# ASIAN SHIPOWNERS' ASSOCIATION
## SHIP INSURANCE AND LIABILITY COMMITTEE

c/o Hong Kong Shipowners Association
12th Floor, Queen's Centre, 58 Queen's Road East, Wanchai, Hong Kong
Tel: (852) 2520 0206 Fax: (852) 2529 8246 Email: hksoa@hksoa.org


## The 24th Interim Meeting

**of the**

## ASA Ship Insurance and Liability Committee

Tuesday, 19th March 2019
Renaissance Harbour View Hotel
Hong Kong

## Agenda

1. Environmental Damage and Limitation of Liability
    a. *Prestige* Judgement and effect on P&I
    b. French Law on Environmental Damage
    c. Draft submission of ICS to IMO's LEG 106 *(Ms. Howlett, ICS Legal, to please update)*
    d. IOPC Funds Update *(Ms. Howlett, ICS Legal, to please update)*
    e. EU Environmental Liability Directive
    f. Chinese Taipei Pollution Law *(NACS to please update)*
2. HNS Convention *(All members to please update progress at your end)*
3. Ports/Places of Refuge – Asian response *(All members to please update progress at your end)*
4. Ocean Governance
5. Fair Treatment/Unfair Criminalisation of Seafarers
6. Cyber Risks
7. Unmanned & Maritime Autonomous Surface Ships
8. Sanctions – Iran, Russia and North Korea
9. IG Re-insurance programme
10. Sulphurcap 2020, ISO 8217:2017 and potential impacts on Charter Parties
11. JWC War Risk Areas
12. Any Other Business
13. Press Release (Optional)

## Notes on Agenda

### 1. Environmental Damage and Limitation of Liability

#### a. *Prestige* Judgement and effect on P&I

As members would recall from the deliberations of the last meeting of 19 March 2018, in November 2017, the provincial Court in La Coruña, Spain delivered a judgment on the quantification of the compensation due in respect of the Prestige incident. The total amount awarded by the Court is, after a correction in January 2018, €1 650 046 893. The 1992 Fund and other parties have filed an appeal before the Supreme Court.

On 20 December 2018, the Spanish Supreme Court upheld the lower court's ruling on the matter, holding the Master of the 'Prestige', personally liable, along with the vessel's P&I Club. It is noteworthy that the Master is in his eighties. He has consequentially been sentenced to 2 years in prison.

*Extracts of the judgement are attached at* ***Annex 1****.*
Needless to say, this judgment is in contravention of the CLC & Fund Conventions which Spain is party to.

Further, on 06 March 2019, the provincial court ordered all parties held responsible to make the payments voluntarily within 20 days.

#### b. French Law on Environmental Damage

After the Erika and Prestige oil spills in 1999 and 2002, respectively, France introduced local legislation on environmental damage which goes beyond the international conventions that France is a signatory to. ICS has reached out to the French Shipowners Association to request the French government to provide written confirmation that the provisions of International Conventions override local regulations. Verbal confirmation has been given to this, however the French Government has declined to provide written agreement. We are following the developments to the cases closely, however, nothing has changed in the past year.

#### c. Draft Submission to LEG 106 on UNIFIED INTERPRETATION OF THE TEST FOR BREAKING THE SHIPOWNER'S RIGHT TO LIMIT LIABILITY

In wake of the recent upholding of the Lower Court's Judgement in the 'Prestige' case by the Spanish Supreme Court and the adoption of the French Law on compensation for environmental damage in the wake of the Erika case, there are industry demands calling for greater uniformity in the interpretation and implementation of the IMO international liability and compensation conventions.

The ICS and the International Group of P&I Clubs have been at the forefront of these efforts. In particular, the focus has been on uniform and consistent interpretation of the provisions dealing with the shipowner's right to limit liability in the light of the above-mentioned cases.

