of the services contracted by them would not be subject to limitation in which case it would not seem to matter, but if the owner does not act on its own initiative and the removal is undertaken under the orders and direction of the competent authority, the costs would have to be recovered from the liable owner and in that situation the global limitation would be applicable.

The other additional exclusion from the scope of the global limitation concerns liability for pollution from

hazardous and noxious substances under the HNS Convention. By the same logic, which excludes CLC claims from the global limitation, HNS claims should be excluded. The LLMC Protocol 1996 also allows a ratifying state to exclude HNS claims from global limitation, but only a few of the state parties to the LLMC Protocol 1996 appear to have made this reservation. In those countries that have not made this reservation, the minimum limit of liability in the HNS Convention, i.e., SDR 10 million for vessels up to 2,000 gross tonnage, would be meaningless if the same claims could be limited by the LLMC Protocol 1996 to SDR 1 million (or SDR 3 million if there were claims for personal injury as well). For larger vessels the difference diminishes and for very large vessels over 115,667 gross tonnage the LLMC 1996 limit of liability exceeds the limit in the HNS Convention. However, the HNS claim would have to share the amount of the global limit with other claims arising out of the same incident. For the claimant it would probably not matter since the separate HNS Fund would cover the claims up to its reasonably high limits, but the real beneficiaries of this overlap would be the shipowner and his P&I Club, whose total liability would be substantially lower. For states that are parties to the 1957 Limitation Convention or the original LLMC 1976, but not the 1996 Protocol, there could be a problem, as HNS claims are not specifically excluded from the scope of global limitation (Griggs and Williams, 1998). This question was debated at the time of adoption of the HNS Convention and the LLMC 1996 Protocol and the solution was to include a 'supersession clause' as Article 42 in the HNS Convention stating that the HNS Convention supersedes any existing convention that is in conflict with it, i.e., applying the principle that a posterior *lex specialis* supersedes older general law (in this case the global limitation). This is the same solution as when the CLC 1969 Convention was adopted (in relation to the 1957 Limitation Convention). There have been no known cases, which would have tried to apply the global limitation to oil pollution claims falling under the CLC Convention. Therefore, HNS claims are probably not subject to global limitation and if that is the case, then making the reservation mentioned at the beginning of this paragraph would be meaningless, but there could have been better ways to achieve certainty on this point.

Finally, there are other specific limitation regimes such as the limitations of cargo and passenger liability, which apply limits per unit of cargo or per passenger. These claims, which may already be limited by the specific limitation regime will then have to compete with other claims within the global limit, further reducing the amount of compensation for the individual claimant (Griggs and Williams, 1998). This can be seen as even more unjust to the individual claimant, but it is not an issue particular to places of refuge and the port of refuge would probably not be affected by these types of claims. On the other hand, pollution from bunkers may become an issue in connection with a vessel seeking refuge and would be of concern for the authorities of the place of refuge, as they would be directly involved with and incur costs for efforts to prevent or limit the pollution

and for the clean up. As stated above, the liability under the Bunker Convention is based on strict liability, backed by compulsory insurance and the right to claim directly against the insurer, but the owner's liability for pollution from bunkers is not excluded from the scope of the global limitation. This means that claims for damage, prevention and clean up might have to compete with all other claims subject to the global limitation, which arise out of the same incident, but Røsæg and Ringbom (2004) found the Bunker Convention less than clear and expressed some doubt over whether global limitation would apply automatically or could be excluded by national law. Furthermore, there may be claims relating to environmental damage arising out of bunker pollution that are not limitable at all under the global limitation regimes (Wu, 2002). The right to claim directly against the insurer would not enable claimants to recover more money because the liability insurer is entitled to the same limitation of liability as the liable shipowner and the insurer is entitled to limited liability (and this relates to other pollution liabilities as well) even if the shipowner would have lost his right to limit (Anderson and de la Rue, 2001).

