

First Working Group Report

Introduction

In recent years all sectors of the maritime industry and many governments have become concerned about the criminal action taken against seafarers in the aftermath of maritime accidents, especially those that involve marine pollution. Examples such as those involving the masters of vessels such as *Nissos Amorgas*, *Erika*, *Tasman Spirit*, *Virgo*, and *Prestige* immediately come to mind. However, there are many other cases, both reported and unreported, that illustrate this increasing trend where seafarers appear to have become the 'scapegoats' for maritime accidents, regardless of whether they are directly or indirectly involved or responsible.

In some cases masters of vessels and other sea-going personnel, have been arrested, imprisoned or otherwise detained, under a variety of 'criminal law' and other proceedings for extensive periods. Often the most basic rights of such persons are not observed and access to legal advice is frequently neither provided nor even permitted. Furthermore, such persons are often neither charged nor provided with information why they are being held. In many instances, such seafarers appear to be held as 'material witnesses' or for other 'administrative and technical' reasons. In other instances seafarers may be 'charged' with causing the relevant marine accident and/or with marine pollution. This occurs despite the fact that there is rarely any directly attributable responsibility for such accidents that may result from circumstances quite beyond the operational responsibility or competence of those so charged. It should be noted that these cases often occur in states that otherwise have an excellent reputation in terms of their criminal justice system and observance of the rights of individuals.

IMO/ILO Responses and Action

As a result of these problems, a number of states, international organisations and professional groups have expressed their concern about this growing phenomenon to the IMO, as well as the ILO. In response a 'Joint IMO/ILO *Ad Hoc* Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident' was formed in September 2004 and finalized later that year.¹ This Working Group, drawn from China, Egypt, Greece, Nigeria, Panama, Philippines, Turkey and the USA, as well as four shipowner and four seafarer members, has been requested to provide recommendations

¹ See: ILO Doc. GB.291/STM/4 of November 2004 and IMO Doc. IMO/ILO/WGFTS1/WP.6 of 19 January 2005

to the IMO Legal Committee and the ILO Governing Body, including draft guidelines on the fair treatment of seafarers in the event of a maritime accident. The Working Group's Terms of Reference require that account should be taken of the relevant international instruments. The Joint Working Group, chaired by Ambassador Liliana Fernandez of Panama, held its initial meeting at the IMO in London 17-19 January 2005. The terms of reference of the group were also finalized at that stage.² In addition, it was decided that a 'correspondence group' composed of other maritime interests, including interested states, would be formed. This group was requested to assist the Joint Working Group in its deliberations through specific, expert input. In particular, the correspondence group would include a number of non-governmental organizations such as:

- Comité Maritime International (CMI)
- International Shipping Federation (ISF)
- International Chamber of Shipping (ICS)
- International Confederation of Free Trade Unions (ICTFTU)
- International Association of Classification Societies (IACS)
- Baltic and International Maritime Council (BIMCO)
- International Federation of Shipmasters' Associations (IFSMA)
- International Group of P&I Associations
- International Association of Independent Tanker Owners (INTERTANKO)
- International Christian Maritime Association (ICMA)

During 2005 the IMO/ILO Correspondence Group received input and submissions from a number of these interests. At the 24th Assembly of the IMO a 'Resolution on Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident' was adopted.³ This Resolution had also been adopted by the ILO Governing Body at its 292nd Session in March 2005. At the same time the IMO/ILO Ad Hoc Expert Working Group also decided that its second session would be held in London 13-17 March 2006 and issued an invitation to IMO member states, UN and other specialized agencies, inter-governmental and non-governmental organizations to attend.⁴

At this stage a number of specific responses to the 'Guidelines' were submitted to the IMO/ILO Working Group by interested members of the 'Correspondence Group'. This included a submission from the ISF, ICS and ICTFTU,⁵ as well as working documents from the CMI and IFSMA, which were appended in a 'Progress Report from the Correspondence Group'.⁶

² IMO Doc: IMO/ILO IWGFTS 1/111 of 3 February 2005

³ IMO Resolution A.987(24). See IMO Doc: A 24/5(b)/1

⁴ IMO Doc: A1/A/4.ILO. Circular Letter No. 2679 of 19 November 2005

⁵ IMO Doc: IMO/ILO/WGFTS 3 of 3 January 2006

⁶ IMO Doc: IMO/ILO/WGFTS 2 of January 2006

CMI Responses and Action

As the CMI was specifically requested to assist in this work, the 'CMI International Working Group on the Fair Treatment of Seafarers' (CMI-IWG) was formed in October 2004 to provide an initial response to this request. This International Working Group consists of:

