THE DISTRESSED SHIP

HER RIGHT OF REFUGE AND THE COASTAL STATE

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THE DISTRESSED SHIP:
HER RIGHT OF REFUGE AND THE COASTAL STATE

CHAPTER I

INTRODUCTION

Perhaps one of the most mutually beneficial customary rules on international sea law for seagoing nations is the right of a ship to seek refuge in a foreign state's sheltered waters.
It means effectively that ships can travel the world knowing that should the need occur, they will, due to reasons of force majeure, be able, not only to seek refuge in sheltered waters, but will also have a general right to enter the port of a foreign state. The rule is independent of any interstate treaties or conflict. The distressed ship becomes in a sense a neutral ship and when she seeks refuge, the flag she is flying becomes practically irrelevant.

The coastal state's obligation to allow a distressed ship to enter its sheltered waters is the corollary to the distressed ship's right to enter. The state has, however, a customary right to protect itself against pollution or anything which could prejudice its security. It is obvious therefore, that a conflict situation could develop between a coastal state's "refuge" obligations and her right of self protection.

It is the object of this paper to discuss the above situation by first analysing any relevant definitions, examining in detail the

laws and customary practices affecting coastal states and distressed ships, and then, with the example of some past incidents, attempt to describe the conflicts and dangers which can arise when a ship finds herself in a position where she is in dire need of a place of refuge. The position of the salvor will also be discussed where appropriate. In salvage law the reaching of a place of refuge by the distressed ship is the salvor's ultimate objective. For the coastal state, however, the problems are only then just beginning.

The perils of the seas have always fired the imagination of people. In most cases complex decisions regarding a distressed ship have to be made under the spotlight of the media and intense public opinion. Unfortunately this can, as will be seen later, provoke under- or over-reaction on the part of the parties concerned.

CHAPTER TWO

CAUSES OF DISTRESS

Customary law on distressed ships does not differentiate between the reasons why a ship becomes distressed. A distressed ship is a distressed ship but to get a clear understanding of the meaning of a distressed ship it is necessary to analyse the causes which result in a ship having to seek refuge.

Unseaworthiness: To be seaworthy a vessel "must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it" (McFADDEN v BLUE STAR LINE 1905 1 KB; @ 697). "A ship is efficient as an instrument of transport if hull, tackle and machinery are in a state of good repair, if she is sufficiently provided with fuel and ballast and is manned by an efficient crew". (Chorley and Giles; Shipping Law; 8th Ed; @ 187).

A vessel in distress due to unseaworthiness need not therefore have been capable of encountering any type of weather or sea condition at the beginning of her voyage. The degree of seaworthiness varies in relation to the contemplated voyage. Crossing the Atlantic Ocean would call for stronger equipment than sailing across the English Channel.

In marine insurance the most important of the implied warranties

is the warranty of seaworthiness. (Chorley and Giles; op cit 566). A ship is "seaworthy when she is reasonably fit, in all respects, to encounter the ordinary perils of the sea of the adventure insured". (F N Hopkins; Ship Masters Business and Law; 5 ED; @ 351).

A vessel seeking refuge due to unseaworthiness need not however be in a poor physical condition. The duty of the carrier to provide a seaworthy ship also involves the duty to provide a safe warehouse for the cargo and a duty to properly stow the cargo. In the case of KOPITOFF v WILSON (1876; 1 QBD; @ 377), iron armour plates which had been loaded badly broke loose in rough weather and went through the ship's side. It was held that she was not cargoworthy and therefore not seaworthy. Grain and timber ships are a good example of how important stowage is in relation to seaworthiness. Regulations have been formulated to secure the safety of ships engaged in certain trades which have been found to be particularly dangerous. (See SOLAS Convention 1974). These regulations are called statutory seaworthiness regulations, the most common being the rules for carrying grain and timber. If these regulations are not adhered to, the vessel can be termed unseaworthy.

The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924 makes seaworthiness not merely an implied term but now an obligation (Art 111 Rule 1(a)). Vessels/Owners have "to exercise due diligence to make the ship seaworthy, to properly man, equip, and supply the ship,

make the holds, refrigerating and cool chambers, and all other parts of the ship fit and safe for cargo reception, carriage and preservation. Not only has the carrier himself to be diligent, but the same duty rests on his servants and agents (ANGLISS & Co v P & OSN Co LTD; 1927; 2 KB; @ 456).

From the above it is seen that the ship owner has NO excuse to his freight paying clients and his insurer should his vessel become distressed due to unseaworthiness. The coastal state which has to receive such a ship will not, it is submitted, be blamed if sympathy towards her is limited and strict controls and checks are applied to her stay. The "MV KARIN" was detained in the Port of Cape Town by the Department of Transport for not complying with her Safety Certificate after she was forced by "force majeure" to enter the port. The Department of Transport found that she had undoubtedly sailed from her last port in an unseaworthy condition.

Distress caused by innocent circumstances: This kind of distress is probably the basis of the on what customary law on distressed ships. A vessel which sets out on a voyage, and which has taken all reasonable precautions, but becomes distressed and needs a place of refuge, is the type of scenario, it is submitted, that warrants full coastal state co-operation.

Examples of "innocent circumstances" are situations such as unforseen engine and structural failure, fire or damage caused by extraordinary weather and uncharted objects. The essential

point in "innocent circumstances" is that NO reasonable action or precaution could have prevented the incident. The principle of "utmost good faith" (found in Marine Insurance) can be compared to "innocent circumstances" as the vessel sets out on her voyage in the utmost good faith that she will reach her destination safely. The British Marine Insurance Act of 1906 states in Sec 17 that "a contract of marine insurance is a contract based on the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party".

As will be seen at the end of this chapter, distress caused by extraordinary weather is the most common cause of "innocent distress". The power of the sea and wind can, in areas such as the international sea route around the Western Cape, South Africa, never be underestimated. Brian Weschan wrote in his book "Shipwrecks of the Western Cape" (1984) that "the sea routes from Table Bay to Agulhas have always known shipwreck and tragedy. Ever since early Portuguese pioneer sailors encountered the treacherous storms off the Cape, ships of every size and description have yielded to the unpredictability of the sea".

There is, however, a very thin line between distress caused by "innocent circumstances" and distress caused by circumstances which should not have put the vessel in danger. In an attempt to prevent ships from sailing the oceans in a dangerous condition, vessels have to have surveys to their hull and equipment at stipulated intervals. Thus they can find themselves

detained in ports if expired certificates are discovered. As early as 1855 Lloyds Register published rules for iron shipbuilding, and now many of the surveys are instituted by IMO Conventions. A few examples of these are:

a. Cargo Ship Safety and Construction Certificate (incorporating SOLAS 74/78)

b. Cargo Ship Safety Equipment Certificate (incorporating the SOLAS of 1974/78)

c. Certification of Classification of Class (issued by classification societies)

d. Certificate of Seaworthiness (Only issued in emergency when own classification is unobtainable).

Although the above regulations do help in controlling standards, they are not foolproof. The greatest problem, it seems, is that the surveys are not carried out properly or are carried out under dubious circumstances. The OCEANOS, a passenger vessel which sank off the South African east coast, had, among other things, defects in the remote closing mechanism of her watertight doors, but all her safety certificates were in order. When an attempt was made to tow the stricken KATINA P to a place of refuge off the coast of Mocambique (1993) it was found that although she had recently been surveyed by the Maritime Hellenic Association of Piraeus, she was in an "appalling state of disrepair" (Mr G Needham, Operations Manager of Pentow Marine Salvage Company).

More recently the SAN MARCO, a 224 metre bulk carrier, sought refuge in Cape Town harbour after encountering "bad weather" off the Cape Coast. The Argus reported on the 20th November 1993

that "The condition of the 1968 vessel is such that questions are being asked how a ship in such a rundown state could have been issued with a certificate, classing her as being seaworthy". (The certificate was also issued by the Maritime Hellenic Association of Piraeus.) "The hull and deck plating of the SAN MARCO are in an appalling condition, badly rusted and corroded and in some places worn very thin. The struts holding the plating of the hold are also badly corroded, and it is no surprise that the plating broke away in heavy seas. It is fortunate that the vessel managed to reach port safely as it is possible that she could have split in two, sailing in her present condition".

Chorely and Giles (op cit 85) states that "an effective way of ensuring seaworthiness is to provide in great detail what should be done and, after appropriate inspection and survey, to prove by internationally acceptable certificates that what is required has been done". This theory is no doubt a sound principle but as the above examples show, the issuing of certificate can be easily abused and valid certificates can never be the sole proof that the vessel's distress was caused solely by "innocent circumstances".

Self inflicted distress: It is submitted that the key principle for self inflicted distress is that the problem could have been reasonably avoided or that the vessel turned a "blind eye" to obvious dangers. The coastal state will, as mentioned, have to accept these damaged vessels but their legal status can certainly

change as "force majeure" immunity (to be discussed later) cannot be reconciled with self inflicted distress.

Self inflicted distress can be caused by many possibilities of which three will be highlighted.

a. Collision: The International Regulations for the Prevention of Collisions at Sea 1972 (Rule of the road) lay down very clear instructions and guidelines to the navigator to prevent collisions. These rules, when ignored, can be a direct cause of a collision and hence cause a vessel to be in a distressed state. "A collision between ships usually involves what is technically called a tort, that is, an unlawful act or omission on the part of someone responsible" (Chorely & Giles; op cit 365). In 1978 two ships, the MARITIME HARMONY and the ANNA BIBOLINI collided in fog. The court (1982; 2 Lloyds Rep @ 400) found that the collision and hence damage to the vessels, was caused as a direct result of the vessels' failure to observe the Collision Regulations of 1972, which in Section 1 of Part B calls for a proper radar watch, and a safe speed in fog.

b. Economic Considerations: "On long ships, such as very large tankers and bulk carriers those responsible for loading the ship have to take care to avoid straining the vessel's hull. If too much weight is placed amidships the vessel will sag". (R M Alderton: Sea Transport - Operation and Economics; 3ed; 1984). Excessive speed through a heavy

sea will obviously add strain to the hull. If bent severely however the ship may become permanently distorted which will be aggravated by the vessel pitching when end on to the waves. (R M Alderton; op cit 11).

In the case of charter party contracts which "are usually made a substantial period in advance" (Chorely & Giles; op cit 218), the vessel will very likely be at some other port or even on the high seas when the contract is signed. An ordinary charter party contains a term under which the first duty of the shipowner is to send his vessel to the port of loading. The terms of the charterparty frequently impose this obligation in terms such as "with due dispatch" or "with all convenient speed" but they may go further and impose a final date by which the vessel must reach her port. (See the GENCON charterparty form) This will be construed as a condition, and if it is not complied with, the charterer may repudiate the contract.

