



European Maritime Safety Agency

**Liability and Compensation in
Relation to Accommodation of Ships
in Places of Refuge**

DRAFT

TABLE OF CONTENTS

1.	INTRODUCTION: PLACES OF REFUGE IN INTERNATIONAL SETTING.....	3
2.	RULES APPLICABLE TO PLACES OF REFUGE	4
3.	LIABILITY AND COMPENSATION RULES AS APPLICABLE TO PLACES OF REFUGE SITUATIONS	6
4.	POTENTIAL GAPS	11
4.1.	Gaps within the scope of international liability conventions.....	11
4.2.	Gaps outside the scope of international liability conventions	14
4.3.	Liability of the State	15
5.	CONCLUSIONS.....	1ERROR! BOOKMARK NOT DEFINED.

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1. Introduction: Places of Refuge in international setting

The purpose of this study is to analyse the existing system for liability and compensation for ship-related pollution incidents in relation to places of refuge. It has been triggered by an obligation imposed on the Commission in Article 20(d) of the Directive 2009/17/EC to “examine existing mechanisms for the compensation of potential economic loss” and to present its evaluation to the European Parliament by the 31st of December 2011. The Commission requested EMSA on the 6th of May 2011 to conduct the present study.

A study on a related topic was commissioned by EMSA and provided by the Scandinavian Institute of Maritime Law (SIML) of the University of Oslo in December 2004. That study examined in particular to what extent a coastal State involved in the decision-making in a place of refuge situation is protected under the existing system and to what extent such a State may be exposed to financial or legal risks. The general conclusion of the study was that the first step in providing a tight and effective network of liability rules would be a quick ratification of the existing IMO pollution liability conventions by all Member States with a coastline. Nevertheless, the study admitted that despite the existence of variety of international rules, the liability in a place of refuge would in many cases ultimately depend on the national law in the State where the case is decided. The present study is supplementary to the study of SIML. It explains what progress has occurred since the first study was published. It acts on the basis of assumption that all international conventions providing for rules of liability and compensation in relation to ships’ operations have been ratified or will be ratified soon and analyses the remaining gaps, especially in relation to economic loss.

In a series of incidents that happened around the turn of the Millennium (most notably the *Prestige* and the *Castor*), ships in distress were refused access to ports or other sheltered waters because of the perceived environmental and commercial risks involved in their accommodation. This provoked a widespread attention within the international maritime community and exposed a number of legal uncertainties in relation to “places of refuge” also in relation to liability rules and potential compensation for damage. This resulted in a notable legislative activity, both on international and EU level (e.g. the IMO Guidelines on places of refuge for ships in need of assistance¹ adopted in December 2003 and the EU Directive 2002/59² dealing among others with places of refuge published in 2002). The issue was high on the political agenda for some time, many conferences were organised, many articles were written and there was a prevailing opinion that something had to be done urgently and that the international conventions had to be widely ratified. Since then, for the last few years, probably due to the absence of any major incident involving a refusal of access to a place of refuge, the attention devoted to the topic seems to have diminished.

¹ IMO Resolution A.949(23)

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, *OJ L 208, 5.8.2002, p. 10–27.*

2. Rules applicable to places of refuge

There is no legal obligation enshrined in international law to accept a ship in distress to a place of refuge. However, the States have obligation to protect their marine environment and (in particular) to refrain from transferring pollution from one area to another³. A number of global and regional conventions include more specific obligations to ensure that the effects of maritime accidents are minimised and that there is adequate capacity and co-operation to respond to such accidents if they occur,⁴ including in some cases specific provisions on places of refuge.⁵ Additional activity over places of refuge has been undertaken during recent years at the international level, but it has not resulted in binding rules. Most notably, IMO finalised its Guidelines on places of refuge for ships in need of assistance in 2003. The guidelines do not specify any liability and compensation rules but are designed to increase the authorities' involvement in place of refuge situations in their territories and to clarify the role and responsibilities of all parties involved with a view to ensuring that ships in distress were handled in a manner which is most beneficial for maritime safety and the marine environment.

The first time the problem of places of refuge was addressed at EU level was by EU Directive 2002/59 establishing a Community vessel traffic monitoring and information system. Article 20 of this Directive imposed on all Member States an obligation to develop plans for places of refuge. By the 5th of February 2004 the Member States were to inform the Commission about the final actions taken in order to fulfil the requirement of Art. 20. The whole process consisted of a number of steps. The first step required that Member States agree on common principles in order to establish the national plans in accordance with Art. 20. These principles were agreed during an expert meeting in May 2003⁶. The second step required the Member States to send the national plans to the European Commission, including their legal transposition as well as the operational measures taken by July 2003. The third step required visits to the Member States by the Commission, supported by European Maritime Safety Agency (EMSA), in order to evaluate how the MS applied their plans in practice and to collect information that was still missing. Following this first round of visits prior to the enlargement of the EU, a second expert meeting was organised by EMSA in March 2004 to give feedback and present to the concerned national administrations the lessons learnt. A first report was also drafted at this stage. In 2005

³ See in particular UNCLOS Article 195: "In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another."

