



SOUNDINGS

Deviation to save life at sea

The recent spate of large numbers of refugees crossing the Mediterranean sea from North Africa to the European mainland has drawn into sharp focus the issue of saving life at sea.

It has been a long standing tradition for masters to go to the assistance of others in distress at sea. This has been formalised as an obligation in a number of international conventions, including the United Nations Convention on the Law of the Sea 1982 (UNCLOS), SOLAS, the Merchant Shipping (Safety of Navigation) Regulations 2002 and the International Convention on Maritime Search and Rescue 1979.

By way of example, Article 98 of UNCLOS requires: “The Master... in so far as he can without serious dangers to the ship, the crew, or the passengers... to render assistance to any person found at sea in danger of being lost...”

Under English law, there are criminal sanctions that can be imposed if the master fails to take appropriate action to save those in peril at sea. Whilst the master’s duty to assist is reiterated in all these conventions it is always subject to the safety of the ship and her crew.

Upon rendering assistance to refugees in distress, the master should stay in regular contact with the relevant Rescue Co-ordination Centre (“RCC”). He should also comply with the requirements of the government responsible for the relevant search and rescue area. The master is not required to take information from refugees, save for names, ages, gender and nationality. He is under no obligation to investigate, for example, whether the refugees have rights of asylum.

The master’s obligations are, however, limited by factors such as the capabilities and limitations of the ship and the safety of the ship and crew are taken into account. Very basic care in the form of food, water, sanitary facilities and makeshift cover is likely to be expected as a minimum on a commercial ship, not designed to carry a large number of passengers. The period for which the ship is to care for rescued refugees is also limited and the ship can disembark them at a place of safety. This will depend upon the circumstances of the case but it is not for the

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refugees to dictate at which port they wish to be disembarked. Disembarkation should be coordinated with the relevant RCC. The Master should inform the relevant RCC of the ship's next intended port of call and his preferred arrangements for disembarkation. The RCC should relieve the ship of the refugees as soon as possible and the master should be advised to insist upon this. The master is not obliged to undertake tasks over and above the basic requirements nor is he required to allow his ship to be used as floating accommodation for the refugees.

The shipowner is not permitted to stop or restrict the master from rendering assistance but he will need to put in place procedures and training and to equip the ship with the necessary equipment to cope with a refugee incident. Any search and rescue or other assistance provided should be properly documented in order to establish that the owner exercised due diligence in relation to training of the crew, if problems arise during the rescue.

If there is a lack of equipment and stores or indeed a failure to have the necessary documentation on board, this could give rise to issues concerning the seaworthiness of the ship. Equally, a lack of training of the crew such that the ship is put in danger when assisting in the rescue could mean that the ship was unseaworthy. This is not to say that the lack of relevant documentation in itself may make the ship unseaworthy, but if search and rescue procedures are not documented, then an owner could have difficulty in establishing that he exercised due diligence in relation to training of the crew.

In present circumstances in which refugee boats are prevalent, particularly in the Mediterranean, it could well be the case that it is reasonably foreseeable that a ship passing through those waters would have to stop and assist. If that is the case, then she will need to be adequately equipped to meet such an eventuality. It is recommended that ships trading in the relevant area should put in place additional plans and procedures in the event that they are called to the aid of a refugee boat. In terms of additional equipment, there may well be a greater than usual requirement for additional food and water and the crew should be provided with protective clothing, safety equipment

and uniform to differentiate them from refugees and to assist in asserting their authority. There should also be available temporary shelter and sanitary equipment for the refugees.

There are additional risks to the owner in terms of damage to the ship by way of, for example, collision with an underpowered refugee boat or damage caused by the refugees whilst on board. There is also the potential for crew claims against owners for illness or injury, both physical and psychological.

On disembarkation, the crew should also undertake a meticulous search of the ship to avoid the possibility of stowaways remaining onboard.