In the case of SMITH v DART (1884; 14 QBD;@ 105) a charter party provided for the ship to go to a safe port, to arrive there, and to be ready to load by a certain date. Owing to the dangers of the sea the ship, though she had arrived at the loading port by the date fixed in the contract, was not ready to load. The charterers cancelled the charter party, and although the owners contended that the delay was due to rough seas, the court held that the charterers were entitled to cancel. In exceptional cases the cancelling

clause "may be qualified, yet to have this effect, and to exclude the rule in SMITH v DART, the qualification must be closely related to the cancelling clause" (Chorely & Giles op cit 219).

The shipowner, through the Master, is therefore under tremendous pressure to meet lucrative charter party deadlines and vessels can accordingly be pushed too hard. If damage is sustained and a vessel has to seek refuge, the coastal state could, it is submitted, claim it to be self inflicted distress.

c. Unlawful Activities: In a very recent incident the MV FRONTIER was "driven" into port on the Island of St Helena low on fuel. It was discovered that she was carrying drugs and the Island Authorities decided to prosecute the crew. In the case (William Merk and B Djakumah v Queen; 1991; Court of Appeal; Case No 12; Supreme Court London; Unreported) the crew's defence was that the FRONTIER had immunity because she was a distressed ship.

The facts of the case showed however, that because of the drugs on board, she could not refuel at an earlier stage of her voyage, and hence had to limp into St Helena. It was also discovered that the vessel had originally claimed that she had engine trouble to avoid having to explain how the ship was in the mid-Atlantic with so little fuel. The Court found that the evidence as a whole did not establish

distress and used the leading English case on the test of distress THE ELEANOR (1809 Edw; @ 135). This case involved a ship and cargo condemned for breach of the navigation laws. At page 161 Sir William Scott said "it must be an urgent distress; it must be something of grave necessity; such as is spoken of in our books where a ship is said to be driven in by stress of weather. It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest firm man...Then again when the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage for there the distress is only a part of the mechanism of the fraud and cannot be set up in excuse of it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner". The court in the St Helena case admitted that had the MV FRONTIER been driven out of control on to the shore of St Helena, a different argument might have been available. But where a conscious decision was taken to enter St Helena with a concealed illegal cargo giving a false reason for seeking refuge there can be no question of successful reliance on the law of distress to avoid prosecution.

Finally, there is also some authority, such as the CARLO ALBERTO case (1852; 11 Sirey I; @ 577) where it was decided

that vessels which are forced to seek refuge in the port of a state in which they had intended to make an unlawful landing, enjoy no immunity at all from local jurisdiction.

The Master's dilemma. The status of a ship's Master is aptly put by the following quotes. "The Master is responsible to the shipowner and is the one person answerable in law for the safe and efficient running of the ship as a whole" (R M Alderton, op cit 70). "The interests of the owners, the safety of the ship and cargo, and the welfare of all on board should, it is hardly necessary to say, must be the constant concern of the Master". (F N Hopkins;op cit 164). "The Master always retains responsibility for the safety of the ship". (Royal Canadian Commission on Pilotage; Part I; @ 26-27).

From the above quotes it can be also clearly seen that the Master is not only the person who has to make a decision on what to do should his vessel become distressed, but he will also have to answer why it became distressed. From the writer's experience, and human nature in general, there is always a tendency to initially "play down" potentially hazardous situations. Mr Godfrey Needham (Operations Manager of the Salvage Company Pentow Marine) said that "in many cases the facts concerning a distressed ship have to be coaxed out of the Master". In a recent incident, south of Cape Point, the Master of a supply tug PELICAN ISLE, radioed that his vessel had lost all power and that he needed a tow. He also said that his vessel was "in no danger whatsoever". When the salvage tug WOLRAAD WOLTEMADE arrived on

the scene the PELICAN ISLE had drifted to within one mile of the rocks. (Details provided by Pentow Marine)

It is submitted that this reluctance to admit danger is probably due to the Master's duty of not incurring any unnecessary expense for his owners. There is also a natural practice not to draw undesirable attention to himself. These attitudes can cause great harm to the coastal state as the true facts of the distressed ship can be concealed or misread. The SAN MARCO entered the Port of Cape Town in November 1993 with "what the Captain reported was a crack", (Argus November 1993) but, she docked with two gaping holes in her bows.

Statistics of Causes of Shipping Casualties: To conclude this section on causes of distress the following is a table for casualties to ships greater than 500 gross tonnage that occurred in 1983. (R M Alderton; op; 199). The total number of ships in this category was about 37,800.

	Total Losses		Partial Losses
	Number	%	%
Weather Damage	72	35	9
Strandings	34	26	11
Collisions	11	5	37
Contact Damage	7	3	Nil
Fire & Explosions	66	32	5
Machinery	1	0	27
Other Casualties	18	9	11
TOTAL	209	100	100

CHAPTER THREE

THE "DISTRESS SITUATION" IN INTERNATIONAL LAW

The Distress Principle

When a ship is driven to take refuge in a foreign port by stress of weather, or is compelled to do so by "force majeure" or any other overruling necessity, she is not only allowed access to sheltered waters but she is also not subject to the local regulations of the port with regard to "incapacity, penalty, prohibition, duties or taxes in force at that port". (International Law of the Sea, Colombos; 4ed; @ 288). R N Hopkins (op cit; 30) defines "force majeure" as "Supreme power" or (in appropriate contexts) circumstances beyond ones control. This rule was affirmed by Lord Stowell in the ELEANOR case. He held "real and irresistible distress proved by clear and satisfactory evidence must be at all times a sufficient passport for human beings entitling them to the rights of hospitality in a British port".

The French Court of Cassation also held in the CARLO ALBERTO case that a ship in distress "is placed, among civilised nations, under the protection of good faith, humanity and generosity". In the United States of America, A.S. Story held in the BRIG CONCORD case (1815; 9 Granch; @ 387] "where goods are brought by superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law, as necessarily to attach the right of duties becoming

payable".

The time-hallowed exception (to the principle that foreign ships have no right to enter internal waters of a state), is that of the ship in distress which has a right to enter internal waters to seek refuge. (D J Devine, The Cape's False Bay: a Possible Haven for Ships in Distress; 1990/1991; SA Year Book of Int Law; Vol 16). Ships in distress (for example, ships fleeing from a tempest, or ships which are severely damaged) possess some degree of immunity. For instance, the coastal state cannot profit from their distress by imposing harbour duties and similar taxes which exceed the cost of services rendered. (A Modern Introduction to International Law; Akehurst 5ed; @ 170). In order to be exempt, however, from the local regulations, it is required "that the 'necessity' must be urgent and proceed from such a state of things as may be supposed to produce, on the mind of a skilful mariner, a well-grounded apprehension of the loss of vessel and cargo or of the lives of the crew". (The New York; 1818; 3 Wheat @ 59). This principle is similar to that of Sir William Scott in the ELEANOR case.

Putting into a port of refuge, or putting back to the port of loading, for the purpose of effecting necessary repairs always constitutes a justifiable deviation so that insurance and other contractual rights remain unaffected. (R N Hopkins; op cit @ 322). The principle of "force majeure" extends to ships seeking refuge in a foreign port for vital repairs or a strict necessity of provisioning. (The REBECCA 1929; AJIL; vol 23; @ 860). It

was also held that International customary law "declares that the local state shall not take advantage of the ship's necessity". A vessel could, as far as the owners are concerned, also be classified as a distressed vessel, if driven into port by mutineers, as the vessels entry was independent of the will or intention of the shipowner. (The MARIA; 1799; C Robb; @ 340).

The Distressed Ship and Maritime Zones

a. High Seas/EEZ

Coastal States have no jurisdiction over vessels on the high seas. The High Seas Convention of 1958, Art 2, states that the high seas are open to all States, and no State may validly purport to subject any part of them to its sovereignty. This rule is considered to be customary law, codified in the conventions prepared by UNCLOS I (United Nations Convention on the Law of the Sea) and UNCLOS III, and is a "corner-stone of International Law" (Churchill & Lowe; The Law of the Sea; 2nd Ed @ 165).

The exclusiveness of the flag states jurisdiction is, however, not absolute. It allows several exceptions, in which third states share legislative or enforcement jurisdiction. (Churchill & Lowe; op cit 169). One of these exceptions, which is relevant here, is jurisdiction in favour of a state "whose coastline is threatened with serious pollution from a foreign shipping casualty on the high seas". (Churchill & Lowe op cit 173).

The above principle or right gained rapid recognition after the

TORREY CANYON incident of 1967. (Abecassis; 1978; ch 10; @ 194). The United Kingdom intentionally destroyed the vessel on the high seas as she was a pollution threat to the British coastline. The two countries involved, the United Kingdom and France, secured the convening of a multilateral conference under the auspices of IMCO to consider the matter.

The 1969 Brussels "Intervention" Convention responded with a codification of the right to "take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or act related to such casualty which may reasonably be expected to result in major harmful consequences". (Art i(1)). In exercise of such authority, states are limited by "a standard of proportionality, balancing the interest threatened, the probability of success, and the interference occasioned by exercise (B Smith; State Responsibility and the Marine Environment; 1988; @ 219). In a subsequent 1973 protocol to the 69 Convention, substances other than oil were approved as pollutants.

The question now is whether "intervention" is a customary principle. Bowett (Self-defence in International Law (1958); @ 105), suggested the customary justification of self-defence as an explanation of the intervention right. Smith reports (op cit 220) that the 1980 session of the ILC concluded that the "TORREY CANYON action was an expression of the doctrine of "necessity"

which would excuse unlawful conduct engaged in, to prevent damage to the "vital interests" of the state outweighing the damage attendant to the breach".

The Law of the Sea Convention contains no direct provision allowing coastal states the right to take action against pollution casualties. (Churchill & Lowe; op cit @ 262). A general obligation to protect the Marine environment is found in Art 196 of LOSC (1982) which states that firstly, "States shall take ... all measures consistent with this convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using ... the best practical means at their disposal..." Art 221 (4) says that "coastal states may ... adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels..."

Churchill & Lowe (op cit 262) suggest that there must have been some doubt about "intervention" on the high seas being customary law otherwise it would not have been necessary to conclude a convention on the subject. The fact is though, that the action was, as mentioned, readily accepted by other states and this could constitute "an emerging rule of customary international law which the Intervention Convention simply crystallised and clarified."

The "High Seas" referred to in the Intervention Convention must surely be assumed to include a state's EEZ. Smith (op cit 216) groups the two zones when he discusses the Convention in Chapter

13 and Churchill & Lowe (op cit 262) point out that if "high seas" were taken literally, "this would mean that the coastal state could not rely on the powers given by the Convention and its protocol to take action in its EEZ". This would mean that the coastal state would have greater powers of self protection on the high seas than in its EEZ, which is obviously unsatisfactory.

