Shipping

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NOT IN MY BACK YARD

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Andrew Chamberlain and Tom Walters, of Holman Fenwick Willan, take a legal view on place of refuge.

It will soon be 12 years since the Liberian-owned, Greek-operated tanker *PRESTIGE* foundered off the coast of Galicia, Spain, spilling the entirety of its cargo of 72,000 mt of HFO, resulting in one of the worst marine pollution incidents in recent years. One of the most controversial aspects of that case was the refusal of the Spanish, Portuguese and French governments to allow the vessel into more sheltered waters where the ongoing salvage operation just might have been successful. The *PRESTIGE* and other cases prompted the IMO to publish eminently guidelines on ports of refuge and logical EU legislation soon followed.

Job done one might have thought, but fast forward barely a decade and sadly coastal states seem to have slipped back into their former bad habits. In April a fire-damaged, Italian owned ro-ro vessel called the *ALTINIA* was held off the Port of Jebel Ali without permission to enter the port despite being the subject of salvage services and in need of assistance. It would be all too easy to consider this as a one off event but in the last couple of years there has been a marked increase in "nimbyism" by many maritime coastal states and an ever increasing reluctance to allow vessels access to a safe port of refuge.

You don't have to go back very far to find other, more serious examples. In December 2013, the chemical tanker, *MARITIME MAISIE*, was involved in a collision with a car carrier. A fire broke out onboard and the owners agreed a Lloyds Open Form salvage agreement (SCOPIC clause invoked) with professional salvors. After a running battle with the chemical fire that raged for 19 days and despite numerous requests made to the South Korean and Japanese authorities to allow the vessel to enter into a port of refuge, neither state agreed to provide assistance. The salvors were left to deal with not only the fire onboard but also the elements. Fortunately, no-one lost their life, the crew were able to evacuate the ship

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safely and the salvors were able to redeliver the ship back to the owners. This was however only after a period of extensive negotiations (with the SCOPIC costs increasing on a daily basis) with the Korean authorities who eventually allowed the casualty to enter Busan in her damaged and weakened condition.

It is difficult to comprehend why neither Korea or Japan were prepared to accede to the owners and salvors request to allow the vessel into a safe port and their actions would appear to be in direct contravention of both IMO Resolution A.949 as well as the guiding principles set out in the 1989 London Salvage Convention, to which both Japan and Korea are signatories. It would might have been of little concern if this had have been an isolated incident but, as discussed below, it appears that whilst many costal states express their desire to avert and minimise environmental damage, their actions are often difficult to align with their failure to allow access to a port of refuge in circumstances where both convention and logic dictate that they should assist.

As with so many cases there are repercussions for all the other stake holders involved. Putting to one side the fact that the denial of a port of refuge may jeopardise the safety of the crew, in many of the examples cited in this article, had the coastal state in question had granted a place of refuge, the salvage operations may not have lasted as long, the damage would not have been as extensive, and the resulting salvage and SCOPIC claim would have been lower. The losers in this situation are therefore the owners and the property underwriters who end up having to foot the bill for the increased costs all round.

The repercussions and ramifications of this myopic approach to coastal states' obligations can result in litigation lasting years. In relation to the *PRESTIGE* it was not until November 2013 that three judges in the Spanish High Court concluded it was impossible to establish criminal responsibility and Captain Apostolos Mangouras, Chief Engineer Nikolaos Argyropoulos and the former head of Spain's Merchant Navy, Jose Luis Lopez were finally acquitted of the charges. The unfortunate Captain Mangouras, who by this time was 78 years of age, was however accused of disobeying the government authorities who ordered the vessel as far from the coast as possible. According to the court, that decision was correct and Captain Mangouras, was found guilty of disobedience and given a nine month suspended sentence. A shocking and disappointing footnote to a less than glorious episode in Spanish legal history and the setting of an unfortunate precedent.

More recent examples of the problems in securing urgent port of refuge approval from coastal states include, in July 2012, a fire onboard the *MSC FLAMINIA* which took the lives of three of the crew onboard and an explosion and subsequent fire onboard the *STOLT VALOR* which left one crew member dead. Both vessel were in urgent need of professional salvage assistance but in both cases the process of securing coastal state approval for an appropriate port of refuge was tortuous, with weeks spent in bureaucratic wrangling, with the casualties left at risk of further damage with obvious consequences for the marine environment.