Charterparty provisions

The unamended NYPE 1946 form gives the ship the liberty to deviate for the purpose of saving life and property pursuant to clause 16. Furthermore, the off-hire clause does not specifically refer to a deviation to save life as an event that would trigger that clause. It is believed that such deviations should not fall within the scope of "any other cause preventing the full working of the vessel" because the event would be extraneous and unrelated to the physical condition or efficiency of the ship. Accordingly, the charterer would be obliged to keep the ship on-hire and to pay for bunkers consumed during the course of the rescue operation. However, the costs of dealing with the refugees may well fall outside the scope of the charterer's obligations.

With regard to the NYPE 1993 form, the off-hire clause would, of itself, have the effect of putting the ship off-hire for a deviation to save life at sea. However, there is express reference at lines 256 to 258 which contain a liberty to deviate to save life. Therefore the ship should remain on-hire.

The Baltime form does not contain any provisions relating to deviation to save life. However, it is likely that in the absence of an express liberty to divert to save life, a court or tribunal would imply such a liberty into the charterparty. Under clause 4 of the Baltime form, the charterer is to provide and pay for all fuel, port costs, pilotage and other expenses. It does not specify (in contrast to clause 7 of the NYPE 1946 form) the causes

for which owners are responsible. As such, pursuant to the unamended Baltime form, the charterer is likely to have to pay hire, bunkers and the majority of the costs of the rescue.

In terms of the Shelltime form, clause 25 makes express provision for the time and cost of saving life or attempting to save life, which is to be borne equally between owners and charterers. Bearing in mind other terms of the Shelltime form, it is likely that the overall effect will be that the time and cost of saving subsequent costs of carrying refugees will be borne equally between owners and charterers, but the time and cost of disembarking them is likely to be for the owners' account only.

BP Time 3 is slightly more beneficial to owners. It contains provisions whereby the ship remains on-hire during any deviation to save life. Furthermore, the charterer is obliged to pay for all bunkers whilst the ship is on-hire as well as all port, pilotage and similar expenses. Although the owner will be required to pay for full provisions, deck and other necessary stores, the charterer would have to continue to pay for bunkers and the port costs during the rescue and in particular the disembarkation.

In terms of voyage charterparties, the time and cost of performing the voyage is borne by the owner and as such owners will bear the time and cost of deviating to save life and disembark the individuals saved.

Finally, owners should be aware that although the charterparty clauses considered above generally apportion the costs of deviating to save life at sea between the owner and the charterer, there are bespoke clauses (particularly in oil major charterparties) pursuant to which all the time and costs of such a deviation will be for the owner's account.

Draft refugee clause

A draft "refugee" clause is set out below. The intention is to achieve a 50% split of all costs associated with the rescue operation, including the costs of the additional equipment, food and water required. Some consideration should also be given as to whether a charterer should be required to pay

in advance for the additional equipment, stores and water in the event that they order the ship to pass through an area where there is a high risk of having to take action to save life. Such a clause would allow for stores and equipment which is unused to be re-credited to the charterer upon redelivery of the ship. Consideration will however have to be given as to how this clause operates with the hire and bunker provisions within the charter.

"In the event of the ship deviating for the purpose of saving human life (other than crew members / the owners' personnel), or for the purpose of participating in search & rescue operations (as instructed by the ship's flag administration or coastal state authorities), all costs, liabilities and expenses excluding the payment of hire and bunkers consumed shall be split 50/50 between the owners and the charterers [in the event that they are irrecoverable from the relevant authorities]. The phrase 'all costs, liabilities and expenses' shall, for the purpose of this clause, include:

- a) All telecommunication costs, crew bonuses and overtime and port costs including anchorage, pilot, tug and other costs incurred;
- b) All water, food, stores, fuel and equipment consumed or used to rescue, care for and disembark the refugees;
- c) All stores and equipment consumed or used and related costs (such as garbage disposal or third party cleaning costs) or any repairs to the ship to return the ship to the same condition she was in before the deviation; and
- d) All liabilities to third parties, including liabilities for injuries suffered by the ship's Master, crew or third parties, except where the liability is caused by the negligence of the Master or crew or a failure to exercise due diligence to maintain or make the ship seaworthy."

If Members have any questions please contact your local Managers' office.



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