The Intervention Convention does, it is submitted, dilute a distressed vessel's "right of refuge", but it does give a coastal state the necessary power to avoid having to bear the brunt of a maritime incident that is clearly a major pollution threat.

b. The Contiguous Zone

Art 24 of the 1958 Territorial Sea Convention provides that the coastal state may exercise in a contiguous zone, not greater than twelve miles from the baseline of territorial sea, "control necessary" to

(i) Prevent infringement of customs, fiscal, immigration or sanitary regulations within its territory or territorial sea.

(ii) Punish infringement of the above regulations committed within its territory or territorial sea.

Fitzmaurice, said "It must follow, and this is the important point, that foreign vessels in the contiguous zone are not basically subject to the laws of the coastal state, or bound to conform to them, as they would be if it were the territorial sea; nor are they, in principle, obliged to submit to the control of

the authorities of the coastal state, as they would be in the territorial sea. International practice allows, or more probably, tolerates that the coastal state should exercise certain limited powers of control in the contiguous zone in order to enable it to prevent eventual infringement within its territory or territorial waters certain of its laws". (The Law and Procedure of the International Court of Justice; 1951-54; @12)

The Territorial Seas Convention in Art 24 therefore only gives enforcement jurisdiction in the contiguous zone. LOSC (1982) in Art 33 follows the 1958 Convention on all the main principles except that the breadth of the zone changes to 24 NM. "The zone" under LOSC, is also not part of the high seas (as it was under the 1958 Convention) but now falls within the EEZ. The presumption of freedom of the high seas in the contiguous zone will therefore fall away. (Churchill & Lowe; op cit 136)

In 1970 Canada introduced its Arctic Waters Pollution Prevention Act. The Act clearly challenged Art 24 of the 1958 Convention by prohibiting waste discharge and mandating, extensive construction, design, equipment and maintenance regulations within a zone extending 100 NM from the Canadian north coast. (Section 3(i)). In response to a wave of international criticism Canada responded in a Canadian Working Paper on the Preservation of the Marine Environment (UN Doc A/AC. 138C. 111/L. 26 [1972]) by saying "A state may exercise special authority in areas of the sea adjacent to its territorial waters where functional controls

of a continuing nature are necessary for the effective prevention of pollution which could cause damage or injury to the land or marine environment under its exclusive or sovereign authority".

Churchill & Lowe (op cit 117) support the view that customary law "is wider in the contiguous zone than the conventional regime". In the TAIYO MARU case (1974; 395 F Supp 413; 70 AJIL 138 (1976) @ 117) it was held that Art 24 of the 1958 Convention was merely permissive, not exhaustive, and that contiguous zones, apparently including both enforcement and legislative jurisdiction could be established for purposes other than those detailed in the article.

Due to the fact that in the contiguous zone a state has greater powers than that in the high seas/EEZ, and the fact that state practice appears to go beyond the powers laid down, it is submitted that a distressed vessel could possibly fall under state control when she enters its contiguous zone on the basis of compromising state security. State practice has also shown that the contiguous zone is used for security purposes (Churchill & Lowe; op cit 116), and it could be argued that the Intervention Convention of 1969 could also apply in that context.

c. <u>The Territorial Sea</u>

The term "territorial waters" is used to indicate that part of the sea which extends from a line running parallel to the shore to a specified distance therefrom, commonly fixed by the majority of maritime states at three miles measured from the low-water

mark. (Colombos; op cit 75). Since LOSC 1982, the accepted width of the territorial sea has been increased to 12 NM (Art 3) and the "twelve-mile limit is now firmly established in international law, and it is likely that the practice, if not always the legislation, of all states will in the near future be brought into line with this limit" (Churchill & Lowe; op cit 67).

The legal status of the territorial sea is described by O"Connell as "Territory which ceased to be regarded as something owned but came to be regarded as a spatial area within which the faculties of sovereignty could be exercised. Police powers could be exercised outside this spatial area to the extent international law permitted, and hence jurisdiction ceased to be coterminous with territory. It now became possible to speak of "jurisdiction" over coastal waters without imparting the notion of property or territory to justify it". (International Law; 1965; @ 325). Art 2(i) LOSC states that "The sovereignty of a coastal state extends beyond its land territory and internal waters ... to an adjacent belt of sea, described as the territorial sea".

The above quotes show that a vessel in a state's territorial sea is subject to the full jurisdiction of the state as "that power exercised by the state over this belt is in its nature in no way different from the power which the state exercises over its domain on land". (Observation to Art 1: Hague Conf; Second Report; Final Act; @ 239).

Smith states (op cit 209) that "The definition of the marginal sea as a component of state territory yields two basic rules governing environmental responsibility. First, harm to the territorial sea environment constitutes harm to the exclusive interests of the coastal state. It is, therefore, the obligation of all states to prevent such harm. Moreover, the coastal state possesses undeniable standing to bring an international claim for any breach of this preventive obligation. The second fundamental conclusion is that the coastal state's obligation to prevent environmental harm to other states arising out of conduct in the territorial sea is generally the same, in terms of the standards and consequences of responsibility, as that defined with respect to any other region of the state's territory".

A distressed ship, with her potential for pollution, can, as shown, be controlled and guided fully by the coastal state even though she has a customary right of refuge. The South African Prevention and Combating of Pollution of the Sea by Oil Act 6 of 1981 states in Sec 3 Part (2) "If, while it is within the 'prohibited area' (See definition in Part 1 of the Act), a ship or a tanker sustains damage, whether to its hull, equipment or machinery, which causes or creates the likelihood of, a discharge of oil from such ship or tanker, or having sustained such damage, enters the prohibited area in such damaged condition, the Master of such ship... shall forthwith by the quickest means of communication available report to the principal officer at the port in the Republic nearest to where such ship ... sustained damage". Sec 4(1)(c) of the same Act states "If any oil is being

discharged or ... is likely to be discharged the Minister may, with a view to preventing ... the pollution of the sea ... require the Master ... to move the ship or tanker ... to a place specified by the Minister.

One right that a foreign vessel has which supercedes the absolute sovereignty of the coastal state in the territorial sea is the right of innocent passage (Churchill & Lowe; op cit 73). Colombos (op cit 113) confirms this by stating "A state's control over foreign merchant vessels is, however, subject to their right of innocent passage which was upheld by several international jurists in the past and remains equally valid today". The regime of innocent passage defined in LOSC (1982) follows closely the provisions of the 1958 Convention. Art 17 commences with a statement of the affirmative right of innocent passage through the territorial sea. Art 18 expands the definition of passage, as compared to 1958 by stating in Part 2 that "passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or are rendered necessary for the purpose of rendering assistance to persons, ships or aircraft in danger or distress". Art 19(2) provides: "Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in any of the following activities ... (h) any act of wilful and serious pollution contrary to the Convention and (l) any other activity not having a direct bearing on passage".

Art 19 appears to deny the coastal state the legal authority to prohibit passage or exercise plenary authority over vessels leaking oil unless the discharge is "wilful". It does in fact seem difficult to comprehend an argument that the preservation of aesthetic and recreational amenities, resource productivity, general economic welfare, and the well-being of the population does not constitute an interest that would be covered by the words "peace, good order or security".

"The consequences, including harm to marine resources interests, can be just as prejudicial if a foreign ship with gross negligence, or merely accidentally or inadvertently, causes them". (Schneider; World Public Order of the Environment; 1979 @ p158). Smith (op cit 200) comments that "the 'mens rea' component of the Convention's definition of innocence is consistent with neither the underlying logic nor the current state of the customary regime. A vessel's innocence, (ie right of passage), ought not be denied, absent an act or threat of pollution which materially affects, or threatens materially to affect, the coastal state's interest".

"Maritime casualty" is defined in Art II of the 69 Intervention Convention as a collision, stranding or other incident of navigation or occurrence resulting in actual or threatened material damage to a ship or its cargo". The definition could easily be used to define a distressed ship which by reasons of "force majeure" has to seek a place of refuge. At face value therefore, LOSC 1982 gives a state less power over a distressed

ship in territorial waters (by reason of her innocent passage) than in the EEZ or the high seas.

Art 19(2) of LOSC 1982 declares that only prejudicial "activities" deny a vessel the right of innocent passage. Characteristics such as the cargo on board a ship, her condition, construction and design would, it seems, not be relevant when determining a vessel's innocence. A vessel's condition and the cargo she is carrying are naturally important factors when considering the seriousness of marine pollution but Art 19(2) of LOSC 1982, in effect, denies this. This conclusion is bolstered by Art 22(2) of LOSC 1982 which confers a very limited right to prescribe sea lanes for the innocent passage of "tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous of noxious substances or materials.

CHAPTER FOUR

THE COASTAL STATE

Besides the already mentioned customary obligation to provide distressed ships with a place of refuge, the coastal state has a number of other international and local obligations (particularly pollution), which will now be examined.

International Obligations

The basic rule governing the international responsibility with regard to the marine environment commits states to ensure that no extra-territorial damage by marine pollution is caused. It is contained in Art 194, para 2 of LOSC 1982, which provides that "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."

In addition to the above, Art 235, para 1 of Section 9 of Part XII, refers directly to states incurring international responsibility and liability in this respect by providing that "States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with

international law."

Art 235, like the provisions of various other conventions relating to marine pollution provides for state responsibility for a breach of international environment obligations - ie responsibility for a wrongful act (B Kwiatkowska; The 200 mile EEZ in the new law of the sea: 1989 @ 187). This general principle may also be found in the 1972 London Dumping Convention.

ILC Draft Articles on State Responsibility list, as an example of international crimes, those resulting from "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas (1980 ILC Year Book Vol II; Art 19).

In the TRAIL SMELTER ARBITRATION (1941; III RIAA @ 1905) the Tribunal concluded that "under the principles of international law ... NO state has the right to use or permit the use of its territory in such a manner as to cause injury ... to the territory of another ...". The International Court of Justice in the CORFU CHANNEL case (1949; ICJ 4; @ 22) endorsed quite a general theme when referring to "every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states". International decisions, practice and opinion now clearly evidence the emergence of an international obligation designed to check the potentially intrusive liberty

of states with respect to environmental matters (Smith op cit 72).

In the early years of this century a doctrine of "relative sovereignty" began to emerge which challenged the "absolute sovereignty" of a state. (Smith op cit 69). In the case EL SALVADOR v NICARAGUA (1917; 11 AJIL; @ 674) it was held that "the function of sovereignty in a state is neither unrestricted nor unlimited". Larson and Jenks (Sovereignty Within the Law; 1965; @ 11) wrote "No State is entitled to invoke the plenitude of its internal sovereignty ... as the basis for freedom of action, unrestrained by law, in the international arena. By the very nature of international society, by the mere fact that no state is entire in itself, by the interdependence which is as inherent in the coexistence of States as it is in the social nature of man, every State is bound by the law of nations". It is submitted therefore that international law defines the limits of states' sovereignty.