The ICS and the IG (International Group of P&I Clubs) discussed the matter with States in the margins of the October IOPC Funds session and also with the Funds

Director and the IMO Legal Secretariat. We have been made aware by ICS that these informal discussions were positive and encouraging. As a result, it is now proposed by the ICS to pursue the matter at the IMO Legal Committee, which is considered to be the rightful place for such a discussion since the limitation provisions are fundamental to all of the IMO liability and compensation conventions and key to the future sustainability of that framework.

A draft submission has been prepared by the ICS Secretariat, for the next meeting of the IMO Legal Committee (LEG 106, 27-29 March 2019).

The submission proposes the development of a Unified Interpretation of the test for breaking the owner's right to limit liability as contained in the IMO liability and compensation conventions. The draft has been kept as succinct as possible while providing the necessary detail and justification for the proposed work.

References to any specific controversial cases have been avoided to avoid negative sentiments during the discussions and to ensure that the discussions are constructive and productive.

*A copy of the draft submission is attached at* ***Annex 2****.*
*Ms. Howlett, ICS Legal, to please provide an update to the Committee*

**d. IOPC Funds update**

Meetings of the governing bodies of the 1992 Fund and the Supplementary Fund were held in London from 28 October to 1 November 2018.
The main items of interest to shipowners were:

- Incidents Involving the IOPC Funds

As expected there was limited discussion of most incidents on which papers had been submitted and the only substantive discussions were held on the Prestige and Agia Zoni II incidents.

On the Prestige, the delegation of Spain made similar comments to those it made in April, objecting to parts of the Secretariat's report. In particular, it objected to the inclusion of the Director's considerations relating to the progress of the case against the P&I Club and whether or not the decision of the Spanish Court imposing liability to the limit of the Club's policy would be enforceable in view of the effect of the "pay to be paid" rule. Spain asserted that these comments were not relevant to the work of the Fund and should not have been included. The Director disagreed and held that it was important for the governing bodies to be informed as to the functioning of the Conventions.

Other States which took the floor noted that the judgment of the Spanish Supreme Court on the appeal was still awaited and agreed that once the court process in Spain had come to a conclusion, difficult decisions would need to be made given the limited amount of money that remained available to pay compensation. Germany also raised concerns about the problems raised when judgments by national courts seemed to lead to inequality of treatment of claimants, as the equal treatment of claimants is one of the principles of the

Conventions. The delegation of France highlighted the importance of the Supplementary Fund in view of the high amounts claimed.

Discussion of the Agia Zoni II centered on the levy of contributions for what seems likely to be a costly incident. Although the report of the Greek authorities' investigation into the incident was not yet available, the delegation of India raised questions regarding the liability of the Fund if the investigation discovered illegal conduct by the shipowner and suggested that further levies for the incident ought to be deferred until there was clarity in the matter. The IOPC Fund Director noted that the 1992 Fund would have to pay claims for this incident no matter what the investigation might conclude with regard to the conduct of the shipowner and that waiting for a decision from the authorities investigating the incident might lead to greater expenses for contributors, as interest on the claims would accrue.

- Implementation of the 1992 CLC and Fund Conventions

All delegations which spoke agreed the lack of proper implementation of the Conventions in the national legislation of some member states was of concern.

It was noted that the matter was also of significant concern to IMO. It was agreed that work should be continued by the IOPC Fund Secretariat on this matter and that the 1992 Fund Assembly should be kept informed of progress on a regular basis.

- HNS Convention

We shall discuss this in agenda item 2.

*A copy of the meeting brief is attached at **Annex 3**.*

*Ms. Howlett, ICS Legal, to please provide an update to the Committee*

**e. EU Environmental Liability Directive**

Members would recall from last year's meeting that the European Commission had concluded its review of the Directive, and that further consideration would not take place prior to 2021. The maritime exceptions had been maintained, and the Directive was thus, not prejudicial to shipowner interests. The European Parliament had developed an 'own-initiative' report on the Directive, the final text of which, adopted in October 17, did not directly mention either shipping or the maritime exceptions.

Committee to discuss as necessary.

