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Places of refuge

Contributing Firm

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Introduction

In recent years requests from ships in distress seeking refuge in coastal waters and ports have given rise to difficult legal questions and also often become politically sensitive. Traditionally, when the only issue was human lives in danger, it was not questioned that a ship in distress was entitled to refuge by coastal States. Likewise, if the purpose of the ship seeking shelter was to preserve property, ships were not normally refused refuge either. In view of the large quantities of oil and other hazardous cargoes carried by sea and the increased importance of environmental issues, coastal States have increasingly become reluctant to allow ships in distress carrying such cargoes to enter their ports and coastal waters if the entry of the ship would represent a significant risk to the environment of the State concerned.

In a number of cases ships have been refused entry in view of the environmental risks, real or perceived, which the ship represented. The most extreme example is that of the *Castor*, a ship carrying a cargo of gasoline, which developed a major crack on its main deck during a storm off the coast of Morocco in December 2000. As its cargo was non-persistent oil, it did not present a significant pollution risk, but it was considered that there was a serious risk of explosion. Requests for permission to enter coastal waters to lighten the ship were refused by seven States, and the ship had to be towed around the Mediterranean for several weeks before a transfer operation could be carried out in Libyan waters. Other examples of requests for refuge being refused by coastal States in respect of ships carrying hazardous cargo are the *Prestige* (Spain, 2002), the *Stolt Valor* (Saudi Arabia, 2012) and the *Flamina* en route to Antwerp (Belgium, 2012). In 2013 it took almost 100 days before the chemical tanker *Maritime Maisie*, which had caught fire after a collision with 30 000 tonnes of hazardous cargo on board, was granted access to a place of refuge in the Republic of Korea.

There are, however, also cases where requests for refuge have been granted by the coastal State in spite of the fact that allowing the ship entry represented a serious pollution risk. A notable case is the *Sea Empress*, a laden tanker in distress that in 1996 was allowed to enter the port of Milford Haven in Wales. Another example, also in the United Kingdom, is the *Napoli* in 2007. In the latter case the United Kingdom authorities took the courageous decision to beach the vessel on the South Devon coast, which most likely avoided serious environmental damage. A more recent example is the car carrier *Modern Express* which was in distress in the Bay of Biscay in 2016 and was granted access to the port of Bilbao (Spain). In 2019, the containership Grande America, carrying containers, some of them containing hazardous substances, and a number of motor vehicles, caught fire in the Bay of Biscay. The ship was granted permission to enter the port of Bilbao, but this permission was not used since the ship sank a significant distance off the Spanish coast.

It should be noted that this analysis is made from a largely European perspective. It should also be mentioned that it relates to commercial ships only and does not address problems in respect of craft carrying migrants across the Mediterranean.

Right to a place of refuge under public international law

Various opinions have been expressed as to the position of public international law regarding the extent to which a coastal State is obliged to allow a ship in distress to enter its coastal waters. The prevailing view appears to be that if the entry of the ship involves significant environmental risks for the coastal State, there is no legal obligation for that State to grant the ship access to a place of refuge. A coastal State that grants access is entitled to making the access conditional on additional requirements. It is also considered that there is no general right for a coastal State to refuse access to a ship in distress. The widely accepted view seems to be that any decision whether or not to grant a ship access is to be taken in the light of the particular circumstances of the case.

It should be pointed out that a State which refuses a ship in distress access to a place of refuge might incur liability under public international law for pollution damage caused in another State as a result of such refusal. The question of inter-State liability under public international law in cases of transboundary pollution is not, however, addressed in this note.

IMO Guidelines on places of refuge

In 2003 the Assembly of the International Maritime Organization (IMO) adopted Guidelines on places of refuge for ships in need of assistance. The purpose of the Guidelines, which are not mandatory ("soft law"), is to set up a common framework for assessing the situation of ships in need of assistance. According to the Guidelines there are circumstances under which it is desirable to carry out a cargo transfer operation or other operations to prevent or minimise damage or pollution and that for this purpose it would usually be advantageous to take the ship to a place of refuge.

In the 2003 Guidelines it is stated that granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis. Consideration has to be given to the balance between, on the one hand, the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge and, on the other hand, the risk to the environment resulting from that ship being near the coast. Coastal States should establish procedures consistent with the Guidelines by which to act on requests for assistance.