3.2 Breaking Limitation

When a shipowner is liable to pay compensation for damage caused by him his normal insurance provides cover for his liabilities, but, with very few exceptions, the liability is limited. The limits of liability, which are quite low in the older conventions, have been raised in subsequent conventions and amendments to them, but when a major casualty involving a multitude of claims occurs, the claimants will most likely not receive full compensation for their losses. The 1957 Limitation Convention may actually be more advantageous for claimants in that it only allows the shipowner to limit his liability if the loss or damage was caused without 'the actual fault or privity of the owner'. Furthermore, the burden of proof is determined by the *lex fori* (Berlingieri and Pineus, 1990), which means that in common law countries the owner has the burden of disproving his actual fault or privity. Under LLMC 1976, as well as most of the specific liability regimes the right to limit is only lost if it is proved that damage or loss was caused by the owner's 'personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'. Practice has shown that this wording makes the right to limit the liability almost unbreakable. There are sentiments, particularly within the European Union, that the owner's right to limit liability for pollution claims should be more easily 'breakable' (EU 2005a, EU 2005b). It has even been suggested that a return to the previous 'actual fault or privity' regime regarding loss of the right to limit liability should be considered (Wetterstein, 2004). Contrary to this Anderson and de la Rue (2001) argued that weakening the owner's right to limit liability for pollution claims would only result in less money being payable by the IOPC Fund but would not increase compensation to claimants. It could also lead to more litigation, which would be disadvantage for pollution victims who would have to wait longer to

receive compensation.

3.3 Liability, Indemnity and the 'Pay to be Paid' Rule

The limitation of the shipowner's liability for most types of claims and the possibility or likelihood that a victim will not get full compensation for his loss is a concern for potential places of refuge. At the same time, it is that same right to limit liability that has kept the liabilities commercially insurable so that at least some compensation would be ensured. However, there is another aspect of the insurance cover, which is a greater potential concern and that is the fact that insurance for a shipowner's liabilities is actually indemnity insurance, not liability insurance.

Liability insurance means that the insurer provides cover for incurred liabilities, whereas indemnity insurance means that the insurer promises to indemnify and hold harmless the assured when the assured has discharged the liabilities that he has incurred, i.e., to reimburse him when he is 'out-of-pocket' (Hazelwood, 2000). The principle that a shipowner must have paid compensation to the victim before he can make a claim against the insurer is very clearly expressed in the rules of all P&I Clubs along the lines of Rule 5 A of the UK P&I Club (2006):

"Unless the Directors in their discretion otherwise decide, it is a condition precedent of an Owner's right to recover from the funds of the Association in respect of any liabilities, costs or expenses that he shall first have discharged or paid the same out of funds belonging to him unconditionally and not by way of loan or otherwise".

This is called the 'pay to be paid' rule and is a central principle of P&I insurance. Furthermore, P&I cover is in principle restricted to the 'legal liability' that the shipowner has incurred, i.e. the liability must have been established by a judgement by a competent court or an arbitration award, and the judgement or award should be final with no further possibility to appeal (Gold, 2002). However, P&I Clubs will also accept an agreed settlement approved by the P&I Club and use their discretion to allow the shipowner not to pursue the right of appeal, if they deem the prospects of an appeal futile. For a third party claimant the 'pay to be paid' rule presents a real problem, since it could take years to pursue the claim, possibly in a foreign jurisdiction, through all stages of appeal and when the liability of the shipowner has been finally established, then the claimant would have to enforce it against the shipowner, possibly in another foreign jurisdiction.