**f. Chinese Taipei Pollution Law**

The Marine Pollution Control Act is being amended. The issue arises mainly because Taiwan is not a member of the UN (and therefore, of the IMO), owing to which it has a parallel set of legislations and enforcement apparatus in place. Details of the second consultation are awaited.

*NACS representative to please provide the latest update to the committee*

## 2. HNS Convention

Members would recall from the deliberations of last year's meeting that the ASA had decided to join the inter-industry liaison group to monitor the progress of States as they worked towards ratification of the HNS Convention, and to coordinate industry outreach work. They have come out with a questionnaire to States seeking their views/apprehensions on ratification.
Last year, the ASA joined the group.

Denmark became the fourth State to ratify the 2010 HNS Protocol in July 2018. They join Canada, Norway and Turkey, who have also deposited instruments of ratification to the Protocol and who are leading the way towards entry into force of the 2010 HNS Convention.

Amongst the criteria for the Convention's entry into force, at least 12 States are required to ratify the Protocol, four of which must each have a merchant shipping fleet of no less than 2 million units of gross tonnage. As a result of this latest ratification, the Protocol now has one third of the number of States required for its entry into force and Canada, Denmark, Norway and Turkey each have more than 2 million units of gross tonnage, so this particular requirement is now met.
*Members to please provide the latest update to the committee on their respective State's intentions of ratification.*

## 3. Ports/Places of Refuge – Asian response

This issue has been on the agenda of the Committee for some time, not because there have been incidents in Asia that require ports of refuge, but because it is always easier (politically) to obtain support for initiatives in times where there have been no recent incidents, rather than in the wake of one.

The EU Operational Guidelines on Places of Refuge, which gained wide industry participation during their development, were finalized in November 2015 as "VTMIS Places of Refuge – EU Operational Guidelines". The Guidelines were officially launched at a European Parliament event in January 2016. The purpose of the Guidelines is to ensure better co-ordination and exchange of information among the relevant authorities and industry stakeholders involved should a ship require assistance.

Version 4 of the guidelines were presented to the Committee during last year's meeting. *The same was revised last year and Version 5 is attached at* ***Annex 4****.*

As reported at the last Interim meeting, under the Cooperative Mechanism between the littoral States in the Singapore and Malacca Straits, Malaysia has embarked on a project to develop regional Places of Refuge Guidelines.
*Members to please provide the latest update to the committee on their respective State's plans of adopting similar projects.*

## 4. Ocean Governance

Members would recall from last year's meeting that the United Nations had started high level negotiations on a new UNCLOS implementing agreement concerning Biodiversity in Areas Beyond National Jurisdiction (BBNJ). The work is likely to lead to the establishment of Marine Protected Areas on the high seas, which could affect the routing of shipping. The UN General Assembly has considered a Preparatory Committee report and has agreed to convene a diplomatic conference to elaborate the text of a legally binding instrument on BBNJ.

The industry, led by ICS, has been concerned to ensure that IMO remains the primary regulator for international shipping, and is working with the IMO secretariat in this regard.

The ECSA has come out with a position paper that is co-sponsored by the ICS and the ASA.

*A copy of this position paper is attached at* ***Annex 5***.

In the recent Maritime Law Committee meeting of the ICS, members were urged to go back to their national Administrations, requesting their support on the matter and to ensure that the stakeholder government bodies within the Administration support this view and speak with one voice in the various international fora that they might attend where the topic is discussed.

As discussed last year, it will be important for the entire maritime sector to engage with their maritime administrations about the work, and to keep abreast of the more general international discussion on ocean governance.

## 5. Fair Treatment/Unfair Criminalisation of Seafarers

No cases of pollution incidents or other maritime accidents that have resulted in notable cases of unfair treatment of seafarers have been drawn to the attention of the ASA SILC/ ICS Secretariat since the last meeting.

