

## **The Fair Treatment of Seafarers in the Event of a Maritime Accident: The Practical Issues**

### **INTRODUCTION**

The Comité Maritime International (CMI) established the CMI International Working Group<sup>1</sup> on the Fair Treatment of Seafarers in September 2004 as response by the work on this issue undertaken by the International Maritime Organization in conjunction with the International Labour Organization which established the Joint IMO/ILO *Ad Hoc* Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident. The IMO/ILO Working Group commenced its work in November 2004 and has also established a correspondence group that seeks input on the issue from other maritime interests.

This brief paper, compiled on behalf of the CMI Working Group, attempts to address some of the practical issues that underlie the complex international and national legal and administrative problems that have to be considered in this area.

### **DEFINING 'MARITIME 'ACCIDENT'**

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. A number of good arguments can be made that 'maritime incident' might cover almost all areas where seafarers might be disadvantaged. It is suggested however, that wide implementation of fair treatment guidelines will only be achieved if the somewhat narrower 'maritime accident' expression were used. Fortunately this was also accepted in the IMO/ILO discussions that have already taken place.<sup>2</sup>

As a result the work that is presently being undertaken at a number of levels by the various interests involved has been confined to 'maritime accidents'. Although much

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<sup>2</sup> See IMO Doc. LEG 90/15, paras. 379-383. See also the very broad UK Government definition of 'maritime accident' in the *Merchant Shipping (Accident Reporting and Investigations) Regulations 2005*, No.881

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
- 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' can be based on that suggested by the International Federation of Shipmasters' Associations (IFSMA) in a recent submission.<sup>3</sup> It is, therefore, suggested that for the purposes of achieving an international consensus on the work undertaken in this area a 'maritime accident' should be defined as:

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<sup>3</sup> IFSMA, "Guidelines on the Fair Treatment of Seafarers", 2<sup>nd</sup> Draft of 4 June 2005. See also the definition put forward by IFSMA in IMO Doc. LEG90/7/1

**...an unforeseen contingency or physical event connected to the navigation, operations, manoeuvring or handling of ships, or the machinery, equipment, material, or cargo on board such ships.**

## CRIMINAL ACTION BY COASTAL AND PORT STATES

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.<sup>4</sup>

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 when an accident has occurred.<sup>5</sup> Coastal and port states also have certain, strictly limited, rights to take action especially if damage has occurred.<sup>6</sup> However, regardless of whether the legal action taken involves criminal law or some other administrative measures, those who are charged, accused or investigated, have the right to be treated fairly. 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 regime of the Law of the Sea.<sup>7</sup> Nevertheless, this is the area where problems have frequently arisen and which has necessitated the work that is now being undertaken.

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<sup>4</sup> Such 'industrial accidents' are generally well covered under ILO and national regulations. However, criminal sanctions may often be involved.

<sup>5</sup> UN Convention on the Law of the Sea, 1982, (UNCLOS) Arts. 94, 97 & 217

<sup>6</sup> UNCLOS, Arts. 21, 25, 27, 218, 220, 225, 226, 228, 231 & 232

<sup>7</sup> UNCLOS, Art. 230

Specifically the problems frequently faced by seafarers today can be summarized to include:

i.) Criminal prosecution of seafarers involved in maritime accidents that have been beyond their control;

ii.) Criminal prosecution of seafarers involved in maritime accidents due to negligence, despite the fact that negligence has rarely, if ever, been considered a criminal offence in the maritime sector;

iii.) Lengthy delays in the administration of the criminal law process following maritime accidents resulting in seafarers being required to remain within the jurisdiction of the relevant state for long periods;

iv.) Cases where the relevant seafarers have not been found at fault, they are, nevertheless, held under criminal law provisions as 'material witnesses';

v.) Seafarers held in custody or otherwise deprived of liberty, without criminal charge, trial or conviction and denied access to legal counsel or other assistance.

## THE CMI QUESTIONNAIRE

In late 2004 the CMI International Working Group sent out a questionnaire to 52 member states covering the administrative and criminal actions that may be taken in the aftermath of maritime accidents. (See Attachment) Responses have so far been received from 23 states representing a variety of legal and maritime administrative systems. The common theme in these 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 in order 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.