The 'pay to be paid' problem does not only arise because the shipowner is prevented from paying voluntarily by his insurance terms, but also when the liable shipowner unable to pay due to insolvency. In common law there is a principle of equity, which has had the effect that the shipowner would have the right to demand payment from his P&I insurer before paying compensation to the victim if it would ruin the shipowner financially to have to pay first. However, since a third party claimant is not a party to the contract of insurance, this principle of equity does not give the

claimant any rights directly against the indemnity insurer. In the United Kingdom, claims have been made against P&I Clubs under the *Third Parties (Rights Against Insurers) Act 1930*, but the 'pay to be paid rule' has been upheld provided the requirement to pay first is a clearly worded contractual condition precedent for seeking indemnity. This was based on the argument that until the liable shipowner has actually paid the claim, he only has a contingent right against the club to seek indemnity and a third party cannot acquire a better right than the assured had (Hazelwood, 2000).⁶ The wordings of the relevant rules of the P&I Clubs are clear and have been specifically drafted with a view to ensure the insurer's immunity against direct action.

The common law rules regarding indemnities would be the same in the United States, but as a matter of public policy many state laws specifically prohibit or negate 'pay to be paid' clauses, or 'no action' clauses as they are called, only requiring a judgement against the liable party before proceeding against the insurer. In such states, insurance policies for indemnity actually become liability insurance policies, but there is conflicting case law on the whether or not claimants have the right of direct action against P&I Clubs (Sturley, 1999, Hazelwood, 2000). In civil law countries the situation is different and third party claimants can proceed directly against the insurer if the liable shipowner has become insolvent (Gold, 2002). For example, clause 13-1 in the Norwegian Insurance Plan 1996 gives the impression of being liability insurance rather than indemnity insurance as it does not contain specific words requiring the assured to pay the claim first. Although strict application of the 'pay to be paid' principle is primarily restricted to English law, the restriction on access to direct action is a very significant one for third party claimants, because a very significant portion of all P&I insurance is covered by clubs and/or club managers based in the United Kingdom. As a result, any direct action against these clubs would need to be attempted in English courts, which would not allow such direct action.

There is one significant exception to the restriction on direct action and that is in relation to pollution liabilities under the CLC, HNS and Bunker Conventions, which all contain provisions for compulsory liability insurance (or other financial security) and specifically allow direct action against the insurers. In these cases the P&I insurer is not protected by the 'pay to be paid' rule, but the insurer is entitled to the same limits of liability and the same defences as the shipowner is. In addition the insurer may invoke the defence that the pollution was caused by 'wilful misconduct of the owner himself'. The previously mentioned European Commission proposal for a civil liability Directive (EU, 2005b) also aims to introduce requirements for all vessels operating in EU waters for compulsory insurance (or other financial guarantee) to cover liabilities under the LLM 1996 Convention (actually for twice the maximum limit) and to allow claimants direct action against the insurer or provider of the financial guarantee.

⁶ The leading case is "*The Fanti and the Padre Island*", [1990] 2 Lloyd's Rep. 191.

In normal situations shipowners do honour their liabilities and objectively speaking, shipping companies do not go bankrupt more often than other businesses. But it is conceivable, particularly in poor market conditions, that a shipowner may abandon a damaged vessel and try to walk away from his liabilities if the vessel has incurred substantial liabilities and at the same time suffered considerable damage itself. The very common structure of one-ship companies and less than transparent ownership make this easier to do and maybe more tempting. A claimant may be well advised to try to have the vessel arrested while it is still in the place of refuge in order to secure his claim and to make subsequent enforcement of the claim easier, and it may even have an effect on determining in which jurisdiction the substantive claim can be pursued. The owner of an arrested vessel (if the owner does not abandon the vessel) would probably try to apply 'damage control' by invoking the right to limit his liability by constituting a limitation fund under the applicable global limitation regime. Thereby the owner also provides funds, or other security, for the benefit of the claimants. Often a letter of undertaking, issued by a P&I Club, will be accepted as an alternative to depositing cash in the court, and it is common that P&I Clubs issue such undertakings for liabilities covered by the P&I insurance. When a P&I Club issues a letter of undertaking it does so purely as a discretionary service to their members (Hazelwood, 2000), but very often they do, and when they do they actually provide a guarantee that the claim will be paid once the validity and extent of the claim has been proven. Effectively this means that the P&I insurer surrenders the 'pay to be paid' defence and makes the insurer liable to pay directly to the third party.