Reference should also be made to the 2007 IMO Guidelines on the Control of Ships in an Emergency. The purpose of these Guidelines is to provide Governments and others engaged in a maritime emergency with a framework of authority within which they will be expected to operate.

Consideration within IMO of liability issues in relation to places of refuge

The IMO Guidelines on places of refuge of 2003 do not address liability and compensation issues.

As requested by the IMO Assembly, the IMO Legal Committee considered in 2005 whether there was a need for an additional, legally binding instrument regarding liability in relation to places of refuge. The Committee took the view that there was no need for an additional convention on this matter. The Committee stated that the more urgent priority would be to implement all existing liability and compensation conventions, namely the 1992 Civil Liability

Convention[1], the 1992 Fund Convention[2], the 2003 Supplementary Fund Protocol,[3] the 2001 Bunkers Convention[4] and the 1996 HNS Convention[5] (later replaced by the 2010 HNS Convention).[6] In 2014 the Legal Committee once more emphasised the importance of ratification and implementation of the relevant IMO liability conventions.[7]

European Union consideration of issues relating to places of refuge

The issue of places of refuge has also been dealt with within the European Union. A Directive adopted in 2002 for the purpose of establishing a Community vessel traffic monitoring and information system (amended in 2009) deals briefly with the procedures to be followed by European Union Member States when considering whether to grant a place of refuge.

However, the Directive does not spell out any criteria to be applied for taking decisions on requests by ships in distress. In the preamble to the Directive it is stated that the IMO Guidelines are to form the basis of any plans prepared by Member States in order to respond effectively to the threats posed by ships in need of assistance. Under the Directive EU Member States are required to designate one or more competent authorities, which have the required expertise and the power to take independent decisions concerning the accommodation of ships in need of assistance. In the Directive it is also stated that ports that accommodate a ship in distress should be able to rely on prompt compensation in respect of costs and damage arising from the operation and that, for this reason, it is important that the relevant international conventions are applied.

This Directive has been supplemented by the EU Operational Guidelines on Places of Refuge (2018), developed by the European Maritime Safety Agency (EMSA). The Guidelines (including Annexes, some 70 pages), although non-mandatory in nature, are intended to support the more uniform application of the underlying legal provisions in the Directive.

The Guidelines aim at the creation of a robust operational process leading to well-advised and, where possible, quicker decision making. They provide practical guidance for the competent authorities and the main parties involved in managing a request for a place of refuge. They support the requirement for national plans to include procedures for international coordination and decision-making.

Although the Guidelines deal mainly with the operational process, there are also some statements of a more substantive character. For instance, it is stated that a place of refuge request cannot be refused for commercial or financial reasons, nor should commercial interests become the main driver for the handling of such requests, or for the selection of a potential place of refuge. It is further stated that lack of proof of adequate insurance cover cannot in itself form sufficient reason to refuse a request for a place of refuge.

European Community Directive on Environmental Liability

Of relevance in this context is European Community Directive 2004/35/EC on environmental liability that in principle applies to place of refuge situations.[8]

Unlike the international liability conventions referred to above, the Directive does not deal

with traditional damage such as damage to property and economic loss. It applies to certain types of environmental damage caused by various activities such as the transport by sea of dangerous and polluting goods. The Directive also applies to preventive measures, i.e. measures taken after an event with a view to prevent or minimise environmental damage, as well as to remedial measures, that is actions to restore the damage environment. Consequently, there is a certain overlap between the concept of damage in the EU Directive and that concept in the maritime liability conventions.

The Directive does not apply, however, to environmental damage arising from incidents in respect of which liability or compensation falls within the scope of the 1992 Civil Liability Convention, the 2001 Bunkers Convention or the 2010 HNS Convention, provided the Convention is in force and applies to the incident.

Since all EU Member States having a coastline are parties to the 1992 Civil Liability Convention and the 2001 Bunkers Convention, the 2004 Directive will not apply to oil spills in European waters.

On the other hand, as a result of the 2010 HNS Convention not being in force, the Directive does at present apply to place of refuge situations in European waters where damage is caused by hazardous substances other than persistent oil.