Members may recall that CMI has an International Working Group on Fair Treatment of Seafarers. Apart from following the ongoing discussions at the IMO Legal Committee where "Fair Treatment of Seafarers in the event of a maritime accident" is a standing item, and taking an interest recently in Pandemic Response, the working group has been largely inactive. In response to a request from the chair for possible topics for the working group's agenda, a member of the working group suggested "crew mental health and suicide prevention". While recognising the importance of this issue, ICS (Employment Affairs) has suggested that the CMI working group is not the correct forum and that the matter is best left to the experts at ILO and WHO. Members should inform their national MLAs that the CMI working group is not an appropriate forum for this matter.

## 6. Cyber Risks

The issue of cyber-attacks has taken a prominent role in the discussion of imminent threats to shipping.

In January this year, the Insurance Committee Chairman of the ICS was approached by the Chairman and Deputy Chairman of the Joint Hull Committee (JHC) and Lloyd's Market Association (LMA) and advised that those bodies were considering alternative approaches to the insurance of cyber risks. This included the idea of all types of cyber risks (i.e. a malfunction or a hostile attack) being insured together on one policy and, in addition a review and potential revision of the Institute Time Clauses (Hulls) 1.10.83 and the International Hull Clauses of 1995 and 2003 to deal with the insurance of cyber risks. After an initial informal consultation with London based shipping company risk managers and insurance brokers, the ICS Insurance Committee's views on the matter were sought in *the letter attached at* ***Annex 6***.

We understand that although there was not much response from ICS members to this circular, the responses that were received were consistent with the views of the London based shipping company risk managers and insurance brokers that there was no support at present for a revision of the various versions of the London Market Hull and Machinery wordings and that the take up of a standalone insurance product for physical damage to the ship resulting from cyber risks was a matter for individual owners. Since the discussions in March 2018, nothing further had been heard from the JHC or LMA on this initiative and when it was raised in the Chairman's meeting with his JHC and JWC counterparts it was confirmed that the proposed revision had been put on hold. The JHC Chairman was of the view that while there remained good reasons to review the wording of the Institute Time Clauses, in the current market there were more pressing issues for underwriters to consider. The JHC Chairman also restated the Joint Hull Committee's previously advised view that the risk of claims for physical damage to ships as a result of cyber security incidents was low and that there was no systemic risk.

Elsewhere, the discussion of cyber risks in shipping continues but has abated somewhat in marine insurance circles in the absence of any reported claims concerning ships. Shipowners continue to prioritise the deployment of resources in the prevention and mitigation of cyber risks rather than the purchase of insurance against them.

One aspect that has seen some discussion by both marine and P&I insurers over the last year is the concept of a vessel being rendered "unseaworthy" where a shipowner's electronic systems are successfully attacked, and they cannot show that they acted with reasonable care in managing cyber risks and protecting their ships. In one theoretical example, a failure to install an advised software patch that allowed a cyber-attack to take place was deemed to have the same effect as a failure to follow manufacturer's recommendations on particular engine parts. In such a scenario it was stated that there is a risk that a vessel may be considered unseaworthy in breach of the contract of carriage. If a Court or Tribunal were to reach this conclusion and investigations indicated imprudence on the part of the shipowner, or a failure to exercise due diligence to make the vessel seaworthy, this might have implications for the validity of any insurances in place.

Members are invited to discuss as necessary.

## 7. Unmanned & Maritime Autonomous Surface Ships

While fully unmanned/autonomous ships are still far from reality, the industry has already started moving ahead, considering their impact on the industry.
The fact that regulatory and insurance developments are well behind the development of MASS technology should be a cause for concern for the industry.
The regulatory and legal challenges presented by the operation of MASS has been taken up by IMO and, in May 2018, the Maritime Safety Committee (MSC) began its work on a scoping exercise of IMO regulations to identify provisions that may require amendment, clarification or adding to in order to accommodate internationally trading MASS. The IMO Legal Committee (LEG) will begin a similar scoping exercise sometime this year, focused on the instruments for which it is specifically responsible (chiefly the liability and compensation conventions).

The Marine Environment Protection Committee (MEPC) and the Facilitation Committee (FAL) have also been invited by MSC to review their instruments.
The Committee to discuss as necessary.