- Prof. Edgar Gold, CM, AM, QC, of the Marine and Shipping Law Unit, University of Queensland, Brisbane, Australia, Chairman;
- Michael Chalos, of Fowler, Rodriguez & Chalos New York;
- David Hebden, Marine Consultant, formerly of Thomas Cooper & Stibbard, London;
- Linda Howlett, General Manager-Legal, International Chamber of Shipping (ICS), London;
- Kim Jefferies, Senior Claims Executive and Legal Adviser, Gard P&I Club, Arendal, Norway; and,
- Prof. P.K. Mukherjee, ITF Professor of Maritime Safety, World Maritime University Malmö, Sweden.⁷

The CMI International Working Group commenced its work as soon as it had been formed and communicated by electronic and other means as it was not able to hold its first meeting until 12 May 2005 in London. However, it was decided that the Working Group should concentrate its efforts in three areas:

- A CMI Questionnaire on the subject matter to be sent out to CMI member states;
- Developing close contacts and communications with other members of the IMO/ILO Correspondence Group; and,
- Participation in a Panel Discussion on the 'Fair Treatment' subject at the CMI Colloquium to be held in Cape Town, South Africa, in February 2006.

The CMI International Working Group's Questionnaire on Fair Treatment of Seafarers was sent to 52 member states in December 2004 by the CMI Head Office. The questionnaire covered administrative and criminal action that may be taken by states in the aftermath of maritime accidents. Responses were received from 25 states representing a variety of legal and maritime administrative systems.⁸ Although a response rate to a CMI questionnaire of almost 50 per cent is apparently considered satisfactory, it is disappointing that no responses were received from a number of states that have had specific difficulties in the area under discussion.⁹

⁷ Natalie Wiseman, the Secretary of the International Shipping Federation, London, and Colin de la Rue of Ince & Co, London, are corresponding members. When required the Working Group's secretariat services are performed by Olivia Murray, of Ince & Co., London. The CMI President, Me Jean-Serge Rohart, and Immediate Past President, Patrick Griggs, are ex officio Members. Three members of the Working Group, including the chairman are also Master Mariners with extensive shipboard service. Michael Chalos successfully defended Capt. Hazelwood of the *Exxon Valdez*.

⁸ Argentina; Australia; Bulgaria; Belgium; Brazil; Canada; Chile; China; Croatia; Denmark; Dominican Republic; Finland; France; Germany; Hong Kong; Italy; Japan; Korea (Republic of); Nigeria; Norway; Slovenia; South Africa; United Kingdom; Uruguay; USA. In addition, an incomplete response was received from Indonesia.

⁹ Greece, Spain and Russia. These states are also members of the CMI Executive Committee.

The responses have been expertly summarized by David Hebden of the CMI Working Group.¹⁰ The common theme in the responses is that although most states have the right to exercise investigative, administrative powers when a maritime accident occurs, such powers are always designed to protect the rights of the individuals who are involved. Furthermore, the responses also indicate that criminal action is only applicable in cases where there has been a clear breach of national law by the individual who is being charged. In other words, according to the responses, seafarers subject to criminal action must be presented with clear evidence of a breach of criminal law that led to the accident. From the responses it appears that if no such evidence is present, the coastal, port or flag state can only mount an administrative enquiry that may result in monetary penalties for the individuals involved or the ship that was the source of the accidental damage.

The CMI Questionnaire responses also indicate that a majority of states have the legislative powers to detain seafarers who have been involved in maritime accidents so that administrative and criminal investigations can proceed. However, such states also indicate that such detention would always be for a reasonable period. The responses indicate that seafarers held as 'material witnesses' must be treated properly and that no discrimination between nationals and foreigners is permitted. Although there are some administrative differences between states that apply 'common law' principles and those subject to civil law, in general, the responses indicate that the rights of individuals are paramount in cases where the criminal law is applicable.