⁴ See e.g. UNCLOS Article 194(3)(b), the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation and its 2000 Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances, as well as Article 11 of the 1989 Salvage Convention.

⁵ See e.g. the amendments made, in September 2001, to Annex IV of the 1992 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area. A new Regulation 13 provides that the States Parties "shall, following-up the work of EC and IMO, draw up plans to accommodate, in the waters under their jurisdiction, ships in distress in order to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority; and ... shall exchange details on plans for accommodating ships in distress". See also Part XII of the Declaration on the Safety of Navigation and Emergency Capacity in the Baltic Sea Area (Helcom Copenhagen Declaration), adopted on 10 September 2001 and HELCOM Recommendation 31E/5 of 20th of May 2010.

Article 16 of the 2002 Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea obliges the parties to "define national, subregional or regional strategies concerning reception in places of refuge, including ports, of ships in distress presenting a threat to the marine environment."

In the North Sea framework, a detailed (interim) chapter on places of refuge was included in the Bonn Agreement Counter Pollution Manual (Chapter 26) in May 2002. See <http://www.bonnagreement.org>

⁶ The expert meeting was held in Brussels by EMSA and the European Commission with the participation of experts from the Member States (EU-15). The conclusions of this meeting formed the basis of the Commission evaluation of the implementation of Art. 20 of Directive 2002/59/EC.

and 2006, an information update on the implementing and operational measures was requested by EMSA, and the evaluation of the new EU Member States was carried out. In November 2006 a final report was presented by EMSA. The outcome of the report was generally positive; it seemed that in general the Member States largely met the requirements of Art. 20. Some concerns remained, especially in relation to the speed of decision making in the critical situation and the absence of formalised cooperation procedures, as well as liability and compensation but these issues were to be addressed at the next amendment of the Directive.

These conclusions helped the European Commission to revise the Directive 2002/59 which resulted in a new Directive 2009/17 and in the amendment of Article 20 as well as introduction of Articles 20(a) to (d) specifically dealing with places of refuge. This Directive, taking into account the experience acquired, is much more detailed in relation to places of refuge. Art. 20 requires Member States to designate one or more competent authorities that will be able to take, when an incident occurs, independent decisions concerning accommodation of ships in need of assistance. The name and address of such authority shall be publicly available. Moreover, art. 20(a) provides for more details in relation to plans for accommodation in the waters under the jurisdiction of the Member States in order to help them to respond correctly to potential threats presented by ships in need of assistance. The plans shall be drawn in accordance with IMO guidelines (Resolutions A.949(23) and A.950(23) and shall take into consideration following elements:

- “(a) the identity of the authority or authorities responsible for receiving and handling alerts;
- (b) the identity of the competent authority for assessing the situation and taking a decision on acceptance or refusal of a ship in need of assistance in the place of refuge selected;
- (c) information on the coastline of Member States and all elements facilitating a prior assessment and rapid decision regarding the place of refuge for a ship, including a description of environmental, economic and social factors and natural conditions;
- (d) the assessment procedures for acceptance or refusal of a ship in need of assistance in a place of refuge;
- (e) the resources and installations suitable for assistance, rescue and combating pollution;
- (f) procedures for international coordination and decision-making;
- (g) the financial guarantee and liability procedures in place for ships accommodated in a place of refuge.” (Art. 20(a) para. 2 of the Directive 2009/17)

Art. 20(b) provides that the authority or authorities referred to above shall decide on the acceptance of a ship in a place of refuge following a prior assessment of the situation carried out on the basis of the plans. If they consider that the accommodation of the ship is the best course of action for the purposes of the protection of human life or the environment, then the ship will be admitted to a place of refuge. They may take into consideration, while designing their plans for accommodation and the issue of accommodation of a particular ship, the financial guarantee provided by the shipowner and the available liability procedures; however

the absence of an insurance certificate cannot be – according to art. 20(c) – considered a sufficient reason for a Member State to refuse to accommodate a particular ship in a place of refuge.

As mentioned before, art. 20(d) provides for the basis of the present report. It requires that “the Commission shall examine existing mechanisms within Member States for the compensation of potential economic loss suffered by a port or a body as a result of a decision taken pursuant to Article 20(1). It shall, on the basis of that examination, put forward and evaluate different policy options. By 31 December 2011, the Commission shall report to the European Parliament and to the Council on the results of the examination”.