A state, even though she has a strict obligation to the international community to safeguard her own and other coasts from pollution nevertheless, still has to honour the right of innocent passage of vessels, including, the passage rights of a distressed vessel. The enforcement power of both the port and coastal state is, however, subject to highly detailed safeguards set out in order to protect freedom of navigation from abuse by such states (Kwiatkowska; op cit 182). Arts 224-227 (LOSC 1982) provide guidelines for state action that might affect navigation

in the EEZ and Arts 223 and 228-232 (LOSC 1982) give procedural protection to foreign states. The most important of these is the flag state's right of pre-emption which enables the flag state to take over proceedings itself (within 6 months of the first institution of proceedings by the port or coastal state), except in cases of major damage to the coastal state and repeated disregard by the flag state of its obligation to enforce effectively the appropriate international rules and standards (Art 288).

Local Obligations with an International Interest

Generally, according to Smith (op cit 106), academic opinion appears similarly uniform in the conclusion that there is no obligation to prevent, in customary law, harm to a state's own territory.

There are, however, a number of instances of state practice in which an international interest in the preservation of a state's territorial environment has been recognized and specific preventive obligations accepted. This is illustrated in the wording of the London Dumping Convention which requires states party to the Convention, to prevent the dumping of specified wastes both outside and within territorial waters. The 1954 Oil Pollution Convention and the MARPOL Convention of 1973 and Protocol of 1978, appear similarly to apply discharge restrictions generally to regions including the responsible state's own territory.

Several recent regional agreements such as the Paris Convention and Protocol (1983), Kuwait Convention(1978), Helsinki Convention (1971) and the Barcelona Revised Draft Protocol for the Protection of the Mediterranean Sea Against Pollution (1976) impose restrictions on landbased marine pollution and limit, by definition, pollution of the territorial environment (Churchill & Lowe; op cit 263).

Principle 7 of the Stockholm Declaration (1972) on the Human Environment emphasizes the obligation to prevent harm in terms of the whole of the marine environment: "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea". Any suggestion, however, that a state's management of its territorial resources were to be qualified encountered substantial opposition. (Sohn; 1973; 14 Harv ILJ @ 423). Principle 21, the negotiated conclusion as to legal responsibility, was accordingly worded; "States have, in accordance with ... international law, the sovereign right to exploit their own resources ... and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". It can be seen therefore, that there is no international <u>legal</u> responsibility for injury to environmental resources within state territory.

Art 192 of LOSC (1982) commences the marine pollution provisions

with an assertion of the same all-inclusive "obligation to protect and preserve the marine environment" agreed on in Stockholm. Arts 210 and 211 proceed from this general obligation by stating that there is a duty to prevent pollution of the "marine environment from dumping and vessels, respectively.

The basic relationship between a state's territorial independence and its environmental obligations is defined in Art 193; "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment". Smith (op cit 109) comments that the environmental duty juxtaposed to sovereign resource independence refers to the protection of the entire "marine environment", not just to the prevention of extraterritorial harm.

The Right of the Coastal State not to be Prejudiced

Root wrote in the North Atlantic Fisheries Arbitration (1910; XI RIAA; @ 2006) that the freedom of the seas "when it approached the shore, met with another principle, the principle of protection, a new independent basis and reason for the modification, near the shore, of the "principle of freedom". The sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries".

Art 19 of LOSC 1982, when discussing innocent passage, mentions the problem of prejudice, to a coastal state from the presence of foreign ships. Devine (op cit 85) states that "Art 19 in effect provides that passage which is "prejudicial to the peace, good order or security of the coastal state" will not be innocent. It is therefore not allowed".

A French writer (Fauchille; Traite de Droit International Public; Sec 242; 1922) said "A State incontestably has the right to take all measures designed to guarantee its existence against the dangers which menace it". An American writer (Hyde; International Law; 1922; Vol I; @ 106) said similarly "when acts of self preservation on the part of a State are strictly acts of self defence, they are permitted by the law of nations, and are justified on principle, even though they may conflict with the normal rights of other states". At page 119 he adds "This freedom of action is due not merely to the circumstance that the continuance of the life of the State demands extraordinary measures, but rather to the fact that its safety is jeopardized by the essentially wrongful conduct of another".

In the case of the VIRGINIUS (II Moores Digest; @ 895 - 890) the Spanish Government arrested the ship on the highseas carrying an insurgent army to Cuba in 1870. The USA and United Kingdom protested but the Spanish Government justified the act expressly on the ground that the right of self-preservation was superior to the normal right of freedom of the seas. The British Government agreed with this principle in the case of the MARY

LOWELL (1879) by saying that "much may be excused in acts done under the expectation of instant damage in self-defence by a nation as well as an individual". (II Moore's Digest; p983).

In the Fur Seal Arbitration (I Moore's Arbitrations; 1902; @ 892) Mr Phelps of the United States asserted the right of a nation to enforce its laws beyond the marginal sea, "if they are reasonable and necessary for the defence of a national interest or right" and stated that in such cases other states would acquiesce, but if they did not, the littoral state might enforce such laws at it discretion.

In the more recent case of THE DUIZAR (1966) France asserted a right to visit and search on the high seas ships suspected of carrying arms to Algeria during the emergency of 1956-62. The Ministry of Defence argued that the action was justified by France's right of self-defence, but the French action was opposed by many states whose ships were affected. The explanation for the distinction between the responses to the VIRGINIUS and the Algerian incidents probably lies in the development, in the intervening period,of rules limiting the use of force generally, and notably Art 51 of the UN Charter which arguably limits the right of self-defence to cases of armed attack. (Churchill & Lowe; op cit 174)

Self-defence or prejudice to the coastal state as giving a reason for the coastal state to refuse entry or to expel a ship in the exercise of self help could, in theory, be of different kinds

(Devine; op cit 90,91). These are in summary:

a. Prejudice to Security: The ship in distress might pose a threat to the security of the coastal state. It might be in the vicinity of sensitive and strategic naval installations and therefore be in a position to obtain, and later to pass on, information which might be prejudicial to the coastal state. Devine qualifies the above point by stating that in most cases a state will have an opportunity to place the ship in a more acceptable position of refuge but, it is submitted, vessels which have suffered sufficient damage to claim "distress" status, are normally looking for the shortest route to a place of refuge.

b. Prejudice to Good Order: The ship in distress might pose a threat to the good order of the coastal state in several ways such as trafficking in drugs, smuggling or landing illegal immigrants. It might even be landing insurgents or arms for insurgents. It could pose a health threat and in all these cases a state would be entitled to take reasonable measures to safeguard its interests. Whether a state could expel a ship or refuse it entry in a way that would endanger it, or persons or property on board, would not be difficult to justify by way of self help. A state would, have to take less extreme measures to protect its legitimate interests.

c. Pollution Prejudice: An example of pollution prejudice

would be the following: A ship is leaking oil and needs repairs. The weather is such that if she leaves (or is refused entry) she may founder and perhaps cause a greater oil spill. The prejudice to the ship, to persons or property on board, and to the environment in general, which results from leaving (or not entering), may far exceed the threat posed to the environment of the coastal state from the minor leak. If, however, the ship were leaking oil substantially, the case for expulsion would be strong but not at the expense of the lives of the crew. Each case similar to this would have to be weighed on the facts available. Self-help by way of expulsion is only available where the coastal state's environmental interest is not outweighed by a greater interest.

It is submitted that any actions taken by a state would have to be reasonable so that all the costs could be recovered. Jessup (op cit 194) states that international customary law "declares that the local State shall not take advantage of the ship's necessity". Over-zealous actions by a State against a distressed ship can subject the State to damage claims. In the case of THE AUGUSTA (1887; 6 Asp MC; @ 161) an umpire awarded damages to American claimants as THE AUGUSTA was forced to take refuge in a Mexican port after being placed in great danger caused by damage suffered in a storm. The cargo was unloaded to permit repairs and permission to reload was denied over a long period on the basis of <u>unfounded</u> suspicions of intent to smuggle. Another case was that of the British ship YORK (II Moore's digest

362) driven ashore and stranded on the North Carolina coast through stress of weather. She was destroyed by two United States cruisers to prevent her falling into the possession of the Confederate forces. The American and British Claims Commission under the treaty of May 8, 1871 unanimously awarded US$11935 damages.

CHAPTER FIVE

PRESERVING SAFETY OF NAVIGATION

Another aspect of port and state enforcement jurisdiction is the question of preserving the safety of navigation. Along with fishing, navigation is surely the oldest use of the sea and it remains logically one of the most important. While aircraft may have replaced ships as the prime means of conveying people across the oceans, ships are still the most important means of transporting goods on such routes.

There is a network of international conventions imposing safety standards and regulations which has arisen in order to ensure that navigation rights are exercised in an orderly and safe manner, and by implication, reduce the number of ships having to seek refuge. In recent years there has been a tremendous increase in the number of ships which have made the world's busiest waterways particularly hazardous. The total world tonnage has increased five fold between 1948 and 1978 (Churchill & Lowe; op cit 204). The size of ships has also increased enormously with consequent reductions in manoeuvrability and the 1972 Collision Regulations had to provide extensive new regulations on traffic separation schemes (Rule 10).

Navigation rights and safety obligations imposed by international law cannot be enjoyed by or imposed on ships as such, since ships are not subjects of international law (Churchill & Lowe; op cit

205). Ships derive their rights and obligations from the state whose flag they fly and whose nationality they bear. Art 5 of the High Seas Convention states that "the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag".

Art 10 of the same convention provides that every state shall take such measures for its vessels as are necessary to ensure safety at sea with regard to communications, the prevention of collisions, crew conditions and the construction, equipment and seaworthiness of ships in conformity with "generally accepted international standards". It is obviously in the interests of shipowners, seafarers and the community at large that the transportation of people and goods by ships should be made as safe as possible, and that accidents such as foundering, stranding or collision should be kept to the minimum. LOSC (1982) adopts this same basic approach, but sets out in more detail the duties of the flag state (including for example, the duty to maintain regular checks upon the seaworthiness of ships) to ensure that crews are properly qualified and to hold inquiries into shipping casualties. (LOSC; Art 94).

Each state therefore remains free in theory to apply its own legal standards to issues relating to seaworthiness but there would surely be chaos if these standards varied widely or were incompatible. It is also a fact that improved safety measures usually involve extra costs for shipowners and most states would naturally be reluctant to impose stricter safety legislation on

their shipowners unless other states do the same. For these reasons, therefore, the international community has developed a set of uniform international standards to promote the safety of shipping.

The main convention dealing with seaworthiness of ships is the already mentioned International Convention for the Safety of Life at Sea (1974). This Convention contains a large number of regulations laying down standards relating to the construction of ships, fire-safety measures, life saving appliances, the carriage of navigation equipment and other aspects of the safety of navigation. These standards are to be prescribed by contracting states for their vessels and enforcement lies largely with the flag state but port states have a limited degree of control (Churchill & Lowe; op cit 211).