During the year the CMI Working Group also made contact and worked closely with a number of other members of the IMO/ILO Correspondence Group. This was made easier as the ICS and ISF were actually represented on the Working Group. In addition, the chairman also held meetings and corresponded with IFSMA, which had significant involvement in the subject from the beginning, as well as the ICTFU (ITF). Documentation was exchanged whenever available. The CMI Working Group also drafted several working documents, including a paper that was presented at the 'International Conference on Security of Ships, Ports and Coasts 2005'.¹¹

The CMI Working Group also developed an excellent Panel presentation on the subject for the CMI Colloquium in Cape Town in February 2006. Panellists include all but one member of the CMI Working Group, as well as Dr. Rosalie Balkin, Head of the IMO Legal Division, and Mr. Alfred Popp, Q.C., the former chairman of the IMO Legal Committee. Further details are available from the Colloquium programme as well as the

¹⁰ It is expected that this detailed summary will be made available by the CMI in due course

¹¹ Edgar Gold, "Initiatives on Fair Treatment of Seafarers by the Comité Maritime International". Halifax, NS, Canada, September 2005

CMI web site. It is hoped that this discussion will lead to the next steps to be undertaken by the CMI.

Legal and Practical Issues

The difficulties faced by seafarers that may lead to unfair treatment subsequent to a maritime accident can be confined to three general areas:

- Criminal action is today frequently taken against seafarers involved in maritime accidents that have been beyond their control;
- In many states regardless of whether seafarers, who have been involved in a maritime accident, are at fault or not, they are treated as criminals;
- Even in cases where the relevant seafarers have not been found at fault, they are, nevertheless, held under criminal law provisions as ‘material witnesses’.

Some difficulties in the initial IMO/ILO deliberations in this area relate to defining the meaning of ‘maritime accident’. Some interests had argued that the expression should instead be ‘maritime incident’. This is the type of discussion that might make lawyers happy but does not provide a solution to the practical issues that need to be resolved. Although a number of good arguments can be made that ‘maritime incident’ might cover almost all areas where seafarers might be disadvantaged, it is suggested that if widely implemented fair treatment guidelines were to be achieved, it would only occur if the somewhat narrower ‘maritime accident’ expression were utilized. Fortunately this was also accepted in subsequent IMO/ILO discussions.¹²

As a result, the work that is presently taking place at a number of levels by the various interests involved has been confined to ‘maritime accidents’. Although much international discussion has concentrated on maritime accidents involving serious oil pollution, there are many other maritime accidents that could lead to criminal action and commensurate disadvantage to seafarers. Maritime accidents include:

- Collision between two or more vessels
- Collision between a vessel and fixed objects, such as an offshore structure, navigational mark, or port installation
- Grounding or stranding of a vessel
- Fire or explosion on board due to various causes
- Machinery breakdown on board due to various causes
- Accidental overboard discharge of pollutants due to various causes, i.e. collision, grounding, fire, explosion, hull or machinery metal fatigue; machinery breakdown; negligence; misinformation or error

¹² See IMO Doc. LEG 90/15, paras. 379-383

- Industrial accidents on board leading to personal injury and/or death of crew members, stevedores or other visitors. These include access problems involving pilot ladders; hold access ladders; tank entry; gangways; equipment failure involving cargo loading equipment; containers; pumping systems etc.; safety and health problems
- Accidents on board passenger vessels leading to personal injury and/or death of passengers from various causes
- Accidents arising from pilotage, towage or salvage operations
- Accidents arising from extreme weather conditions at sea, including foundering
- Accidents due to improper loading and/or stowage of cargo, including overloading
- Accidents occurring during cargo operations from various causes
- Accidents occurring during cargo transshipment or lightering operations

This list is not exhaustive and simply illustrates the wide variety of ‘maritime accidents’ that may occur. In most cases direct or indirect damage will result. This will give rise to damage claims by those who have been affected. In other words, the word ‘accident’ always implies an unforeseen, fortuitous, or unexpected event. Perhaps the best definition of ‘maritime accident’ may be:

...any unforeseen contingency that is connected with the sea and in particular with the navigation and handling of ships, and the documents, equipment, machinery, material, cargo or persons on board such ships.¹³

Administrative or criminal action for damage resulting from a maritime accident against those considered to have been at fault or otherwise negligent is resorted to more frequently today. This is also the area where most difficulties for seafarers that may lead to unfair treatment may occur. This is due to the fact that in many maritime accident cases some type of direct or indirect human error or omission is likely to be present. This error or omission may not necessarily involve only those operating the vessel. In some cases a vessel may have been improperly constructed, repaired or even loaded without the direct involvement of those in charge of the vessel. In other cases, weather conditions, totally beyond the control of the seafarers involved, may have resulted in a major grounding with commensurate damage from pollutants. In other cases, cargo operations undertaken by stevedores, again generally beyond the control of the seafarers involved, may result in personal injury and death. Yet in such cases administrative and criminal action is often taken against the seafarers on the subject vessel.