3. Liability and compensation rules as applicable to places of refuge situations

The general rules of international law provide little guidance as to the rules of liability of and compensation in relation to places of refuge. Article 235(2) of UNCLOS requires States to “ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction”. Article 232, which deals specifically with the liability for enforcement measures taken to protect the marine environment provides that “States shall be liable for damage or loss attributable to them arising from [enforcement] measures taken (...) when such measures are unlawful or exceed those reasonably required in the light of the available information. States shall provide recourse in their courts for actions in respect of such damage or loss.” Similarly, the 1969 Intervention Convention, which in its first Article gives States broad rights to take measures on the high seas to prevent or mitigate or eliminate dangers arising from oil pollution casualties, provides in Article VI that a State that has taken measures “in contravention of [the Convention] causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by the measures which exceed those reasonably necessary to achieve the end”.⁷ So far, however, there is no known case law on places of refuge which establishes liability for a coastal State under public international law.⁸

On the other hand, international liability conventions provide for rules and limits of liability in relation to various types of pollution damage and cover both private and public claims. Those conventions were already extensively analysed in the SIML Study from 2004. As this Study was well received, never contested and is publicly available, its most important points will be reminded.

⁷ The 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. The same rule has been extended to apply to other forms of pollution than oil, through Article II of the 1973 Protocol to the Convention.

⁸ In this respect it may be interesting to note the on-going disputes in US Courts between the Spanish Government and the American Bureau of Shipping (ABS) in relation to the *Prestige* incident. Here, the ABS, in response to allegations against it made by the Spanish State, took action against the Spanish State, arguing that any damage suffered by Spain was caused in whole or in part by its own negligence. The New York Court dismissed the counterclaim on the grounds that the Spanish State was entitled to sovereign immunity. ABS is currently seeking reconsideration by the Court or permission to appeal. For a brief summary, see IOPC Fund Doc. 92FUND/EXC.26/8, para. 9.8.

The most extensive regime is related to oil pollution damage. It is regulated by the **Convention on Civil Liability for Oil Pollution (CLC) 1992** and supplemented by the **International Oil Pollution Compensation Fund (IOPC)** established in 1992 and **Supplementary Fund** established in 2003. The system provides for strict liability⁹ of the shipowner for oil pollution damage which is defined as loss or damage caused outside of the ship by contamination resulting from the escape or discharge of oil from the ship and it includes also reasonable measures of reinstatement and preventive measures. The pollution damage is subject to compensation as long as it occurred in the territory, territorial sea or exclusive economic zone of the State Party and the preventive measures are subject to compensation in all circumstances, regardless where they were taken. According to the practice of the IOPC Fund the economic loss is also compensable as long as it occurred as a direct consequence of the damage. The shipowner is liable up to a limit calculated on the basis of the tonnage of the ship with the maximum of 89.7 mln SDR (Special Drawing Rights). He loses the privilege to limit the liability if the damage resulted from his "personal act or omission (...) with intent to cause such loss or recklessly and with knowledge that such loss would probably occur". To ensure actual payment of compensation the shipowner is obliged to contract civil liability insurance up to the limits of liability.

In case the shipowner is not liable or not able to pay, or if the damage is higher than the limit of liability, the IOPC Funds provide additional compensation. The Funds' liability is nearly absolute, only with narrow exclusions. Compensation payable by the 1992 Fund in respect of an incident occurring before 1 November 2003 was 135 million SDR, including the sum actually paid by the shipowner (or his insurer), however the limit was increased up to 203 million SDR on 1 November 2003 and it applies to incidents occurring after this date. In relation to the State Parties of the Supplementary Fund the compensation of up to 750 mln SDR can be paid. This is a very big financial capacity – so far only Prestige accident generated damage higher than the limit of liability of the 1992 Fund, however if the Supplementary Fund would have been in force at the time of the accident, the damage would be below its limits.

Most often the compensation is provided on the basis of out of court settlement between the claimants and the shipowner (and his insurer) and the IOPC Funds. The Funds use the "Manual on Claims" which defines the rules for compensation, among others in relation to compensable economic loss (in particular that there must be a reasonably close link of causation between the expense, loss or damage covered by the claim and the contamination caused by the spill). However, if the claimants do not feel satisfied, they can bring an action against the shipowner, insurer and the IOPCF Funds before the courts of the State Party to the Convention in whose territory, territorial sea or EEZ or equivalent area the damage occurred. Ultimately, the national law will decide if the claims are subject to compensation although the rule that the shipowner's liability is strict has to be upheld.

The rules explained above will apply equally to any pollution damage resulting in a place of refuge. Moreover, it may be that the fact of accommodating a ship in distress in a place of

⁹ Which means that the exclusions of liability are only the following:

- a) the damage resulted from an act of war or a grave natural disaster, or
- b) the damage was wholly caused by sabotage by a third party, or
- c) the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.

refuge in order to prevent oil pollution should be considered a preventive measure in the meaning of the CLC Convention. The measure had to be reasonable, undertaken to prevent or minimise pollution damage and the threat of pollution damage was grave and imminent.

The CLC/ IOPC system is the most extensive (there are 106 states that belong to CLC/IOPC 1992 and on top of this, 27 states that also belong to the Supplementary Fund) and so far it has handled a considerable number of big oil pollution accidents. The system can also be applied to any oil pollution damage resulting in a place of refuge situation.