Compensation for damage caused by oil and other hazardous substances in place of refuge situations

A question that will have to be considered by those responsible for taking a decision on whether to grant a ship in distress carrying a hazardous cargo or large quantities of bunkers access to a place of refuge is whether it would be possible to get compensation for damage caused by the ca**r**go or the bunkers.

As regards *oil tankers*, the shipowner has under the 1992 Civil Liability Convention strict liability for pollution damage, his liability is covered by insurance, and claimants have the right of direct action against the insurer. The International Oil Pollution Compensation Fund 1992 (1992 Fund) will step in and pay additional compensation up to an aggregate amount of US$280 million if the total damage exceeds the amount payable by the shipowner and his insurer. The financial protection is even better for States that are parties to the 2003 Supplementary Fund Protocol, as a result of the very high amount available for compensation for pollution damage in these States, US$1 030 million.[9] Of the EU coastal States all except one (Romania) are members of the 1992 Fund, and all but four (Bulgaria, Cyprus, Malta and Romania) are parties to the 2003 Protocol.

An important aspect is the provisions in the 1992 Civil Liability Convention that channel the liability to the registered shipowner and provide responder immunity, except in rare cases, to those, including States and other public authorities, carrying out salvage and clean-up operations or taking other preventive measures. These provisions should, as regards cases involving oil tankers, result in reducing hesitation on the part of these groups to intervene rapidly also in difficult circumstances.

It is submitted that those having suffered pollution damage in a State belonging to the international regime created by the 1992 Conventions as a result of a tanker oil spill would, except in rare cases, rather pursue their claims under the international regime than take legal action against a State or public authority where normally negligence or failure to act with due diligence on the part of the defendant would have to be established.

With respect to place of refuge situations involving *ships other than oil tankers*, liability issues relating to oil pollution are governed by the 2001 Bunkers Convention to which all EU coastal States are parties. Also, under that Convention the shipowner (which includes the charterer, manager and operator of the ship) has strict liability for pollution damage, his liability is covered by insurance and claimants have the right of direct action against the insurer. However, the limitation amounts, which will normally be determined under the Convention on limitation of liability for maritime claims (LLMC), may be relatively low.[10] For States that are not parties to the LLMC, limitation of liability will be governed by national law. There is no second layer of compensation from an international fund.

The Bunkers Convention does not, therefore, give the same protection as the regime relating to spills from oil tankers. Admittedly, spills of bunker oil from non-tankers are seldom of the same magnitude as a major tanker oil spill, and in most bunker spill cases the Bunkers Convention gives a reasonably good financial protection for coastal States in place of refuge situations. There have however been several cases where bunker oil spills caused damage for very high amounts, and in these cases the financial protection under the Bunkers Convention was clearly inadequate. For this reason, a number of States have made reservations to the LLMC against the limitation amounts for bunker oil spills. One State, New Zealand, has even denounced the LLMC in the light of its experience in relation to an incident in 2011 involving a containership (the *Rena*)**.**

Until the HNS Convention enters into force, there is no international regime governing liability for damage caused by *cargoes other than oil.* Liability issues relating to such cargoes will be decided pursuant to applicable national law, and the shipowner and any other potentially liable party will normally be liable only if negligence on their part is proven. In addition, the shipowner may be entitled to limit his liability to an amount which is insufficient to provide full compensation to the public authorities and other claimants, and there is no second layer of compensation from an international fund. Although the EU Directive on environmental liability will apply, the Directive does not cover traditional damage such as property damage and economic loss, but only certain types of damage to the environment and costs of restoration.