## 8. Sanctions – Iran, Russia and North Korea

The reports below summarise the main developments in international sanctions regimes affecting the shipping industry since the last meeting.

Iran

Members are advised to be cautious in conducting business with Iran if they also called at the US. The Office of Foreign Assets Control (OFAC), would examine transactions many times removed from, but ultimately connected to the business in question in order to discover a violation.

There is an OFAC helpline to which business cases could be presented for assessment and approval.

There would probably be difficulties for shipowners and their insurers to rely on the EU Blocking Regulation to continue trading to Iran and also noted that the act of making an application under the Blocking Regulation could itself be considered a violation of the EU rules. Also, while there were still legitimate trades for non-US shipowners to Iran even under secondary sanctions (for example humanitarian aid) shipowners should be wary of the US designation of ports in Iran since it was likely that paying port fees to such ports would be a violation of the sanctions even if paid in service of a non-sanctioned trade.

P&I cover at International Group clubs was completely withdrawn for sanctioned trades and available for previously concluded contracts in legitimate trades only up until the 4 November cut-off date. There were also questions about whether any insurance payments could ultimately be made in the event of a claim with an Iran nexus, because of the extent and severity of the sanctions on banking transactions.

Russia

No updates compared to the last meeting.

North Korea

P&I Clubs are coming under increasing scrutiny with regard to the enforcement of international sanctions on North Korea. This followed a damning report that Clubs were failing in their due diligence and consequently facilitating North Korean sanctions busting via illegal ship to ship transfers to North Korean ships. The UN was putting pressure on insurers to insert a clause into contracts compelling ships to keep AIS beacons switched on at all times as it believes that ships which undertake such illegal transfers do so with AIS switched off. In addition, the UN had suggested that certain ships trading in petroleum exports should be required to submit supporting documentation to prove that none of their cargo had been diverted to North Korea.

## 9. IG Re-insurance Programme

As discussed in the previous meeting last year, on 13th December 2017, the International Group announced that the arrangements for the renewal of the International Group Excess of Loss reinsurance contract and the Hydra reinsurance programmes for 2018/19 had been finalized.

*The IG Reinsurance Program for 2018-19 is attached at* ***Annex 7***.

## 10. Sulphurcap 2020, ISO 8217:2017 and potential impacts on Charter Parties

As members will be well aware, from 1 January 2020, amendments to MARPOL Annex VI will come into force, which stipulate that the sulphur content of fuel oil used on board commercial ships trading outside sulphur Emission Control Areas must not exceed 0.50%m/m. This will be a significant reduction from the current limit of 3.50%m/m, which has been in place since 2012. Industry organisations have been working towards mitigating the technical, operational and economic challenges that will be presented by the large-scale switch to low sulphur fuels. Apart from the significant additional cost of compliant fuels, there is continued uncertainty about the worldwide availability of compliant fuels in every port worldwide immediately after 1 January 2020.

In addition, the diversification of fuel types expected to enter the market in response to these regulatory changes presents significant concerns in relation to the quality and safety of the fuel to be supplied, and the risks that might be posed by the handling of several different fuels on board ships. Fuels that are compliant with the new sulphur limit may not be compliant with the recommendations of engine manufacturers and other fuel safety parameters, (for example stability, acid number, flashpoint, viscosity or cat fine content) and as a result, may cause damage to engines and raise other safety issues.

In addition, compliant fuel grades having the same specification and sulphur content, but bunkered in different geographical locations may not be compatible, which adds to the logistical challenges for shipowners as close attention will need to be paid to measures to prevent mixing and co-mingling of fuels.

The ISO delivered a statement at the last PPR Intersessional Meeting assuring the meeting that ISO8217:2017 covered all marine fuel oils, including the low-sulphur blended/hybrid fuel for compliance with the Sulphurcap 2020. It was pointed out to members that this Standard did not cover matters concerning compatibility, consequently opening up possibilities for Charter Party claims/delays resulting from incompatibility issues. ISO further affirmed that the Standard was final and that it would not be reviewed/amended further.