A similar system, but providing compensation for damage caused by hazardous and noxious substances has been created by the **International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea** 1996, as amended by the Protocol of 2010. This Convention also provides for strict liability of the shipowner for pollution damage (defined as contamination resulting from the escape or discharge of HNS from the ship), loss of life and personal injury on board or outside of the ship, loss or damage to property outside the ship, as well as reasonable measures of reinstatement and preventive measures. The damage is subject to compensation if it occurred in the territory, territorial sea or exclusive economic zone of the State Party, with the exception of preventive measures that are subject to compensation regardless where they were taken. The economic loss will also be compensable as long as it is in direct consequence of the damage. The system is similar to the CLC/IOPC system.

The shipowner is liable up to a limit calculated on the basis of the tonnage of the ship with the maximum of 100 mln SDR. He loses the privilege to limit the liability if the damage resulted from his "personal act or omission (...) with intent to cause such loss or recklessly and with knowledge that such loss would probably occur". To ensure actual payment of compensation the shipowner is obliged to contract civil liability insurance up to the limits of liability.

In case the shipowner is not liable or not able to pay, or if the damage is higher than the limit of liability, the HNS Fund provides additional compensation. The Fund's liability is nearly absolute, only with narrow exclusions and it provides compensation up to 250 mln SDR. According to the information gathered by the International Group of P&I Clubs there has been no HNS pollution accident that would reach this limit. There have been a few accidents that resulted in a damage higher than the limit of liability of the shipowner according to LLMC 1996 but not according to the HNS Convention (based on a purely theoretical exercise, as the HNS Convention is not yet in force).

Due to its similarities with the CLC Convention it can be assumed that the same or similar rules will be applied by the Fund to the compensation of damage. There is always a possibility for claimants to bring action to the courts so ultimately the national law will decide apart from the fact the shipowner's liability has always to be strict.

The Convention can also be applied to any HNS damage resulting in a place of refuge situation. As in the case of the CLC, it may be that the fact of accommodating a ship in distress in a place of refuge in order to prevent HNS pollution should be considered a preventive measure.

Since the HNS Convention 1996 did not attract many ratifications, a Protocol was adopted in 2010 mostly amending the modalities of payment of premiums to HNS Fund and payment of compensation. The scope of the Convention itself has not been changed. In this report we work on the assumption that the Convention will be ratified soon (although at the moment only one EU Member State has ratified it).

Another convention regulating a certain type of pollution damage and created in similarity to the CLC is **International Convention on Civil Liability for Bunker Oil Pollution Damage 2002**, which entered into force 2008 and has been ratified by the majority of the EU Member States. The Convention establishes rules of liability of the shipowner (as well as bareboat charterer, manager and operator of the ship) in relation to pollution damage caused by bunker oil. The shipowner is strictly liable for damage similarly defined as in CLC: loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ships, costs of reinstatement of damaged environment as well as costs of preventive measures and further loss or damage caused by preventive measures. The damage is subject to compensation if it occurred in the territory, territorial sea and in the exclusive economic zone of a State Party, with the exception of preventive measures which are compensable wherever they were taken.

The main difference between this convention and the CLC or HNS is that the Bunkers Convention consists of only one tier. There is no Fund, the shipowner is the only person liable and his liability is limited by the limits of LLMC 1976, as amended. These are limits calculated on the basis of the tonnage of the ship, however the limitation fund created on the basis of such calculation is supposed to satisfy all other claims resulting from the operation of the ship (apart from claims regulated by separate international conventions, such as CLC or HNS). For the purpose of compensation of bunker oil pollution damage the shipowner is required to maintain insurance or other financial security.

According to the Directive 2009/123 on the shipowners' insurance all Member States are to require ships flying their flags and ships entering their ports to have liability insurance for LLMC included claims up to LLMC 1996 limits. It is to be concluded that the claims under Bunkers Convention will also be subject to limitation under the LLMC 1996 limits and not LLMC 1976.

If a spill of bunker oil occurs in a place of refuge situation, it will be compensable under the rules of the Convention. It may also be that if such spill is prevented, the action of accommodating the ship in a place of refuge should be considered a preventive measure.

Another convention that may be successfully applied to a place of refuge situation is the 2007 **Wreck Removal Convention**. The Convention is not yet in force as it needs 10 ratifications but for the purpose of this study we have assumed that it will enter into force soon.

The Convention provides a legal basis for coastal States to remove from their territorial waters and EEZ the wrecks which pose a hazard to the safety of navigation or to the marine and coastal environments. Shipowners are strictly liable for the costs of reporting, marking and removing of the wreck of their ship and required to take out insurance or provide other financial

security to cover those costs. The limit of their liability are the limits as calculated according to LLMC 1996 Convention and the insurance has to be taken for the same amount.