Coastal states are entitled to see that ships of other contracting parties in their ports have on board valid certificates of the kind required by this Convention. Where "there are clear grounds for believing that the condition of the ship or of its equipment does not correspond substantially with the particulars of any of the certificates", or where a certificate has expired or where the ship and its equipment do not comply with the provisions of Regulation 11 of Chapter 1 of the 1974 Convention (which requires the condition of a ship and its equipment to be maintained after a survey), the authorities of the port state "shall take steps to ensure that the ship shall not sail until it can proceed to sea or leave the port for the

purpose of proceeding to the appropriate repair yard without danger to the ship or persons on board (Chapter I; Regulation 14).

As well as the SOLAS Convention, there are three other IMO conventions which are concerned with the seaworthiness of ships. The International Convention on Load Lines of 1966 deals with the problem of overloading, often the cause of casualties to ships, by prescribing the minimum freeboard to which the ship is permitted to be loaded. Enforcement of the Convention is very similar to that of the SOLAS Convention, including the power of the port state to obtain ships which lack an appropriate and valid certificate. The 1971 Agreement on Special Trade Passenger Ships, together with its Protocol of 1973, deals with the safety of ships carrying large numbers of unberthed passengers in special trades, such as the pilgrim trade, while the 1977 International Convention for the Safety of Fishing Vessels (not yet in force) lays down regulations governing the construction and equipment of fishing vessels.

As mentioned before, the enforcement of these IMO conventions remains a problem. Churchill & Lowe (op cit 217) state "a basic defect of these IMO conventions is that, for the most part, enforcement lies in the hands of the flag state. Thus, if that state is unable or unwilling to enforce these standards - and this is allegedly usually to be the case with flags of convenience (except perhaps now Liberia), although flags of

convenience states are not the only flag states culpable in this regard - then, however admirable the standards may be in theory, they will in practice be ineffective in dealing with the problems at which they are aimed".

The current drawbacks of flag state enforcement are to some extent overcome by the powers of control given to the port state by some of the IMO conventions. A similar approach is found in ILO Convention No. 147 of 1976 concerning Minimum Standards in Merchant ships. Under this convention, a state which believes that a foreign vessel in one of its ports does not conform to certain specified safety standards may inform the flag state and "may take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health", provided that it does not "unnecessarily detain or delay the ship". (Art 4).

It would seem that under customary international law, port states have, and in practice exercise, the competence to inspect foreign vessels in their ports and detain them if unsafe, so that the ILO and IMO Conventions essentially do no more than consolidate and clarify existing law and encourage port states to use their powers. Consolidating this line of thinking even further, but still in accordance with customary international law, the maritime authorities of fourteen West European states signed a Memorandum of Understanding on Port State Control on 26 January 1982. Under this memorandum, each authority undertakes to maintain an effective system of port state control to ensure that vessels visiting its ports comply with the main IMO safety

conventions discussed above, ILO Convention No. 147 as modified by the 1978 Protocol, to the extent that such conventions are in force and the port state is party - but regardless of whether the flag state of the ship concerned is a party. Under the memorandum each authority must inspect a minimum of 25% of the ships using its ports. Guidelines for inspection are set out in Annex 1. Where an inspection reveals deficiencies what are clearly hazardous to safety, health or the environment, the hazard must be removed before the ship is allowed to proceed to sea.

Art 94(6) of LOSC (1982) provides that a state which has clear grounds for believing that a flag state has not exercised proper jurisdiction and control over one of its ships may report the facts to the flag state, and that "upon receiving such a report, the flag state shall investigate the matter and, if appropriate, take action necessary to remedy the situation".

It is submitted that ships seeking refuge because they have sustained damage will consequently not meet the safety standards laid down by the conventions and will therefore find themselves detained. "Force majeure" immunity will logically not apply since, as shown, the port states are now tasked with having to maintain standards in conjunction with the flag states. A port state which is slow or indifferent to maintaining standards of seaworthiness will surely also look rather hypocritical if it were to apply strict measures of self defence or self-help when confronted by a potentially hazardous distressed ship.

CHAPTER SIX

PORTS

What is a Port ?

A very wide range of activities are carried out every day in any port in the world. To describe a port of any reasonable size as a "world of its own" would, in the writer's experience, be realistic. "Under a port authority's administration in a major port, are to be found surveyors, repair yards, dry docks, maintenance companies, chandlers, stevedore and tallying firms, traffic control officials, harbour police, pilotage services, towage services, etc., working in co-operation with one another towards the ultimate aim of providing an efficient, safe and valuable service to ships of all types and sizes using the port facilities". (Hill; op cit 390).

In the case of R v HANNAM (1886; 2 TLR; @ 234) Lord Esher said "a harbour in its ordinary sense was a place to shelter ships from the violence of the sea, and where ships were brought to load and unload goods". In HUNTER v NORTHERN MARINE INSURANCE COMPANY (1888; 13 App Cas 717) Lord Herschel said "A port is a place where a vessel can lie in a position of more or less shelter from the elements, with a view to the loading or discharge of cargo". At common law, therefore, "harbour" and "port" seem to be synonymous for most purposes.

A question which occasionally arises in relation to the

definition of "harbour" is whether a particular area of water is sufficiently enclosed or sheltered by land to be regarded as a harbour. The United Kingdom Harbour Act of 1964 defines harbour in sec 57(1) as "any harbour, whether natural or artificial, and any port, haven, estuary, tidal or other river or inland waterway navigated by sea-going ships".

"Statutory powers are necessary to manage a harbour as the construction and maintenance or harbour works below high water mark may be open to challenge in the courts, unless such construction and maintenance is authorized by statute, on the grounds that the works interfere with the public right of navigation, and furthermore, harbour authorities for significant harbours need to have powers to regulate ... the movement and berthing of ships within the harbour. Adequate powers for these purposes can only be obtained by or under statute". (Douglas and Geen; The Law of Harbours and Pilotage; 1989; @ 2).

The Right of Entry

The sovereignty, of a state, should not be construed as conferring upon it unlimited power to prohibit the use of its ports and harbours to foreign nationals. This would imply a neglect of its duties for the promotion of international relationships, navigation and trade which customary international law imposes upon it. (Colombos; op cit 150)

Churchill and Lowe (op cit 52) state "the existence of sovereignty over internal waters and absence of any general right

of innocent passage through them logically implies the absence of any right in customary international law for foreign ships to enter a state's ports. There is, indeed, very little support in state practice for such a right, except for ships in distress seeking safety, which enjoy a right of entry". Churchill & Lowe however follow up this statement later on by saying "it is generally admitted that a state may close even its international ports to protect its vital interests without thereby violating customary international law, and it would be difficult to establish that any interests invoked by a state were inadequate to justify closure. Furthermore, states have a wide right to prescribe conditions for access to their ports".

In several cases it has been indicated that distress constitutes sufficient excuse for entering a blockaded port and exempts the vessel from the usual penalty attaching thereto (Jessup; op cit 196). In the case of the DIANA (1868; 7 Wall; @ 354), Field J. said "It is undoubtedly true that a vessel may be in such distress as to justify her in attempting to enter a blockaded port. She may be out of provisions or water, or she may be in a leaking condition, and no other port be of easy access. The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable doubt." Sir William Scott said in the same case "Nothing less than an uncontrollable necessity, which admits of no compromise, and cannot be resisted, will be held a justification of the offence. Any rule less stringent than this would open the door to all sorts of fraud."

In a later case, the NUESTRA SENORA DE REGLA (1872; 17 Wall; @ 29) the Supreme court held that a vessel which had put into the blockaded port of Port Royal in actual distress and want of coal, was clearly "not lawful prize of war or subject of capture, and the corporation which owned her is doubtless entitled to fair indemnity for the losses sustained by the seizure and employment of the vessel."

Although the above two cases are centred around a "blockaded port" it is submitted that the principles of a distressed ship's right of entry are the same whether the port is blockaded or not.

The general principles applicable to ports, harbours and roadsteads are capable of being summarised as follows: (Colombos; op cit 150)

a. In time of peace, commercial ports must be left open to international traffic. The liberty of access to ports granted to foreign vessels implies their right to load and unload their cargoes. It is submitted that this point is, as shown, in conflict with LOSC (1982).

b. No port can ever be shut against a foreign ship seeking shelter from tempest or compelled to enter it in distress.

c. Purely military ports may be closed to all foreign warships or merchant vessels on the ground of justifiable precaution.

d. Entry of ships of war even into commercial ports may be subjected to certain restrictions both as regards the number of vessels allowed to enter and the length of their

stay.

e. Each state has the right to enact laws controlling navigation within its national waters.

The above points show that the entry of foreign vessels may therefore be reasonably regulated provided international law is not unreasonably compromised and no discrimination is made between states so as to favour some at the expense of others. On December 9, 1923, a Convention and Statute relating to the "International Regime of Maritime Ports" was signed at Geneva, providing that the sea-going vessels of the contracting parties shall enjoy on a basis of reciprocity, equality of treatment in, and freedom of access to, the maritime ports of contracting parties. The United Kingdom together with several other states (33) have ratified the Convention (Churchill & Lowe; op cit XXI).

Port State Legislative and Enforcement Jurisdiction

In the case of the INDUSTRIA (1869; Forsyth; Cases and Opinions on Constitutional Law; @ p399, 400) which put into Jamaica in distress, Attorney General Legare maintained "that no authority or principle, or analogy of the law of nations, will justify the enforcing on board a foreign ship, thus involuntarily within the jurisdiction of a foreign nation, the municipal law of that nation, to the utter subversion of authorities and rights undoubtedly established and guaranteed by the municipal law of its own country. The principle is, that if a vessel be driven by stress of weather, or forced by "vis major", or, in short, be compelled by any overruling necessity to take refuge in the ports

compelled by any overruling necessity to take refuge in the ports of another, she is not considered as subject to the municipal law of that other, so far as concerns any penalty, prohibition, tax or incapacity that would otherwise be incurred by entering the ports; provided that she do nothing further to violate the municipal law during her stay."

International law demands that distressed ships be given a degree of immunity from coastal state jurisdiction. They are entitled to be excused liabilities which arise inevitably from their entry in distress - for eg. liability to pay import duties on their cargo or liability to arrest. (Churchill & Lowe; op cit 57). Although the above shows that distressed vessels do have a degree of immunity, it is submitted that certain enforcement jurisdiction must apply to all vessels, regardless of their condition in the interests of self-help and the enforcement of international pollution and navigation rules. In the more recent case of PEARN v SARGENT (1973; 2 AC; @ 141) Lord Widgery said of Sec 52 of the United Kingdom Harbours, Docks and Piers Clauses Act 1847 that "the function of the Harbour Master is to regulate traffic; after all it is a public harbour where the public have a right to be, and it is not the Harbour Master's function to keep them out. Of course, there will be cases when he has to go beyond these simple functions; of course there may be cases where necessity arises and he has to impose wider prohibitions for a particular time ..."