Various clauses have been developed by organisations like Intertanko & BIMCO, however, the robustness of these clauses to deal with the various issues that might arise is to be seen.

Members are invited to discuss as necessary.

## 11. JWC War Risk Areas

Members would recall this item, which was brought up rightly by the Indian National Shipowners Association (INSA).

The JWC maintains as "hazardous war risk areas" (WRAs), areas which are in excess of the amended HRA declared amongst multinational entities with varying interests such as UKMTO, MSCHOA, EU NAVFOR, CGPCS, SHADE. The direct consequence of this is that the area of Gulf Oman, lying north of 22 deg N Latitude and between Longitudes of 58 deg East and 65 deg East, is also considered by the JWC for the levy of additional war risk premium.

This area has no reported case or piracy or attempted piracy for the past several months. However, this area is an important channel for passage of all cargo that moves to countries East of India, which would include the ASA membership.
The Listed Areas were amended again in June 2018, however, the area in question continues to remain listed.

The ASA SILC took this matter up with the ICS, seeking their support in last year's Maritime Law Committee meeting of the ICS. From the casual discussions at the sidelines of the meeting, it was gathered that the ASA's efforts in this direction would most probably be futile, given that JWC uses its own internal security risk analyst, who deem the area to be a region of high risk.
Members to discuss as necessary.

**12. Any other business**

## 13. Press Release (Optional)

# Annex 1

[…]

**APPEAL OF THE PUBLIC PROSECUTOR'S OFFICE**

**ONE.** The Public Prosecutor's Office gives a single ground of objection to the ruling of the Court in La Coruña, in which it disputes section nine of the substantive part of this ruling, in which the Court provides that "for enforcement of this decision in the United Kingdom, the parties may seek such enforcement before the authorities of that country in the terms of the EU declaration", since, for enforcement in non-community countries, it provides that rogatory commissions will be sent in the usual and conventional terms. Accordingly, it distinguishes two methods of enforcement, depending on membership of the European Union. The Public Prosecutor's Office considers that this is an unlawful provision which has no legislative basis and which infringes the right to effective legal protection, since this provision contravenes the legislative provision in

Article 984.3 of the Criminal Procedure Act, which states "for enforcement of the judgment, with regard to compensation for the damage caused and payment of damages, the provisions laid down in the Civil Procedure Act will apply, although this will, in any event, be initiated at the instance of the judge who ordered it". It is also contrary to the constitutional mandate of Article 17.3 of the Constitution which orders the judge to rule upon and enforce the judgment. The Public Prosecutor's Office therefore considers that enforcement cannot be delegated.

The ground is allowed. The provision laid down in Article 984 specifically establishes the action at his own instance of the judge responsible for the civil enforcement. However, Article 38 of the then European Community Regulation 44/2001 provides that "1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom".

This regulation applies to the civil and mercantile jurisdictions and, even though it applies to this case, it does not contravene the provision in Art. 984 of the Criminal Procedure Act, which describes the action at his own instance of the judge responsible for the enforcement as "in any event". This rule, which is a specific rule of the criminal procedure, provides that it shall be the judge in the criminal area of jurisdiction who shall take action, directly, without transferring his right to proceed to victims appearing before the courts of the United Kingdom. Here, the criminal procedural law and EU directives 2012/29 apply. Articles 16 and 17 of the directive state the provisions concerning enforcement and the right to compensation. It is not a matter of giving the enforcement judge universal and extra-territorial jurisdiction, as argued by some of the parties to this appeal, but of establishing the competence of the Spanish judge, also as a Community judge, who must make use of the specific instruments for enforcement in the terms laid down in Community regulations on enforcement.