This Convention can be applied to a place of refuge situation – it is easy to imagine that a ship in distress may suffer extensive damage and a wreck can be left behind in a place of refuge. Nevertheless, the possible claims are limited by the LLMC 1996 limit and they compete with other claims to the limitation fund. Though, State Parties to LLMC have a right to exclude from its scope the costs of removal of a wreck or a cargo from a wreck. Some EU Member States did that which makes the compensation potentially unlimited. In any case insurance for wreck removal will only be contracted according to the Convention, which is up to 1996 LLMC limit.

All international pollution liability conventions described above cover a wide range of claims and provide for basic minimum rules for those claims: who is liable, on what basis (always strict liability), which are the exclusions and what is the financial limit of liability. The claims that are not covered by the conventions remain subject to the regulation by national laws. Each national law will then define the potentially responsible person, the basis of responsibility, potential exclusions and financial limitations.

Moreover, the claims for preventive and remedial measures following environmental damage that the relevant administration of a Member States may have and that are not covered by international pollution liability conventions are subject to **Directive 2004/35 on environmental liability**¹⁰. The Directive applies to “environmental damage” or “damage to protected species and natural habitats” caused by any of the occupational activities listed in Annex III (e.g. transport of hazardous waste as according to the Directive 75/442/EEC¹¹, transport by sea of dangerous or polluting goods as defined in the Directive 93/75/EEC¹² or transboundary shipment of waste in the meaning of Regulation (EEC) No. 259/93¹³). This Directive provides that an operator of an activity that was the source of the damage (e.g. a ship operator for the ship-source pollution) is liable towards the relevant administration for such measures but if the claim is within the scope of the LLMC Convention then the operator will be allowed to limit his liability to an amount calculated on the basis of the ship according to this Convention.

At this point we would like to refer to the judgement of the European Court of Justice in case C-188/07¹⁴ which was given as preliminary ruling in a case *Commune de Mesquer v. Total France SA* at the *Cour de Cassation* in France. The case concerned the accident of *Erika* tanker which sank at French Atlantic coast in 1999 causing extensive pollution and in particular potential liability of the involved parties. The Court ruled that “hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State (...) where they are no longer capable of being exploited or marketed without prior processing” constitute “waste” within the meaning of Directive 75/442 on waste. Then it added

¹⁰ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, *OJ L 143*, 30.4.2004, p. 56–75.

¹¹ Council Directive 75/442/EEC of 15 July 1975 on waste, *OJ L 194*, 25.7.1975, p. 39–41.

¹² Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods, *OJ L 247*, 5.10.1993, p. 19–27.

¹³ Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, *OJ L 30*, 6.2.1993, p. 1–28.

¹⁴ *ECR 2008*, p. I-4501.

that the seller of the product and the charterer of the ship carrying the product can be considered to be the “product producer” and therefore responsible for the cost of “disposing of the waste” as far as this cost is not born by the IOPC Fund (if the Fund is not liable or if the cost is higher than the limit of liability of the Fund). The consequences of this judgement for the future have not yet been entirely understood but it gives a certain basis for the relevant administration to look for compensation for preventive and remedial measures (as according to the Directive 2004/35) outside of international conventions even if the claims seem to be under the scope of international conventions.

Last but not least, the role of the **Convention on Limitation of Liability for Maritime Claims** has to be explained. This Convention deals with “maritime claims” which are claims related to the operation of the ship. However, all claims under the scope of more specific conventions (such as CLC, HNS) are excluded. In relation to the remaining claims the Convention provides for a global limitation of liability – the maximum amount that the shipowner or the ship’s operator will pay out calculated on the basis of the tonnage of the ship. The LLMC initial text was adopted in 1976 and it was amended in 1996. Its amendment increases the limits of liability. Most EU Member States are parties to LLMC 1996, however all of them will be obliged, when Directive 2009/20/EC on the insurance of shipowners for maritime claims¹⁵ enters into force, to require the shipowners flying their flags and all ship entering their ports to have insurance for the values as calculated on the basis of LLMC 1996. The mentioned Directive presents an added value to the LLMC 1996 as it requires the shipowners to have civil liability insurance for the claims that are within the scope of the Convention.

The LLMC does not provide for any liability rules so ultimately it is the national law (or in case of bunker oil pollution or wreck removal claims – other conventions) that decides who is liable and what claims are admissible. Therefore, as was already mentioned, once the relevant international conventions enter into force, only a limited category of claims will be left under the scope of the LLMC. Out of those, the claims brought by the relevant administration for preventive and remedial measures require strict responsibility of the ship’s operator on the basis of the Directive 2004/35.

4. Potential gaps

4.1. Gaps within the scope of the international liability conventions

All international conventions presented above provide for strict liability of the shipowner which means that he will be liable in most of the circumstances, irrespectable of fault, only due to the simple fact that he was operating the ship that was the source of the damage. There are three main exceptions to the owner’s liability, which are common to all IMO liability conventions:

1) if the damage resulted from an act of war, hostilities, civil war or insurrection or exceptional natural phenomenon;

¹⁵ Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims, *OJ L 131, 28.5.2009, p. 128–131*

- 2) if the damage was wholly caused by an act or omission by a third party done with the intent to cause damage; and
- 3) if the damage was wholly caused by public authorities' negligence in maintaining lights or other navigational aids.