Once the 2010 HNS Convention has entered into force, the situation will be largely the same for ships in distress carrying other hazardous cargoes than oil as for oil tankers.[11] If the amount payable by the shipowner is insufficient to compensate all claimants in full, additional compensation will be available from the International Hazardous and Noxious Substances Fund (HNS Fund). The total amount available for compensation under that Convention will be US$345 million, i.e. higher than under the 1992 Civil Liability and Fund Conventions (US$280 million), but significantly lower than under the Supplementary Fund Protocol **(**US$1 030 million**).**

For States not parties to the above-mentioned treaty instruments, issues of liability and compensation for damage in place of refuge situations will be governed by the applicable national law. It should be noted that the United States is not a party to any of the instruments that are in force, nor will it become a party to the HNS Convention. Consequently, issues relating to liability and compensation in place of refuge situations in United States waters will be governed by the relevant US legislation, primarily the Oil Pollution Act 1990 (OPA-90).[12]

Concluding observations

The above analysis shows that mandatory international law is not of any great guidance to those who have to take a decision when receiving a request for granting a ship in distress access to a State's ports or coastal waters. The IMO Guidelines are of only limited assistance in this regard. However, as for the EU Member States, the IMO Guidelines coupled with the EU Directive and the EU Operational Guidelines, if fully applied, should contribute to a more efficient and uniform handling of requests for places of refuge within the EU.

The reality is, however, that granting or refusing a ship access to a place of refuge often involves a difficult and delicate decision which can only be made on a case-by-case basis, taking into account all interests involved. Under the EU Directive Member States are required to designate competent authorities, which have the power to take independent decisions concerning the accommodation of ships in need of assistance. It is nevertheless likely that in major cases such a decision will, at least in some States, in reality be taken at a high political level. This is in particular so, if the ship carries oil or other hazardous substances because of strong resistance from local politicians and authorities, as well as from the general public and businesses in the area concerned. The authorities involved may fear that granting such a request could result in major damage and expenses, for example costs for clean-up of polluted beaches, costs of salvage operations, and loss of income in the fisheries and tourism sectors. There may also be fears that it will be difficult to get compensation for the damage caused.

These concerns are understandable. It should in any event be recognised that a refusal to grant access to a place of refuge may also result in significant damage, as was amply illustrated by the *Prestige* incident in Spain in 2002.

States have chosen different mechanisms for decision-making in such cases. The most radical one is the procedures adopted in the United Kingdom, where a senior civil servant, the Secretary of State's Representative (SOSREP), has been given the authority to take all necessary decisions in place of refuge situations.

Some States have, after careful consideration, pre-selected suitable places of refuge along their respective coasts that could be used should the need arise. The advantage of such an approach is that the selection can be made without the pressure of an ongoing incident. This might also facilitate the decision by the competent authorities when faced with a request for access to a place of refuge by a ship in distress.

[1] International Convention on Civil Liability for Oil Pollution Damage, 1992; 140 States

parties.

[2] International Convention on the Establishment of International Fund for Compensation for Oil Pollution Damage, 1992; 117 States parties.

[3] Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992; 32 States parties.

[4] International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001; 95 States parties.

[5] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010; five States parties (not in force).

[6] In 2009 the Legal Committee considered a draft Convention on places of refuge intended to supplement the IMO Guidelines prepared by the Comité Maritime International (CMI), an international non-governmental organisation. The Legal Committee decided again that there was no need for a new convention.

[7] As for the liability and compensation regimes established under these treaties see Måns Jacobsson, The IMO: Liability and Compensation, and Global Ocean Governance, in *The IMLI Treatise on Global Ocean Governance, Vol III The IMO and Global Ocean Governance*, Chapter 3, Oxford University Press 2018.

[8] The 2004 Directive was amended by Directive 2013/30/EU on safety of offshore and gas operations, but the amendments are not relevant for the purpose of this note.

[9] The limitation amounts in the treaties dealt with in this note are expressed I the Special Drawing Right (SDR) of the International Monetary Fund. Conversion into United States dollars has been made at the rate applicable on 2 December 2019.

[10] The original version of the LLMC of 1976 has 55 States parties. The revised version of 1996, which provides for higher limits than the original Convention, has been ratified by 59 States. All EU coastal States are parties to the 1996 LLMC, except Italy that has ratified neither the 1996 LLMC nor the 1976 LLMC. Italy has however introduced national legislation which largely reflects the provisions of the 1996 LLMC.

[11] So far, the 2010 HNS Convention has been ratified by only five States, viz. Canada, Denmark, Norway, South Africa and Turkey. It has been suggested that the Convention may enter into force in 2022/2023.

[12] Of other States not belonging to the 1992 Civil Liability and Fund Convention regime could be mentioned Brazil, Egypt and Saudi Arabia.