Given the highly dangerous nature of some modern cargoes, and the

catastrophe which could result if, say, a ship with defective steering collided with a gas carrier, the United Kingdom felt that there ought to be a clear power for a Harbour Master to prohibit a ship from entering or to require a ship to leave a harbour where, in his opinion, this was necessary to avoid a serious accident. This was the genesis of the United Kingdom Dangerous Vessels Act of 1985 (Douglas & Geen; op cit 42). It is submitted that a damaged vessel seeking refuge, which is a potential pollution or fire threat, would also be classified as a "dangerous vessel".

Sec 1 of the Act enables a Harbour Master to give directions prohibiting the entry into, or requiring the removal from, the harbour of any vessel if, in his opinion, the condition of that vessel, or the nature or condition of anything it contains, is such that its presence in the harbour might involve:

a. grave and imminent danger to the safety of any person or property; or

b. grave and imminent risk that the vessel may, by sinking or foundering in the harbour, prevent or seriously prejudice the use of the harbour by other vessels.

In deciding whether to give directions under Section 1 in any particular case, a Harbour Master must have regard to all the circumstances of that case and, in particular, to the safety of any person or vessel, whether in or outside the harbour, and including the vessel which would be the subject of his directions.

It is submitted that the purpose of the Act is to enable the Harbour Master to take action to avoid a catastrophic accident. It does not give him 'carte blanche' to exclude ships from the harbour. Douglas and Geen (op cit 143) state "It does not entitle a Harbour master to exclude a ship simply because, in his view, oil from the ship may pollute the harbour - although, if he has reason to believe that a ship which proposes to enter the harbour does not comply with the requirements of the United Kingdom Merchant Shipping (Prevention of Oil Pollution) Regulations 1983, he may, and indeed he must, under Regulation 33 of those Regulations, report the matter to the Secretary of State, who may deny the ship entry to port if he is satisfied that it presents an unreasonable threat of harm to the marine environment".

"The universal enforcement jurisdiction of a port state is the most important innovation of the enforcement system established by the LOSC (1982) with regard to pollution from ships and a notable achievement of that Convention from an environmental perspective. This is particularly so because, unlike coastal state enforcement, the port state's enforcement, while strengthening compliance, involves no interference with the freedom of navigation, for it applies only to vessels being voluntarily in the port of that state" (Kwiatkowska; op cit 180).

Art 218 empowers the port state to investigate, and where the evidence so warrants, institute proceedings with respect of "any discharge" from a vessel "outside" that state's jurisdiction, but

only for violation of applicable international rules and standards. The port state may also prosecute discharge violations committed within maritime zones of the other states, but only at the express request of such other state, the flag state or a state damaged or threatened by a violation, or when a violation is likely or has caused pollution within the maritime zones of a port state. (Art 218; para 2). More recently here, when a port state has ascertained that a vessel violated international rules and standards relating to seaworthiness of vessels (Standards on constructions, design, equipment, operation and manning of ships) and thereby threatens damage to the marine environment, it is obliged, under Art 219, to take administrative measures to prevent the vessel from sailing. Such measures are to be taken "as far as practical" and may include permitting the vessel to proceed to the nearest repair yard. Upon removal of the causes of a violation, the port state must permit the vessel to continue immediately. Art 220(1) follows customary international law, though supplementing it as a result of the introduction of the EEZ, by providing that a state may arrest and prosecute a vessel in one of its ports which is alleged to have violated that state's pollution laws or applicable international rules in its territorial sea or EEZ.

The LOSC (1982) provisions represent a significant extension of the rules of MARPOL 1973/1978, which provide, in Art 4-7, only for an inspection by a port state, and merely in relation to discharge violations occurring within the national jurisdiction. MARPOL (Art 9; para 2) does say however, that the convention is

without prejudice to "the codification and development of the law of the sea" or to "the present or future claims and legal views of any state concerning the law of the sea and the nature and extent of coastal and flag state jurisdiction". Para 3 of Art 9 also stipulates that the term jurisdiction is to be applied in the light of international law in force at the time of application or interpretation of the MARPOL Convention.

Economic Considerations

It is well established that a Harbour Authority will be liable if they, or their servants, fail to exercise reasonable care and skill in carrying out the Harbour Authority's functions (Douglas & Geen; op cit 18). It was held in MERSEY DOCKS AND HARBOUR BOARD TRUSTEES v GIBBS (1866; LR 1 HL; @ 93) that Harbour Authorities are liable for damage occasioned by their failure to take reasonable care that their dock, so far as they keep it open for public use, may be used by those who choose to navigate it without danger to their lives or property. In the case QUEEN OF THE RIVER STEAMSHIP CO v RIVER THAMES CONSERVATORS (1906; 96 LT) it was held however that a Harbour Authority is not liable for damage caused by an obstruction in their harbour which they are not aware of and could not reasonably be expected to be aware of.

In a charterparty contract the preliminary voyage will usually be to a port specified in the contract. The charterparty may give the charterer the option to name a port, or to proceed to a "port or ports as ordered ... and it will be appreciated that such an option must be exercised within a reasonable time, for

if the vessel is kept waiting, heavy overhead charges are incurred." (Chorely & Giles; op cit 220)

Scrutton on Charterparties (1984; 19ed; @ 125) states that where the charterer does not expressly undertake to nominate a safe port, there is an implied obligation to do so. In the case of LEEDS SHIPPING CO LTD v SOCIETE FRANCAISE BUNGE (1958; 2 Lloyds Rep; 127 @ 131) Sellers LJ defined a "safe port" as "a port that will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship".

Hill (op cit 394) states that "if the owner of the harbour property is a private owner, he is liable to shipowners in the same way as an occupier of premises on land. The harbour-owner must make the premises as safe as care and skill can reasonably make them. This principle is based on the commercial consideration that this is his fundamental duty if he has agreed that for financial consideration persons have the right to enter upon the property for a purpose which both parties mutually contemplate". In the case of BULK OIL SS CO LTD v TEES CONSERVANCY COMMISSIONERS (1948; 81 Ll L Rep; @ 479) the court said that the obligation is not an abstract warranty. It is an obligation to use reasonable care to see that the port is reasonably safe for those coming there and navigating it on lawful occasions and for reward to the authority. Liability

depends on the special individual relationship arising with each ship entering the authority's jurisdiction and is a duty to be considered analogous to the ordinary common law duty existing as between invitor and invitee.

The above discussion shows that a safe available port is essential for the smooth operation of commercial shipping and that a Port Authority has an obligation to ensure that the port meets the reasonable expectations of the shipping operators. Clogging a port with "force majeure" vessels, especially those which have become distressed due to negligence can obviously become a headache for a Port Authority. At the time of writing the SAN MARCO (mentioned earlier) has recently occupied two hundred and fifty metres of quay space in Cape Town for three months and it seems that she will now have to be sold which means that she should be in port for at least another month. According to the PORTNET tariff book of 1993, for a ship of the size of the SAN MARCO, there is an initial charge of about $5000.00 for a docking. Substantial revenue can therefore be lost when there is a poor turnover of shipping due to congestion. It is submitted that a port will not be able to turn away a distressed vessel for commercial reasons but the Port will be fully entitled to control and manage her so that she causes as little disruption as possible.

CHAPTER SEVEN

CONFLICT OF INTERESTS

The Salvor

The right of refuge of the distressed ship and the rights and international obligations of the state can, it is submitted, be a source of conflict. Salvors are also frequently involved in distress cases and their objectives are to deliver a distressed vessel to safe waters as "the ultimate outcome must be successful in some degree before a reward can be paid, ... as salvage is based on the simple idea that a reward is paid out of the fund preserved as a result of the property having been saved" (Hill; op cit 195). Lord Phillimore said in the case of SS MELANIE v SS SAN ONOFRE (1925; AC; @ 246-262) that "success is necessary for a salvage award. Contributions to that success, or as it is sometimes expressed, meritorious contributions to that success, give a title to a salvage award. Services, however meritorious, which do not contribute to the ultimate success, do not give a title to salvage reward. Services which rescue a vessel from one danger but end up leaving her in a position of as great or nearly as great a danger, though of another kind, are held not to contribute to the ultimate success and do not entitle to salvage reward".

The principle of "no cure - no pay" in salvage can also, it is submitted, be a source of conflict between the salvors and the coastal state. Salvage principles mean that salvors have to be

positive and confident in their work and an over-cautious coastal state which is taking its pollution and self help-rights to the limit is naturally not going to be received very well by salvors trying to deliver their "prize" to safe waters. Local salvors are, however, surely an asset to a state as they provide the expertise to protect a coastline by being able to tow potentially hazardous vessels to safety or, if the situation warrants it, removing them to a safe distance.

The MIMOSA Incident

A coastal state and local salvage companies would logically benefit from mutual respect and co-operation.

A good example of this was the damaged MIMOSA. The 357 000 dwt Norwegian tanker was about 20NM south of Cape Recife in August 1991. Due to weather damage (August 1991), hydraulic lines to her steering gear brakes fractured, leaked oil and caused her rudder to thrash about and finally to lock into a "hard-a-starboard" position.

Local salvors, Pentow Marine, were called and a Lloyds Open Form was signed. The Pentow Marine salvage tugs WOLRAAD WOLTEMADE and JOHN ROSS sailed from Cape Town. Despite the extreme conditions, the tugs made good time in winds in excess of 100 knots and 23m swells (weather recorded by the Mossgas production platform).

A tow was secured when the MIMOSA was only about 12 NM from the "Riy Bank" and drifting fast. Shortly before the tow was

connected the ship started to break up. A 230m² hole appeared in the starboard side, fortunately in way of an empty ballast tank, and cracks developed on the port side.

With a salvage tug at each end, the tanker was taken about 35 NM out to sea and held into the weather while a "Kuswag" pollution vessel, also owned by the salvors, dealt with the oil spillage which was estimated to be only a few hundred barrels and not significant.

When the situation had been assessed and permission obtained from the Department of Transport, the ship was taken into Algoa Bay with a draft of 22,5m. It was then decided to perform a ship-to-ship transfer of the cargo of oil. Fortuitously, a sister ship of the MIMOSA, the HANSA VEGA, was nearby and was diverted to Algoa Bay.

Meanwhile, Pentow Marine prepared for the ship-to-ship transfer. Whilst the two big salvage tugs stood by, the CAUSEWAY SALVOR (another vessel in Pentow Marine's fleet) was dispatched from Cape Town with the necessary transfer equipment, the PENTOW MALGAS from Mossel Bay and two Pentow Marine Kuswag pollution vessels. The salvage team, which included ten divers, were flown from Cape Town. Six giant fenders were rigged on the port side of the MIMOSA in preparation for the two 362m ships to be alongside each other. The WOLRAAD WOLTEMADE was secured to the stern of the ships to keep them bow to sea and swell.