The first two defences are of a general nature and are commonly considered to be necessary exceptions in any pollution liability regime involving compulsory insurance and are, in any event, unlikely to be of relevance in a place of refuge situation. The third defence, however, is specific to the IMO Conventions and could very well be raised by the owner of a ship in a place of refuge situation.¹⁶

A fourth defence, which exists only in the HNS Convention (Article 7.2.d), is where the owner is unaware of the hazardous and noxious nature of the substance shipped due to failure of the shipper or other persons to inform him about it and provided that the owner or his servants and agents ought not reasonably have known about this anyway. This may also have some relevance in a place of refuge situation.

In case of oil pollution damage and HNS pollution damage the Funds will still provide compensation even if the shipowner was not liable. The Funds are exonerated from their compensation obligations only if:

- 1) they can prove that the damage resulted from an act of war, hostilities, civil war or insurrection;
- 2) they can prove that the damage was caused by substances released from a warship or other ships owned or operated by a State (thereby invoking the liability of that State); or
- 3) the claimant cannot prove that the damage resulted from an incident involving one or more ships.

Only the second defence may play role in a place of refuge situation however it concerns specific circumstances which is when the ship in distress is a warship or another state-operated ship.

In addition to those very limited defences, the IOPC and HNS Funds, like the owner under the first tier, have a possibility to exonerate their obligations wholly or partially towards particular claimants in case the Funds can prove contributory negligence or intent on behalf of the claimant. It has to be noted however that previously mentioned shipowner's defence in case public authorities' negligence in maintaining lights or other navigational aids does not apply to the Fund although it may constitute a basis for the recourse against the public authorities after the Fund paid compensation to the claimant. The conventions provide that the Funds shall "in any event be exonerated to the extent that the owner may have been exonerated [under the first tier]". However, in the second tier this possibility is coupled with a significant limitation, in that "there shall be no such exoneration ... with regard to preventive measures." Even if, in the

¹⁶ See more in the SIML Study, p. 16.

examples above, the coastal State is found to have acted negligently, thereby exonerating the owner from his duties towards the coastal State, the State would still have access to compensation for its losses, provided the measures can be characterised as preventive measures. Therefore the question of whether the authorities' measures in relation to a place of refuge situation qualify as preventive measures is of key importance for determining their financial risks. According to the CLC, Fund and HNS Conventions preventive measures are defined as "any reasonable measures taken by any person after an incident has occurred to prevent and minimize damage". They have to be taken after an incident has occurred but they are compensable even if the damage did not happen. They do have to be reasonable and the history of the cases compensated by the Funds should be taken into consideration to understand the meaning of reasonableness although it is always decided on case by case basis. Therefore, in conclusion, the identified gaps in relation to oil and HNS pollution damage include total or partial exoneration of the liability of the Fund in case of negligence of public authorities for claims that are not included in the scope of preventive measures.

In relation to bunker oil pollution damage and wreck removal the negligence of public authorities will result in partial or total exoneration of the shipowner without the possibility of any Fund to step in as those two conventions are single tier conventions.

All those conventions provide for the obligation to have insurance which reinforces the ability of the shipowner to satisfy the claims, however in the instances when the shipowner is not liable, the insurance will not cover either.

In conclusion, the international liability conventions contain a number of exclusions of the shipowner's liability (like war or terrorism), which however are unlikely to play role in a place of refuge situation. The only valid, for this purpose, exclusion of shipowner's liability is negligence of public authorities in maintaining lights or other navigational aids that contributed to the incident. The shipowner will not be liable in this case and for oil and HNS pollution damage the liability of the Funds will depend on the extent to which accommodating the ship in the place of refuge is considered to be a preventive measure. Similarly, any other contributory negligence that can be attributed to the authorities bringing claims will, if not exclude, at least proportionate the shipowner's liability.¹⁷

Moreover, a potential gap may arise from the limitation of liability itself. If the claims brought are higher than the financial resources available on the basis of the calculation of the limit of liability, the claims will not be satisfied entirely but only proportionally (some may have priority before the others but that concerns mostly personal injury and not property and economic loss claims). According to the information provided to the IMO by the International Group of P&I clubs¹⁸ and according to the case law of the IOPC Fund¹⁹ the available resources for oil and HNS pollution damage seem to be largely sufficient to deal with this type of claims. However, it has not been yet proved if the LLMC 1996 limits are sufficient for bunker oil or wreck removal claims. The ability to actually pay compensation is reinforced by the fact that all those conventions require liability insurance up to the financial limits prescribed by each convention.

¹⁷ See more in the SIML Study, pp. 40-46.