As a consequence, we must incorporate from the substantive part of the appealed Ruling the part providing that it will be the parties who must initiate enforcement of the ruling given before the authorities of the United Kingdom but subject to the provisions of section three of Article 984 of the Criminal Procedure Act, which states "for enforcement of the judgment, with regard to compensation for the damage caused and payment of damages, the provisions laid down in the Civil Procedure Act will apply, although this will, in any event, be initiated at the instance of the judge who ordered it". For this purpose, the enforcement judge must make use of any enforcement institutions and regulations of Community law in order to require performance of the enforcement proceedings, ordering precautionary measures vis-à-vis action in these proceedings and reserving to the enforcement judge any powers that legally correspond to him.

The content of the appraisal is restricted to implementation of the provisions of the section extracted from the substantive part, to which we would add that this is done subject to the procedural requirements of Art. 984 of the Criminal Procedure Act.

## APPEAL OF THE FRENCH STATE

**FIVE.** The appeal lodged by the French State is based on a single ground and this relates to an error of law because of improper application of Articles 1101, 1106 and 1107 of the Civil Code and Article 78 of the Law regulating value added tax. The compensation corresponding to the Spanish and French States[1]. The similarity of the two appeals, based on the same grounds of appeal, means that both appeals should be examined together, consolidating the response to be made to the objection put forward by the State Legal Service concerning the refusal to allow the amount of VAT in the two claims made. Declare ex officio payment of the procedural costs of the appeal.

The court's argument in the Ruling containing the refusal to include in the amount of the compensation the sums of VAT paid for services hired for

[1] Translator's Note: incomplete sentence in source text.

recovery and reparation of the damage suffered is easy to understand and it is to an extent consistent in its explanation: the State is not entitled to claim from the party causing the damage the amount of VAT passed on to it because it is an item that it will recover through the payment made by[2] the company that provided the relevant service. If the party causing the damage, subject to obligation derived from civil liability, pays to the administration through this channel the amount of the VAT, the Public Treasury will enjoy unfair enrichment, which cannot be allowed, because the Spanish and French Treasuries will be paid the amount of the tax twice, through the payment to the service providers hired for the repairs and through the payment that is made by the party which is charged with civil liability. The French State, in its appeal, argues the opposite, from the point of view of the principle of "restitutio in integrum", which governs the establishment of civil liability. Moreover, it mentions the different nature of the two payments, one being restitution of what has been paid and the other a service activity that derives from the operation of the economy as an economic activity. These are two different situations which give rise to the receipt thereof. If the State has paid for the repair services, the amount of the compensation is the expense actually incurred, which is what must be repaid.

The ground must be allowed. First, because the rules governing compensation contained in Articles 109 et seq. of the Criminal Code and Articles 1092, 1101 and 1157 of the Civil Code state that the repayment must comprise the expenses or economic consequences of the event that gave rise to settlement of the compensation but it is not possible to establish a different system in terms of compensation when the party incurring the expense, payment for the service, is the State, which has had to pay the amounts of value added tax. From that perspective, the State may claim from the party causing the damage the sums corresponding to VAT because it has paid them and because this is a direct consequence of the event giving rise to the compensation. As the State Legal Service says, in its appeal report and in its appeal, asserting its challenge on the basis of a similar argument, this is a pecuniary loss that must be added to the damage suffered to the property and rights that the State administers and

[2] Translator's Note: source text error here?

manages. The State made full payment for the service that it contracted as a consequence of the damage and for which it must be compensated, with this compensation to include the total sum of the expense incurred. It is not feasible to contend that a State that has to pay VAT, when it contracts a service, cannot claim back that VAT because it will be repaid in the end and this is so because this and the kind of compensation that the court establishes are not similar debts. One derives from the event that gave rise to the compensation, restitution, whilst the other sum derives from an economic activity actually engaged in and which, of itself, creates a tax obligation. The State Legal Service puts forward various examples that clearly demonstrate the inconsistency of the submissions set forth in the appealed ruling, that, for the same event, [in] an action brought [to] remedy damage caused by unlawful conduct, the amount of the compensation would differ, depending on who had ordered the economic activity to carry out the repairs, because, if it were a private person, there is no doubt that sums actually paid, including VAT, would have to be included in the compensation, and yet, if it is the State, that part of the compensation and the right to that claim are refused, on the basis of foreseeable and possible repayment in the future. That repayment, stemming from different causes, may and does follow different paths. Thus, by reason of the distribution of powers in a State, between the State or autonomous or local entities, the amounts paid were not paid directly to the State but may be sent to other administrations which, although forming part of the State, have different finance procedures, or the party obliged to pay the tax can argue certain situations when it becomes payable, such as tax reliefs or set-offs against previous periods, that mean that the sums claimed and then paid do not coincide. Furthermore, in this case, the matter is complicated by the existence of the two interested