Flag states have specific jurisdiction to take administrative and/or criminal action against seafarers operating vessels under their flag who have been proven to be reckless or incompetent or who have been under the influence of alcohol or narcotics

¹³ Based on a submission by IFSMA. See: IFSMA, “Guidelines on the Fair Treatment of Seafarers”, 2nd Draft of 4 June 2005

when an accident has occurred.¹⁴ Coastal and port states also have certain, strictly limited, rights to take action especially if damage has occurred.¹⁵ It has long been accepted under established international human rights provisions that anyone accused of a crime should always be treated fairly and be provided with all available legal rights. This is also spelt out specifically under the UNCLOS regime.¹⁶

Given this very brief initial assessment of state responses, the question arises of why the fair treatment has arisen in the first place? Some of this difficulty appears to have arisen from the concern about the ‘criminalisation of maritime accidents.’ This may well be the wrong starting point. Most states utilize their criminal law system when maritime accidents and commensurate damage, injury and death occur. That is also confirmed in the responses to the questionnaires. Furthermore, there is no question that sovereign states have every right to criminally prosecute individuals and other entities for maritime accidents, occurring in their jurisdiction, that are in breach of national law. The problem is not the use of criminal law but its *administration* that has appeared to lead to unfair treatment of seafarers, especially in cases where there is evidence that such seafarers had no direct responsibility for the accident. For example, if a vessel laden with a pollutant cargo experiences an engine breakdown and subsequently grounds and causes serious pollution, although the master has done everything possible to prevent the grounding, he can hardly be held criminally responsible for the damage that occurs?

Although the coastal state is likely to have national law provisions that make pollution a criminal offence it can only be applied if there was clear evidence that the accident that caused the pollution was due to a deliberate or negligent act. Even if the negligent act could be attributed to the shipowner, cargo owner, or other entity, but not to those in charge of the ship, criminal sanctions against the seafarers involved will be limited. At best the coastal state could ensure that those in charge of the vessel would supply whatever material evidence might be required to impose criminal or civil law sanctions on those entities that were considered to have ultimate responsibility for the accident and the damage.

However it is at this stage that the ‘unfair treatment’ problem often arises. There may be several causes for this. Firstly, the damaged state may be frustrated in receiving insufficient cooperation from the relevant shipowner or other entity. In some cases, the shipowner may be difficult to locate, especially in cases of single-ship companies. As a result, this may result in the relevant seafarers being held longer than necessary—

¹⁴ UN Convention on the Law of the Sea, 1982, (UNCLOS) Arts. 94, 97 & 217

¹⁵ UNCLOS, Arts. 21, 25, 27, 218, 220, 225, 226, 228, 231 & 232

¹⁶ UNCLOS, Art. 230

almost as an inducement for those responsible to come forward. Secondly, there may be differences of opinion between the damaged state and those in charge of the vessel on technical matters that led to the accident. The master may have a certain loyalty to the shipowner in order to protect the owner's interests, which may be interpreted as a lack of cooperation with the damaged state. In other cases, a master, who may have experienced the trauma of losing his ship, perhaps involving loss of life and pollution damage may be reluctant or even be physically unable to cooperate as fully as may be expected by the coastal state. In other cases, the coastal state may itself be partially to blame for what eventually occurred and is then anxious to ensure that those in charge of the vessel become the principal 'scapegoats'. There are numerous other permutations that may all lead to the misadministration of otherwise acceptable criminal law provisions and the commensurate lengthy detention and unfair treatment of seafarers. In other words, the principal problem in this area is administrative rather than legal.

Conclusion

At this stage the IMO/ILO deliberations on the subject have already concluded that a set of widely accepted international guidelines on the fair treatment of seafarers in case of a maritime accident is required. As indicated above, the IMO/ILO Working Group has already completed a first draft of such a document that has been the subject of an IMO Resolution. Several members of the IMO/ILO Correspondence Group (ISF, ICS, ICFTU, IFSMA, etc.), are also in the process of drafting their own versions of such guidelines or suggesting further amendments to existing drafts. Hopefully these documents can be used to construct a single, generally accepted version that will assist the IMO/ILO Working Group. The CMI International Working Group believed that this subject is not only of importance to international shipping but also that it the CMI's expertise is required to develop a viable international regime in this area. The subject will be extensively discussed at the CMI's Cape Town Colloquium and it is hoped that the next stage of CMI involvement will then be decided.

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