¹⁸ Submission of IG of P&I Clubs to the IMO, LEG/CONF.17/6 of 8th of March 2010.

¹⁹ See: www.iopcfund.org and in particular the Annual Reports

However payment above the insurance level is rather unlikely. Even if the shipowner is liable without limits (like in case of wreck removal claims if the State Party excluded those claims from the scope of the LLMC), in practice it will probably not be able to satisfy such claims as unlimited liability insurance is not available on the market.

4.2. Gaps outside the scope of the international liability conventions

Claims which are not subject to the scope of international conventions are subject to national laws. That means that the national law of the country where the claim is settled decides who is liable and on what basis (absolute, strict or fault based liability). This is why it is difficult to find an extent of a possible gap in this study as every national law may regulate those issues differently.

Some common points can be found, though: for "maritime claims" which are claims related to the operation of the ship that are included in the scope of LLMC, the responsible persons are: the shipowner, ship's operator or any other person involved in the management of the ship, however the basis of responsibility is defined by the applicable national law. Their responsibility is limited to a maximum value calculated in reference to the tonnage of the involved ship on the basis of LLMC 1976/96. LLMC is not a liability convention, and does not therefore define the basis of responsibility, only provides for its financial limit.

The following claims are subject to the limitation of the LLMC (Article 2.1):

- a. claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
- b. claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- c. claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;
- d. claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
- e. claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
- f. claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures."

In order to be covered by the limitation regime of the LLMC, the damage or loss has to fall within one of these categories. This raises a number of questions with respect to places of refuge and claims for pollution damage. While 'traditional damage', such as damage and losses to property, and associated consequential losses, fall under subparagraph "a", it is less clear to what extent the list includes 'pure economic losses', that is, losses of earnings by persons who

have not suffered any material damage. In case of a decision that pure economic loss does not fall under the scope of LLMC, liability for such claims is potentially unlimited but it depends on the relevant national law.

A reinforcement of the LLMC is brought about by the Directive 2009/20 on the insurance of the shipowners²⁰ which requires that the Member States should ensure that all ships flying their flag and all ships entering their ports regardless of their flag shall have insurance for the claims under the scope of LLMC and up to the liability limits calculated according to the LLMC.

There are a number of potential gaps in this respect but their exact form will vary in each state. In case the liability is based on fault, there are number of permitted exclusions which may result in exempting fully or partially the shipowner or ship's operator. In case the shipowner is liable, the claims that fall under the scope of the LLMC will be financially limited and the aggregate value of claims may potentially be higher than the limit. On the other hand – as explained before – the category of claims subject to the LLMC is getting narrower with every new liability convention entering into force. For the moment the LLMC concerns mostly private claims related to cargo interests. It is therefore not impossible, but not very probable either that the aggregate claims would outgrow the limit of liability under the LLMC 1996, especially taking into consideration the recent discussions in the IMO to have those limits raised.

The claims that are not within the scope of the LLMC will be entirely dealt with by national laws which may provide for their own limitation or for the unlimited liability. Potentially this category could contain claims for pure economic loss not related to oil, bunker oil and HNS pollution which again would not be a very wide category. For the claims not subject to LLMC there is no obligation to contract insurance so even if the liability is unlimited, the shipowner may not have means to pay out the whole compensation.

Moreover, regardless if the LLMC applies or not, the Directive 2004/35 on environmental liability will apply to the "environmental damage" that is not subject to international conventions. On this basis the relevant administration of a Member States may bring against the "polluter" claims for compensation of preventive and remedial measures taken in connection to the environmental damage.

4.3. Liability of the State

The risk of not being able to recover fully its losses and expenses represents only part of the potential concerns of a coastal State admitting or refusing a ship into a place of refuge. The risk that the coastal State may be held liable for having contributed to the damage through its own decisions and conduct during the operation is a much more serious problem.

²⁰ Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims, *OJ L 131, 28.5.2009, p. 128–131*

Despite the fact that the IMO liability conventions, through their strict liability regimes and various manifestations of the “responder immunity”²¹, are designed to avoid this type of result, concurrent coastal State liability is not excluded. This could take place in a number of situations. The incident may not be covered by any of the conventions, either because they are not in force or because the incident otherwise falls beyond their scope. In addition, certain aspects of the litigation relating to the incident may, depending on the parties to the dispute, take place in a jurisdiction where the conventions do not apply. Finally, even if the conventions do apply, there is no guarantee that coastal States will be immune from claims of liability, as many aspects will depend on the domestic laws of each State Party.²²

The main issue the “reasonableness test”. If the decision of the State to accommodate a ship in a place of refuge is not considered reasonable, it may lose the “responder immunity” and various actors may bring against public authorities an action for compensation of their losses. Moreover, even if accommodating a ship in a place of refuge is considered to be a preventive measure under the CLC, it also has to be proved reasonable in each case. In the contrary, Article III(5) of the CLC allows the shipowner and the insurer to take recourse action against public authorities involved. The liability of public authorities in the context of such recourse actions is not governed by the conventions, which means that it will be subject to national law of the State concerned.