Pumping began at a rate of 9000 tons per hour and increased to 11 000 tons per hour. Four days later the job was completed. In the meantime efforts had been made to bring the rudder into the amidships position. When this failed, the problem was eventually solved by the JOHN ROSS putting "up a wire" and heaving the rudder into position. When the job was completed, the HANSA VEGA sailed for Rotterdam with the cargo, and the WOLRAAD WOLTEMADE with the MIMOSA in tow, for Dubai. (Details supplied by SA Shipping News and Fishing Industry Review; 1991; Vol 46; No.4).

It is submitted that the above incident is almost a textbook case of co-operation between parties and professionalism on the part of the salvors and ships' crews. Such was the success of the salvor's work that they received, it was thought by Pentow Marine, to be a world record salvage award. The right of refuge principle was also perfectly observed. The advantage of having salvors with local knowledge is also evident and there was no controversy with the authorities.

One could argue however, that the permission that was obtained from the DOT to enter Algoa Bay and the fact that she was initially ordered to go 35NM offshore, was a contravention of the ship's right of innocent passage. Algoa Bay is not a closed or historical bay and the waters are therefore territorial and not internal. (Art 3; LOSC). The MIMOSA's oil leak was, as stated, not significant and the only way that the DOT could justify their control over her movements in international law was if she was

reasonably perceived to be a serious threat to the environment. (See "Distressed Ship and Maritime Zones (Territorial Seas); @ Chap 3 above).

Unfortunately, as will be seen shortly, events do not always proceed as they did in the MIMOSA incident, but it is hoped that the course of events surrounding her distress and subsequent entry into sheltered waters can serve as a reminder of what can be achieved, even in very difficult and hazardous conditions.

The RIVER PLATE Incident

The relationship between the salvor, the state and the master/owner of the distressed ship surrounding the principle of "right of refuge" can be well illustrated by the damaged 131,260 ton (deadweight) bulk carrier, RIVER PLATE. The vessel was en route from Montevideo to the Far East when, on the 21st July 1993, she reported through a Lloyds Intelligence report that she had a hole in the port side and was taking water. The captain of the vessel was concerned about the structural integrity of the ship (she was fully laden with iron ore) and requested helicopter service to remove the non essential crew members and asked the South African authorities for permission to enter False Bay so that she could undertake repairs. (Details supplied by Mr G Needham; Pentow Marine).

"False Bay" lies to the west of Cape Point. It is some 30km wide between its natural entrance points, Cape Point and Cape Hangklip, and covers an area of 900km^2. It lies some 25km south

of central Cape Town, with all its attendant facilities. False Bay is a haven for shipping, particularly in winter, as it offers shelter from the north-west wind which prevails at that time of the year". (Devine; op cit 31)

The waters of False Bay are internal waters as the bay fits the definition of a bay found in Art 10 of LOSC (1982). Although the bay has not been "closed off" by a closing line, this gap could be filled by the courts applying international customary law which has been held "to be part of the common law of South Africa". (NDULI v MINISTER OF JUSTICE; 1978; 1 SA 893 (A)). International law states that "bays have a close connection with land and that it is more appropriate that they should be considered as internal waters rather than territorial sea". (Churchill & Lowe; op cit 33) In the NDULI judgement, Rumpff CJ stated that "according to our law only such rules of customary international law are to be regarded as part of our law as are either universally recognised or have received the assent of this country (SA)".

Prior to the RIVER PLATE affair, False Bay recently had three tankers seeking refuge. These were THE ARABIAN SEA (315,695dwt) and THE STAVROS G.L.(350,000 dwt) which both got into difficulties in July 1989, and THE ALBOREZ which sought refuge with a damaged bow in April 1991. All three tankers were sufficiently repaired (see South African Shipping News, October 1989 and The Argus 18 April 1991), and in the case of THE ALBOREZ, a major ship-to-ship oil transfer was completed without

incident. The ALBOREZ case will be discussed shortly.

Although the entry into False Bay of the above three ships had gone smoothly, the incidents did raise "an outcry from people living near the coast in question: they wished the ships to be removed from the bay, no doubt having in mind the potential pollution threat represented by the presence of oil tankers, particularly leaking ones". (Devine; op cit 82) The Navy initially refused THE STAVROS G L entry into the bay and THE ALBOREZ was described as a "pollution time bomb" (Devine; op cit 82). The Argus (18 April 1991) quoted Mr Jannie Momberg MP as saying that he wanted "to reiterate (his) strongest objections against bringing tankers into False Bay".

It was against this background that the South African Department of Transport (DOT) had to decide a course of action for the distressed RIVER PLATE. The Principal Officer for the Marine division of the DOT advised the vessel that the State would first have to inspect the vessel and that she would have to be escorted to False Bay by a sufficiently strong tug. Pentow Marine who were monitoring the situation from the beginning, offered the vessel a Lloyds Open Form as the master began to fear that the ship might sink. The owners rejected the offer outright, and when Pentow Marine pointed out that the master was evacuating crew members, the owners said "that the master was mad" and that they had no faith in him. A deal was however struck on a daily hire rate and THE RIVER PLATE was accordingly escorted into False Bay. (Details supplied by Pentow Marine).

Once she was safely anchored, the owners of THE RIVER PLATE then attempted to dismiss the tug claiming that the danger was over and that the attendance of a salvage tug was totally unnecessary. The DOT reacted swiftly by threatening to expel the vessel if she dismissed the tug as their Port State inspection had found that the Master's damage report was grossly inaccurate. The State Surveyor reported that "the port side hull plating amidships in holds three and five was found adrift from the frames and panting" (Seatrade Week Newsfront (SWN) 30 July-3 August 1993, Vol XII No 31). To complicate the matter further, a repair team was found on board the vessel having sailed with the ship from Brazil, whose job it was to conduct repairs on the voyage. Local inspectors told SWN that "the ship had numerous prefabricated web frames already on board along with a 14-man "riding squad". Moreover sea scaffolding had been erected in several holds and large sections of frame had been replaced in other parts of the hull. Whether or not work was being done during the laden voyage, the operator was clearly aware that the structure of the vessel had deteriorated (SWN; No 31).

Mr Simon Cooper of Fairbridge, Arderne & Lawton Inc., who was appointed to represent the owners in an interview with the writer, (13 Jan 94), defended the owners' decision to dismiss the tug as he felt that the South African authorities over-reacted on their insistence of having a tug on standby and that the Government's attitude to distressed ships (particularly those entering False Bay) is "with all due respect, dogmatic and without due regard to all the facts". The Principal Officer of

the DOT (Cape Town), when asked about the "status quo" of False Bay said that "it is now a standard rule that any distressed ship that is given permission to enter False Bay will be obliged to take a tug". (Interview with the Principal Officer of Cape Town 13 Jan. 1994).

The refusal of THE RIVER PLATE'S owners to hire a standby tug caused further problems for the DOT. The Principal Officer stated that "we are caught between the devil and the deep blue sea" (SWN; No 31) and that THE RIVER PLATE was "in breach of the agreement (to take a standby tug) and laid down conditions ... so I had no alternative other than to kick the ship out of the bay". (Cape Times, July 29 1993).

The attitude of the DOT to a distressed vessel is clearly influenced by the circumstances surrounding the case. The Principal Officer (Cape Town) admitted that the fact that the ship misled him through its damage report, the owner's sudden refusal to hire a tug and that she only had a tired skeleton crew on board, had caused him to take "no chances" and he gave the ship the ultimatum of complying with his conditions or leaving False Bay.

THE RIVER PLATE, it is submitted, was not seaworthy to do her contemplated voyage and it seems very unfair that the State should be pressurised by her owners. On the other hand, whatever the circumstances, a state cannot, as mentioned earlier, take advantage of a distressed ship. Pentow Marine's "daily hire"

rate for providing a standby tug was deemed far too high by the owners (Cape Times; 29 July 1993) and after lengthy negotiations Pentow Marine reduced their price by 40%.

Pentow Marine's tug stood by THE RIVER PLATE for three days before she was finally allowed to be dismissed by the DOT. Allegations were made that the early dismissal was to encourage the vessel to do extensive repairs in South African waters and hence provide a considerable contract to local repair contractors but this was denied by the DOT who stated that "after the third day the vessel had stabilised and the repairs were well under way so there was no further need to have a tug on standby".

The SAN MARCO Incident

The Principal Officer, who let it be known in no uncertain terms, that the crews and owners of many vessels sailing the oceans these days could "simply not be trusted" and he owed it to the State to take precautions to cover any eventuality. The attitude of mistrust is supported by an incident like the already mentioned SAN MARCO detained in Cape Town harbour (November 1993). The vessel was in Vancouver a few months earlier to load a sulphur cargo and was also detained on 22 May 1993 for unseaworthiness. Towards the end of June she was allowed to depart Vancouver under tow as "so bad was the condition of the ship that the Canadian Coast Guard would only allow her to be towed unmanned" to a repair yard (Seatrade Review; June 1993). On 20 July 1993, however, she was reported by Lloyds Register to

be passing Panama.

What happened to the repairs? The presumption must be that the ship, notwithstanding that she was in such a dangerous condition that she had to be towed unmanned, picked up its crew again in Mexico and sailed to Brazil to pick up another cargo substantially in the same state as she had been in Vancouver (Seatrade; op cit 8).

How could Hellenic Register (which surveyed the ship in May 1993) have found the ship to be in a "good condition and well maintained" the same month as she was detained by the Canadian Coast Guard for unseaworthiness? (Survey details supplied by Seatrade; op cit 8). These questions were put by Seatrade to Hellenic Registry but after three weeks the magazine was still unable to obtain an answer.

Sometimes it is even difficult to trace the owners as was the case with the SAN MARCO. In Seatrade it was stated that "to anyone outside the shipping industry it would seem astonishing that it could prove difficult, as it does in this kind of set up, to trace the real owner of 57,000 dwt of potentially lethal transport vehicle. Within the shipping industry it is accepted with a shrug". (op cit 7).

The ALBOREZ Incident

In April 1991 the ALBOREZ, an Iranian tanker with a seriously damaged bow, anchored at Roman Rock Lighthouse in False Bay. The

ALBOREZ was refused permission to anchor in Table Bay because of rough weather and the danger of oil pollution. She was suspected of not being insured against oil spillage (as required by the Prevention and Combatting of Pollution of the Sea by Oil Act 6 of 1981; Sec 13) and was ordered to a distance of 50 NM from the coast by the DOT. When it was discovered that she was insured, she was given permission to enter the calmer waters of False Bay to be inspected. A ship-to-ship transfer of oil to another tanker, the HAPPY FIGHTER, was completed to avoid any possible pollution. (Details supplied by The Argus; 18 April 1991). The ALBOREZ was not breaking up or sinking and "no oil spillage was taking place but it could not be denied that an element of risk occurred in the oil transfer. If the tanker had been on the open sea, transfer could have resulted in further damage to and tearing of the hull and the resultant pollution would have been greater in any pumping operation". (Devine; op cit 88).