3.4 Demanding Guarantees

Van Hooydonk (2004) has provided a comprehensive analysis of the justification and legality of the practice of demanding guarantees, bonds or other financial security as a condition for granting a vessel a place of refuge. A further detailed analysis cannot be undertaken here, but it is a controversial issue. Firstly, Article 26 of UNCLOS prohibits the levying of charges on ships for providing general services but 'as payment only for specific services rendered to the ship' and that any charges levied should reflect the actual cost of providing such special services, which would be difficult to assess prior to actually rendering any services. Secondly, vessels in distress have under customary international law and for humanitarian reasons enjoyed exemptions from public charges (Van Hooydonk, 2000). And thirdly, we have seen that international conventions allow shipowners to limit their liabilities in many cases and also limit the right of states to recover costs or damages over and above those limits. Van Hooydonk (2004) states that by demanding financial security the state 'takes the law into its own hands and avoids having its claims assessed by an independent judicial authority' and that any policy to seek such security would have to be based on very clear national legislation. In many countries such legislation does not appear to exist, although guarantees may still be demanded on occasion.

Some countries have enacted legislation allowing authorities of the coastal state to demand guarantees. One example is the Belgian *Marine Environment Protection Act, 1999*, under which a ship that has been involved in a casualty and poses a threat to the environment may be required to post a bond, bank guarantee or P&I Club letter of undertaking. The Belgian act is clear and appears fair in the sense that the amount of the bond is limited to the maximum limits of liability established in relevant international conventions and Belgian law. Refusal to provide the requested guarantee may lead to detention of the vessel (Van Hooydonk, 2000), which may be an inconvenience, but it is much better than refusing assistance completely. A much more controversial example of national legislation is the Spanish *Royal Decree 210/2004*, issued on 6 February 2004, according to which Spanish authorities do not have an obligation to provide refuge to a ship in need of assistance and allows them to require a guarantee as a precondition for granting refuge. The amount of the guarantee can be very high and may by far exceed the limits of the shipowner's liability under all existing international liability conventions. Most controversial, however, is the proviso that the shipowner may be required to denounce his right to limit his liability under international conventions and their national enactments (Ringbom, 2004). To make granting refuge contingent upon the vessel providing a guarantee in advance, raises, apart from safety and humanitarian aspects, the question of the legality of such a demand, purely as a matter of legal principle. Although Ringbom (2004) considers a 'voluntary' denunciation of the right to limit liability legally possible it might be argued that any such 'voluntary' agreement to give up the right of limitation could later be contested on the grounds that it was made under duress.

It should be noted, though that such guarantees could be useful if they provide ports with an incentive to offer a vessel in distress a place of refuge by removing any fears they may have of suffering damage or disruption without assurance of receiving reasonable compensation and the International Group of P&I Clubs has drafted a standard letter of guarantee to cover the shipowner's liabilities for wreck removal and pollution. It is, however, of utmost importance that the amount and form of the demands for security are not formulated in a way that the safety of the vessel is further jeopardised or the risk of pollution increased because time is lost in negotiating about or attempting to meet the demands of the authorities (Van Hooydonk, 2004). Any policy or practice of demanding guarantees for excessive amounts, which bear little relation to the risk of potential damage and whose real purpose is to discourage vessels from seeking assistance or to *de facto* prevent refuge being granted, is difficult to justify.

3.5 Current Developments

Unfortunately, the fact that there are several competing liability regimes, each with their different limits of liability and different criteria for 'breaking' the owner's right to limit his liability gives room for forum shopping, which adds to the uncertainty for the claimants.