In the *MSC FLAMINIA*, after more than five weeks of negotiations, the container vessel was finally granted a port of refuge at the newly-constructed German deep sea container port of Wilhelmshaven. However, prior to this the partially burnt-out ship was required to pass a safety inspection 40 nautical miles off Lands End to ensure that she was is safe and stable enough to proceed under tow through the English Channel and once off the German coast, the vessel was anchored in the German Bight, approximately 12 nautical miles off Heligoland, where she was subjected to yet another inspection by dangerous goods specialists, chemists and a team of salvage experts before being allowed into Germany's only deep sea container port, Wilhelmshaven.

As noted above, following the *PRESTIGE* incident, the international community, in the absence of any global legal regime governing the issue of ports of refuge for ships in distress issued Directive 2002/59 on Community Vessel Traffic Monitoring and Information System. This was subsequently amended by Directive 2009/17 following the *ERIKA* which required EU member states to



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draw up and implement plans and arrangements to take ships in distress requesting a port of refuge under their authority. These plans and procedures were to be established taking into account the relevant IMO Guidelines, specifically, IMO Resolution A.949(23)

The wording of the EU Directive has three strands. Firstly, it provides that all plans in respect of accommodation of ships in need of assistance shall be drawn up by the competent authority on the basis of IMO Resolutions A.949(23) and A.950(23). The plan shall contain details listed in the amended Article 20 which includes: the identity of the authority responsible for assessing the casualty and decision making with the power to grant or deny access to a vessel requiring assistance.

Secondly, the EU Directive requires that a decision on whether to accept a ship into a port of refuge shall be based on a prior assessment of the situation carried out in accordance with the member state's plan. There is no prescriptive requirement but a member state is required to have due regard to IMO Resolutions A.949(23) and A.950(23). These resolutions set out a non-exhaustive list of relevant factors and criteria for the evaluation of risks in providing a place of refuge to a casualty. Interestingly, the guidelines require that *"due regard should be given, when drawing the analysis, to the preservation of the hull, machinery and cargo of the ship in need of assistance"* which mirrors the requirements placed on a salvor by the 1989 Salvage Convention.

In relation to the decision making process, the IMO guidelines state: *"When a request for an access to a place of refuge is made, there is no obligation for the coastal State to grant it, but the coastal State should weight all the factors and risks in a balanced manner and give shelter whenever reasonably possible"* [our emphasis] and in effect subjects the traditional right of a vessel in distress to seek refuge to the protection of coastal states interests.

Thirdly, it provides that the absence of insurance shall not excuse a member state from carrying out a preliminary assessment of the casualty and shall not in itself be considered sufficient reason for a member state to refuse entry to a vessel requesting a port of safe refuge.

Clearly these provisions apply to EU member states and other non-EU countries will have their own requirements but one might have thought that this would go some way to addressing the problem and member states have been required to inform the EU Commission about the measures taken by each state to implement Article 20 by 30 November 2010.

However, the EU Directive has two pitfalls. Firstly, it does not create a legal duty for coastal states to provide a port of refuge for casualties or vessels in distress. Secondly, it does not stipulate whether the pre-designated places of refuge should be made public.

Albeit rightly or wrongly, a majority of the member states have opposed the publication of a list of ports of refuge for fear that it will encourage a fleet of sub-standard tonnage to take up residence close to their shores and would be opposed by the local port authorities.

After the *PRESTIGE*, and in contravention of the EU Directive, Spain now requires that any vessel requiring access to a port of refuge must, as a pre-requisite to entry, provide a certificate of insurance. This stance has been taken by many other coastal states and so whilst in theory vessels should be granted access to a port of refuge, in practice this is rarely granted without a considerable amount of time and costs being expended to provide the relevant insurance and undertakings to the port authorities before a casualty is allowed to enter port.

It is of course perfectly laudable for coastal states to seek to avoid the risk of an environmental disaster on their own doorstep, but a lack of understanding on the part of the relevant maritime authorities (and those advising them) of the operational imperative for ports of refuge, coupled with an inadequate framework for international co-operation and decision-making often results in the wrong outcome. This flawed approach will often result in a far higher risk of further damage to maritime property, risk to life and of course environmental catastrophe (and there is no better example than the *PRESTIGE* itself).

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