The question that can now be asked is whether the DOT acted against customary law by sending the distressed ship away from the coast on a wrong presumption that she had no oil pollution certificate and, as it was later discovered, she was not breaking up or leaking oil. The DOT pointed out that "anything with oil is a danger". To justify their decision to admit, finally, the ALBOREZ to internal waters they said that there "is less of a danger than sending the tanker away to sink somewhere and cause a huge disaster". (Cape Times; 19 April 1991).

Devine is of the view that although the ship was in no danger of

sinking, it was reasonable to think that immediate repairs were essential before the ALBOREZ was sent back to sea "lest her sinking resulted, not only in the loss of the ship herself, but also in major environmental damage. False Bay was probably the best place to effect an inspection of the damage and an oil transfer before repairs could be carried out." (op cit 88).

It is submitted that the response from the DOT on the whole was a proportionate response to what seemed to be at that stage a minor threat to the environment. One point of concern however, is the "assumption" that there was no insurance and that the tanker was in danger of sinking. Both assumptions turned out to be inaccurate and had the ALBOREZ sustained further and unnecessary damage by being sent 50 NM offshore in stormy seas, a serious situation for the state would have occurred. The transfer of oil in False Bay (which appeared to be a necessary procedure in this casualty) went off smoothly and without incident and the order initially to the ship to distance herself by at least 50 NM from the coast could be interpreted as being in contravention of the rights of a ship in distress. It would also contravene Art 58 of LOSC (1982) which states that "In the EEZ, all states ...enjoy ... the freedom referred to in Art 87 of navigation ... and other internationally lawful uses of the sea, such as those associated with the operation of ships". The ALBOREZ's insurance should also not have been a factor as a distressed ship's right of refuge is a basic right and is not qualified in customary law over issues such as insurance, nor is freedom of navigation restricted by insurance conditions.

The ATLAS PRIDE Incident

Another victim of winter gales off the South African coast was the fully-laden, 248 000 dwt Greek tanker ATLAS PRIDE, in heavy seas off East London. Plating was ripped from her port bow and she trailed a six-mile oil slick until oil was pumped into a reserve tank.

Inspectors viewed the damaged ship from an aircraft and reported that a gale force southwester and 5m waves were not breaking up the slick. "Kuswag" anti-pollution vessels were dispatched from Durban and East London.

The salvage tug JOHN ROSS was early on the scene but Greek owners Phoenix Maritime declined assistance offered by Pentow Marine. Instead they negotiated with a Greek salvage firm, accepted a tow from an oil rig supply craft, the HERDENTOR, and under the orders of the DOT attempted to tow the vessel 50 NM offshore in a southerly direction until a relief tanker could be found.

The next day, to the surprise of the DOT, the ATLAS PRIDE was only 19 NM from the coast. The HERDENTOR was clearly not managing the tow. Later the owners did a re-think and Pentow Marine were appointed as sub-contractors. The DOT then insisted that the ATLAS PRIDE owners produce a comprehensive salvage plan as at that stage the Greek salvage company had "provided one salvage Master and nine cans of dispersant".

Four days later, with her bow visibly working, the tanker was

struck by more heavy weather while standing by about 50 NM offshore. Winds gusted up to 80 knots. Pentow Marine divers had boarded the ship and sprayed detergent into the damaged compartment to disperse the oil left there.

Two tankers in the area would have provided suitable ship-to-ship transfer but the owners insisted on the ALSOMA AL ARABIA, which they were operating, being diverted on passage from South America.

Under the direction of Pentow Marine's Captain Dai Davies, the two big ships were eventually moored alongside one another. Pumping took five days at an average 8 500 tons per hour and after the transfer the ATLAS PRIDE was towed stern first to Cape Town by the JOHN ROSS. (Details from SA Shipping News 1991; Vol 46 No. 4; and Pentow Marine).

The controversy surrounding the ATLAS PRIDE incident was that she was only sent 50 NM offshore when her owners insisted that the oil be transferred into a tanker selected by themselves. Mr Simon Cooper said in his interview that "it appeared that the DOT were punishing the ATLAS PRIDE for not taking the first available tanker".

An important point here is whether the ATLAS PRIDE was in danger of causing substantial pollution in the area where she was first damaged. As discussed in the MIMOSA incident, the DOT would be in contravention of international customary law if it could be

proven that the ATLAS PRIDE was not a pollution threat as they would have tampered with her right of innocent passage. Moreover Algoa Bay is in the territorial seas zone and refusing her entry into Algoa Bay would therefore also have been illegal. (Art 19; LOSC). It is submitted that there can be no "blanket rule" for the treatment of damaged tankers in coastal waters.

Any sort of discriminatory treatment is also clearly not in the spirit of a distressed ship's "right of refuge". The owners of the ATLAS PRIDE, according to Mr Cooper, had a valid and reasonable reason for wanting the transfer of the cargo to be made with the ALSOMA AL ARABIA. There was no reason why the ATLAS PRIDE should not have been allowed to come into Algoa Bay to wait there for the arrival of the ALSOMA AL ARABIA with an extra tug in attendance if necessary. As it turned out, the ATLAS PRIDE had to spend 4 days out at sea in the teeth of a horrific storm. The Master of a bulk carrier, LYDIA which was also in the area at the time and had to seek refuge in Port Elizabeth, said that he had "never experienced such appalling conditions in 28 years at sea".

Mr G Needham of Pentow Marine totally disagrees with Mr Cooper. He alleged that the original salvors were incompetent and the DOT's decision to send the vessel 50 NM offshore was completely justified. He is also of the opinion that Pentow Marine should have been awarded co-salvor and not merely subcontractor status.

On this issue the question could be asked why the South African

government did not exercise their right to appoint Pentow Marine as salvors once it became clear that the HERDENTOR was not coping. It is submitted that this question would, in terms of International Law, only have been relevant if the ATLAS PRIDE was a danger to the state. The HERDENTOR's ability to tow the vessel would have to, until then, remain an issue between the ship and the salvor.

The 1981 Oil Pollution Act states in Art 4(2)(a) that "If in the opinion of the Minister, the master and owner of ... a tanker are or would be incapable of complying with a requirement made ... under Sec 1 (Powers of the Minister to take steps to prevent pollution of the sea where oil is being, or is likely to be discharged) ... the Minister may cause any such steps to be taken as he has power to require to be taken in terms of the said subsection." This decision , should it have been taken, would not have affected the salvors remuneration as they are protected under Sec 23 of the same Act which states " ... no provision of this Act shall be construed as derogating from any right of salvage award, nor shall a salvor who would be entitled to a salvage award in respect of an act of salvage actually performed, cease to be so entitled merely on the ground that such act was carried out as a direct or indirect result of a requirement laid down or an order issued in terms of this act."

The exercise of the above powers would surely also have to be judged from the point of view of international law. For the Minister to exercise powers that infringe on ships' rights when

this is not necessary to avoid danger, would be contrary to international law and flag states could protest.

Fortunately for all concerned, the transfer was, as mentioned, finally completed without incident, but the question could be asked why the whole affair could not have been handled in a smoother, less abrasive manner?

In sympathy with the DOT one should remember that "The risk of a major oil disaster is also serious because of the potential consequences. The seas around South Africa are highly productive and support large scale commercial fishing. These substantial resources are continually at risk. In addition, the mild climate has permitted recreational facilities to be highly developed along the coast. These too are at risk." (D J Devine; 1986; The Law of the Sea; Art: Sea Passage in South African Maritime Zones: Actualities and Possibilities: @ 215).

The DOT has the unenviable duty to make the correct decision concerning distressed ships in the light of the fact that distancing damaged tankers from the coast is prima facie interference with passage rights and navigation and it would have to be achieved in conformity with international law, and particularly, in accordance with the provisions of Art 196 of LOSC (see The Distressed Ship and Maritime Zones; High Seas; @ Chap 3 above). It is submitted that the DOT must base its actions on "intervention" which is ex post facto and occurs only where there has been a maritime casualty.

The Press

Two final points on the subject of "conflict of interests" are the emotions of the public and the sometimes very inaccurate reporting in the media. Mr Needham of Pentow Marine said a description of a vessel in False Bay being labelled as a "floating time bomb" (Argus; 18 April 1991) shows a "great level of ignorance". The False Bay situation reached such a stage of conflict that a meeting was called by Mr A Clayton (Cape Town City Engineer) to discuss the issue with all interested parties. Mr Needham was invited to put the salvor's case and he successfully allayed many of their fears. (Interview with Mr Needham 12 Jan 1994).

Pacifying the public however, is a different matter. The Principal Officer of Cape Town said that public awareness regarding oil pollution influenced him greatly in his decisions concerning distressed ships. It is submitted, in his defence, that should an oil spill occur as a direct result of the DOT giving refuge to a distressed ship, the Principal Officer would receive a cool reception if he tried to justify his actions against the international principle of distressed ships having a right of refuge.

In the THE RIVER PLATE incident, the Cape Times (28 July 1993) began reporting on the matter under the headline "Crew lifted off damaged tanker". The article also carried a quote from Major Redelinghuys (SA Air Force) who said that the airlift was a "precautionary measure" and not a distress signal. As stated

earlier THE RIVER PLATE was a bulkcarrier and it is not surprising that the public could become confused and pressurise the DOT when they read that a "tanker" was limping into False Bay with 75% of her crew evacuated for "precautionary" reasons.

CHAPTER EIGHT

CONCLUSIONS

Many of the leading cases on distressed ships and their entry into places of refuge date back approximately to the turn of the century, and whilst it would surely be dangerous and undesirable for the crew and owners if the status of a distressed ship should change, it is suggested that modern vessels provide a far greater threat to the coastal state than the vessels of yesteryear.

States therefore have the difficult task of applying a customary law that was initially reasonable to enforce but is now becoming more and more controversial with the added complication of the need for expensive salvage tugs which can sometimes be interpreted as exploiting the distressed ship.

Worldwide awareness of oil pollution, new conventions coupled with some horrific tanker disasters (including disasters which could have been avoided such as THE AMOCO CADIZ), have caused the "starting point" of the discussion of the distressed ship to move away from her "right of refuge" to considerations why she should not come near the coast. The comments on the "status quo" of False Bay by the Principal Officer of Cape Town is a clear example of this as it disregards the principle of "right of refuge" or the principle that action by means of self-defence or self-help must be proportional to the threat.

It is a simple fact that ships do have accidents and will suffer weather damage even if they are on a maiden voyage and a place of refuge is in many cases the first line of defence for the saving of a ship and her crew. In a mariner's chronicle it was written in 1834 that "never do the mere unassisted efforts of man appear feebler than amid those great convulsions of nature to which the mariner is so especially exposed".

The function of sea transport like that of any other form of transport, is to move things. It's success lies in finding people who have things to move and in it's ability to move them safely and efficiently. Distressed ships are an unfortunate spinoff of this trade, which must surely be the oldest form of transport, and it is essential that coastal state governments keep a cool head and deal with the principle of "the right of refuge" in a sensible and objective way.

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