What some see as a problem is the level at which the liability cap has been set considering that the losses and damage a vessel can cause can be very substantial, even enormous. Be that as it may, a shipowner's right to limit his liability is dictated by public policy, and the strength of that right and whether the limits of liability are fair or sufficiently high is ultimately a question of feasibility and politics. There is currently a strong push from the European Commission to change that policy (Stares, 2007a) but there is also strong opposition within the Council of Ministers and particularly from the shipping industry (Stares, 2007b, ECSA/ICS 2006). The jury is still out on whether and when there will be fundamental changes to the global limitation regime.

4. Places of Refuge

4.1 A Right or an Obligation?

When a vessel faces real and immediate danger to the extent of being in distress, the lives of any persons on board are also at risk. The obligation to provide humanitarian assistance to ships and seafarers in distress is based on an ancient tradition in customary law and is now also well codified in many international conventions (Chircop, 2006). This obligation applies to ships as per SOLAS, Chapter V, Regulation 33 and UNCLOS⁷ Article 98 requires states to give it effect by legislation and to promote effective search and rescue services. This obligation is hardly controversial, but on the other hand, it does not always entail granting a place of refuge to the ship as the quickest and safest way to save the lives of the crew of a vessel in distress is usually to airlift them, either directly off the ship or from lifeboats or life rafts and not by trying to take the vessel into port. However, the situation would be quite different if the vessel carried a large number of passengers, but if such a situation were to arise, it is difficult to imagine that the vessel would not immediately be offered a place or port of refuge. When only the vessel and other property are at risk, and that would apply also after the crew has been rescued, a coastal state does not have an obligation to offer refuge while it does have a right to protect its marine environment and its population. For example, Article 9 of the International Convention on Salvage, 1989, specifically states that the Convention does not affect the rights of the coastal state "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." Furthermore, Article 11 stipulates that in deciding upon matters relating to a salvage operation "such as admittance to ports of vessels in distress," the state shall consider the need for co-operation in order to achieve "efficient and successful performance of salvage operations for the purpose of saving life and property in danger as well as preventing damage to the environment in general."

⁷ The United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 188 U.N.T.S. 3 (hereafter 'UNCLOS')

4.2 Pre-designated Places or ad hoc Decisions?

Humanitarian aspects aside, experience has shown that that granting a vessel in distress access to a place of refuge involves political decisions as much as considerations of maritime safety, protection of the environment and compensation for damage. A major problem is that when a vessel in distress needs a place of refuge there is a risk that granting that vessel refuge becomes too sensitive an issue and that the appropriate authority decides to refuse refuge and turns the vessel away. There have been too many such cases in recent years – the *Castor*, the *Erika* and the *Prestige* are only the best known among them. These incidents did, however, focus the minds of the legislators on the need to provide a framework for deciding whether and where a place of refuge should be granted and the IMO Guidelines and EU Directive 2002/59 were adopted as a direct consequence of these incidents.

The EU Directive notes (in recital 16) that “non-availability of a place of refuge may have serious consequences.” Article 20, therefore, obliges coastal member states to draw up plans for places of refuge. Such plans shall take into account the IMO Guidelines and incorporate “necessary arrangements and procedures” for accommodating ships in distress by granting a place of refuge, “subject to authorisation by the competent authority.” The Directive also required member states to inform the European Commission of the steps they had taken in this respect. Some, but only a few, member states have implemented this directive by actually designating specific places or areas for this purpose, and making them public (Stares, 2007c). Most member states have limited themselves to taking an inventory of possible places of refuge saying that a specific place of refuge will be identified if and when a situation requiring a safe haven occurs.

4.3 To Grant or Refuse? – The Best Option

The needs and legitimate interests of the vessel (and its cargo), on the one hand and the coastal state, on the other, obviously need to be balanced. Often these interests may be opposite or they would appear to be so, but that is not always the case. In many situations the best way, objectively, to protect the environment is to take the vessel into sheltered waters and if this is the case, the words of the Salvage Convention referred to above can actually be construed to mean there does exist an obligation to provide refuge. Noteworthy in this context is also UNCLOS Article 195, which prohibits the direct or indirect transfer of pollution damage or hazards from one area to another when the state takes measures to prevent, reduce or control pollution. In other words, a state owes a duty to other states not to refuse refuge to a vessel if it only leads to damage being moved to the territory of another state.