The other issue is “negligence”. There is nothing in the conventions to prevent victims of an oil spill suing the public authorities directly for negligence. The only international law guideline comes from UNCLOS whose Article 235(2) prescribes that “States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused (...) by natural or juridical persons under their jurisdiction”. In such cases again, the national laws of the State concerned will apply.

We are not able to give clear conclusions in respect of possible liability of the State in a place of refuge situation as each case would have to be considered individually and the outcome would depend on the nature of the damage, the details relating to the action of the State and relevant national laws. It has to be noted however that so far the negligence or liability of the coastal State has not been of practical relevance in the operation of the IOPC Fund.

The issue of State liability will be subject to a separate Study.

5. Conclusions

As it was already concluded in the SIML, the international liability conventions offer quite a dense network of rules that can be applied to damage occurred in relation to accommodating a ship in a place of refuge. If all of the conventions are adopted by all Member States, the

²¹ Responder Immunity: A term used to express the limited immunity from civil liability given to “responders” to an environmental accident whose actions taken or not taken result in worsening the environmental consequences, as long as their conduct was in accord with certain principles and as long as the worsening of the consequences was not due to gross negligence or wilful misconduct (<http://www.juridicaldictionary.com>)

²² See more in the SIML Study, pp. 46-53.

network is quite effective. They all provide for strict liability of the shipowner (or in some cases a wider category of persons), high limit of liability, obligatory insurance and – in case of CLC and HNS – additional compensation sources (Funds). In case of bunker oil pollution and wreck removal, though, the question if the applicable liability limits (LLMC 1996) are sufficient to satisfy the claims is still to be tested in practice. On the other hand, non-ratification of international liability conventions creates a noticeable gap in the system. (For example if the HNS Convention does not enter into force, a number of potentially high claims may be left unsatisfied.)

Assuming however that all international conventions are or will be soon uniformly ratified through the EU, the area of claims covered by those conventions (oil and HNS damage, bunker oil damage and wreck removal) presents relatively only minor gaps based on the exclusions of liability contained in those conventions, only a few of which are likely to be relevant for the places of refuge. The risk of not obtaining compensation may be narrowed down if accommodating a ship in places of refuge is to be considered a reasonable preventive measure (the exclusions in case of preventive measures are narrower). It has to be noted however that the concept of “reasonableness” of preventive measures has not yet been applied to decisions in context of place of refuge situations. On the basis of the IOPC Fund’s policy on preventive measures by public authorities in general, it seems that emphasis is placed on the technical soundness of the decisions in light of the information available at the time of the decisions²³. The practice will still have to show how this concept is interpreted in case of places of refuge.

Outside of the area covered by international liability conventions the situation is different. A number of potential claims will be subject to national laws which may vary in determining the responsible persons and the basis of their liability which is why a unique conclusion cannot be drawn. A few common points can be made however – in case of environmental pollution the ship’s operator is strictly liable and financially responsible towards the relevant national authority for the cost of preventive and remedial measures according to Directive 2004/35, all claims that are within the scope of the LLMC convention are subject to limitation of liability and insurance up to this limit has to be contracted by the shipowner according to the Directive 2009/20. Therefore, apart from any indefinable gap that may arise under national laws in relation to basis of liability, another potential gap may be created by the application of the limitation of liability which, under the LLMC, is not very high. The exact amount of the liability will depend on a variety of factors, such as the size of the ship, the version of the LLMC which applies in the Member State concerned (although from the 1st of January 2012 it will be only LLMC 1996), the type of claims at issue and the extent to which specific reservations have been made.

The same applies to the liability of the State. In case of negligence of public authorities any interested party can bring a claim for compensation against them and the outcome will be variable as it will depend on the national law of the State. It has to be noted however that so far the negligence or liability of the coastal State has not been of practical relevance, at least not in relation to oil pollution in the practice of the IOPC Fund.

²³ See IOPCF Claims Manual at <http://www.iopcfund.org/publications.htm>

The most substantial gap is probably visible in case of potential compensation for pure economic loss. Under the international liability conventions the compensation for such loss is decided on case by case basis and in the practice of the IOPC Funds it is available only for the economic loss resulted in direct consequence of the pollution damage. If such loss is not related to any of the international conventions, it will be subject to national laws, which means again that the solutions may vary in each country. Moreover, for claims outside of the LLMC no insurance obligation exists.

In the Study of Oslo University from 2004 the most important conclusion drawn was that all international liability conventions should be ratified by all EU Member States. Moreover some additional measures were proposed, such as to place additional entry requirements for ships entering places of refuge in the EU, to develop specific insurance requirements for the benefit of places of refuge, to introduce legislation which could reduce the exposure for coastal State liability or to establish a 'back-up' fund financed by the maritime industry. Those solutions, and the arguments underlying them, remain valid today.

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