## INITIAL CONCLUSIONS

Even this very brief initial assessment of state responses raises the question of why the fair treatment problem has arisen in the first place. It is suggested that 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. States are entitled to utilize their criminal law system when maritime accidents and commensurate damage, injuries and deaths occur. That is also confirmed in the responses to the questionnaires. Furthermore, sovereign states have the right to criminally prosecute individuals and other entities for maritime accidents, occurring in their jurisdiction, that involve a breach of national law. However, the problem is not really the use of the criminal law but its *administration* that has appeared to lead to unfair treatment of seafarers. This is especially so in cases where there is evidence that such seafarers had no direct responsibility for the maritime 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 intentional or negligent conduct or a deliberate act or omission. 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 subsequent 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 a minority of shipowners, managers or operators who may be difficult to locate or identify, especially when single-ship companies may be involved. On the other hand, responsible shipowners, wishing to cooperate fully, may be discouraged from being physically present in the relevant coastal states as that might

expose them or their representatives also to criminal action. This may result in the relevant seafarers being held longer than necessary—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. This 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, ship and serious pollution damage, may be reluctant or even be physically unable to cooperate as fully as 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'. Last but not least, in almost all high-profile cases, especially those involving marine pollution, the media will be centrally involved. The media has a critical role in stimulating public and political outrage, as well as the expectation of severe action by regulators and courts. 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 may well be administrative rather than legal. This appears also to be confirmed by the initial survey of the CMI Questionnaire responses.

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. The IMO/ILO Working Group has already completed a first draft of such a document,<sup>8</sup> which should be used as a basic document for further refinement and input from other interests. It is hoped that the input from such interests as well as members of the IMO/ILO correspondence group can be used to construct a single, generally accepted version that will assist the IMO/ILO Working Group. The CMI International Working Group will continue to assist in this process. In addition, the CMI will be holding an international colloquium on the subject in Cape Town in February 2006.

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Edgar Gold<sup>9</sup>

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<sup>8</sup> As adopted by the ILO Governing Body at its 292<sup>nd</sup> Session in March 2005, and by the IMO Legal Committee at its 90<sup>th</sup> Session in April 2005

<sup>9</sup> Chairman, CMI International Working Group on the Fair Treatment of Seafarers

## ATTACHMENT

### CMI-IWG Questionnaire sent to CMI Member Associations

#### CMI International Working Group on the Fair Treatment of Seafarers

### QUESTIONNAIRE

#### **PART I (Answers to these Questions are essential)**

***Question 1:***

Who has responsibility for administering and enforcing maritime safety and marine pollution prevention and control in the waters under the jurisdiction of your State?

***Question 2:***

When maritime accidents and/or marine pollution incidents occur within the waters under the jurisdiction of your State, what process of accident investigation is legally required?

***Question 3:***

Do your State's maritime accident and/or marine pollution investigative processes contemplate criminal charges against any ships' personnel involved and, if so what action may be involved?

***Question 4:***

If there is no criminal process, what other investigative process is utilized?

***Question 5:***

Does your State's investigative process permit detention of seafarers and, if so, under what circumstances and with what safeguards?

***Question 6:***

If seafarers are required to be present for an investigation, trial or other hearing will they be permitted to leave your State until such investigation, trial or other hearing takes place?

***Question 7:***

Does your State require a financial surety to ensure that seafarers return for any subsequent hearing and, if so, how is the amount of such a surety determined and what form is required?

***Question 8:***

Is your State's maritime administration or other authority given legal responsibility for the protection, rights and welfare of all seafarers and, if so, how is this responsibility administered?

## **PART II (Answers to these Questions would be most helpful)**

### **Question 9:**

If a maritime accident resulting in serious pollution occurs in waters under the jurisdiction of your State that involves a foreign-flag vessel with a crew of different nationalities, what is the expected role of vessel crew members held responsible in the subsequent investigative process?

### **Question 10:**

If the accident, as outlined in Question 9, is due to negligence but not wilful misconduct by responsible crew members, will your State proceed only with pollution damage claims under the accepted international civil liability and compensation system?

### **Question 11:**

If the answer to Question 10 is 'No', what other processes or procedures will be undertaken by your State?

### **Question 12:**

If the maritime accident outlined in Question 9 occurred outside your State's Territorial Seas, although damage occurs in areas under your State's jurisdiction, would the procedures involved be different?

### **Question 13:**

Regardless whether your State's investigative process utilizes the criminal justice system or any other system, will the relevant vessel crew members be detained? If so:

- a. What is the legal reason for such detention?
- b. What rights will the accused/detained crew member have during the process, and do such rights differ from those available to citizens of your State?
- c. Will full reasons and/or charges be provided to those detained?
- d. What is the expected length of such detention?
- e. Where and how will the seafarers involved be detained?
- f. What access to legal advice and/or defence will such personnel have available to them?
- g. Will the vessel's representatives, agents, family members, labour organisation representatives, or lawyers be given immediate and full access to those detained?
- h. Will the relevant seafarers have the legal right not to answer questions that may be considered self-incriminating, if so advised?

### **Question 14:**

Does your Association have any other comments, suggestions or recommendations on this subject?