If a vessel in real distress is refused a place of refuge it may be, and often is doomed and this can turn out to be extremely costly in terms of damage and pollution as well as recovery of remaining pollutants on board the ship. On the other hand, allowing a vessel into sheltered waters is no guarantee that the vessel can be success-

fully salvaged and considerable costs and environmental damage can result from such a decision. The real problem is the fact that it is much more difficult to predict the future than the past. Since no two incidents are the same, it is practically impossible to construct reliable decision making models, except in theory, of which alternative would be best and any theoretical model would only be as correct as the theoretical assumption, which in all likelihood would not correspond with the actual situation with regards to wind speed and direction, currents, the state of the sea and, most importantly, the actual condition of the vessel in distress. On the other hand, comparing the actual outcome with alternative courses of action is not really possible since it is only possible to analyse what happened, but not what might have happened.

For example, it has generally been contended that had the *m/t Prestige* been allowed into more sheltered waters, it could probably have been saved and that, in any case, the resulting pollution damage would have been much less severe and would have cost much less to combat and clean up. However plausible that contention may be, we will never know because that alternative was not tested. As an argument to support that contention, the events surrounding another tanker, the *m/t Magnitude* is often cited. Only six days after the sinking of the *m/t Prestige*, while the *m/t Magnitude* was waiting to enter the port of Milford Haven in the United Kingdom with 90,000 tonnes of heavy fuel oil on board, the vessel was found to be leaking oil from a crack in the hull. It was agreed between the Secretary of State Representative (SOSREP) and the harbour master that the vessel would be taken into the port where booms were placed around the vessel. The outcome was successful and very little pollution ensued (Maritime & Coastguard Agency, 2007). However, there is no real comparison between the two cases, since the circumstances of the vessels and the conditions surrounding them were obviously different. However, the IMO Guidelines clearly recognize the fact that the risk for a stricken vessel increases the longer it has to stay in open seas, as its condition and/or the weather may deteriorate. The best way, therefore, to prevent further damage to the vessel and pollution is to bring it to a place where repairs can be undertaken and cargo and bunkers can be lightered.

One factor to consider is the fact that granting a stricken vessel a place of refuge almost always entails bringing it into sheltered waters, which could mean taking it into a port but otherwise into a bay, inlet or similar place, which is closer to shore and provides some protection from the winds and the seas. The proximity to shore means that the particular area is exposed to greater risk of more severe pollution. However, the IMO Guidelines also recognize the fact that the extent of coastline exposed to the threat is limited. The obvious advantage lies in the fact that the reduction of the geographical area in which pollution prevention and clean up measures need to be undertaken, which should result in a reduction of the overall cost for such mitigation measures.

5 Conclusion

At the beginning the assumption was made that most vessels are 'normal' with both the vessel and its managers and operators fulfilling reasonable industry standards and the analysis of liabilities and compensation have been based on that assumption. However, all vessels are obviously not 'normal' and in the case of 'abnormal' vessels extraordinary legislative measures may be required to protect coastal states and the public against the extraordinary risks imposed such vessels, but above all, to prevent them from continuing to trade.

When a vessel finds itself in distress at sea the potential hazard, not only for the vessel but also for the coastal state may increase if the vessel is not offered a place of refuge. A decision to grant or refuse a place of refuge, therefore, must take into account the advantages for the vessel **AND** the environment, on the one hand, and balancing that against the risks for greater damage to the vessel **AND** the environment, on the other. It is contended that the balance would, more often than not, turn out to favour a decision to grant a place of refuge.

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