Treasuries. Finally, it would indeed be a paradox if different financial treatment were applied that would put a State into a worse position if it had undertaken the repair of the effects of an unlawful act than if, instead of the State conducting this activity, the actual individual affected by the unlawful act carried out that repair, contracting the relevant services. In this second case, there is no doubt as to the compensation including the VAT and yet, in the first case, that sum is disallowed on the basis of the argument that it will be repaid in the end.

The reference made in the appeal by the party with civil liability to Art. 78.3.1 of the VAT Act, Law 37/92, of 28 December, is not applicable. The appellant considers that compensation is excluded from sums accrued for VAT. What the rule in question provides is that "The following will not be included in the taxable base: 1. Sums received by way of compensation, other than those contemplated in the preceding section which, by their nature and function, are not consideration or set-off for deliveries of goods or provisions of services subject to the tax".

It is clear that the transactions carried out that are aimed at provision of the service contracted for repair of the damage caused will be subject to the tax.

If the State administration has paid for provision of a service contracted for repair of the damage caused, what it is doing is paying the price of the service that has been provided and, when the service provider pays the tax, it is transferring that sum to the party causing the damage. In the end, the party causing the damage pays the tax and does so without the administration receiving the same amount twice, but instead the State recovers by way of compensation for provision of the repair service that it carried out and it collects the tax for performance of an economic activity that has been engaged in.

Accordingly, the appeal lodged by the French State shall be allowed, with amendment of the point in the Ruling that refuses the increased amount derived from the value added tax, and compensation in favour of the French State

that will include the amount of that tax is ordered.

The same shall apply in relation to the Spanish State, where the €43,600,000 corresponding to accrual of the value added tax are included in the amount of the compensation.

## APPEAL OF THE INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE

**NINE.** This appellant argues six grounds of appeal. The appeal is preceded by a preliminary statement which sets forth the origin, nature and functions of the fund, highlighting the fact that this is a public entity subject to the regulatory convention. It presents the Fund as an official and objective body which determines compensation. This point is not disputed in the appealed ruling and legal ground 70, to which we refer, concerns the International Fund for Compensation for Oil Pollution Damage, setting out the function that it performs in this case, similar to that which the appellant sets out, and highlighting the Fund's obligations, pursuant to Article 4.1 of the Convention, and the limitations established in the International Convention on Civil Liability for Oil Pollution Damage. The Fund's liability is therefore objective, although there are situations where the pure objectivity of its liability is played down, and legal and valued, with distribution on a pro rata basis between people who have suffered damage that can be compensated.

In the first ground, it raises two issues that warrant separate examination. In the first section, it questions whether the Fund, whose appeal we are considering, has to be liable for what the decision calls environmental and moral damage since, under Arts. 1.6 and V of the Convention on Civil Liability, CLC 92, this damage is excluded.

The ground will be allowed. Under Article 4.5 of the Fund's regulatory Convention, and as we have said above, the Fund's liability is objective, that is,

regardless of the guilt of any legal agent since it is established directly in the rule, the Fund Convention. In addition, it is valued because it is the rule itself that states the qualitative limits and the damage to be compensated. Article 1.6 of the Convention, CLC 92, initially of 1969 and amended in 1992, states that damage caused by pollution, that is, damage that must be covered by these funds, is: a) losses or damages caused outside the vessel by contamination resulting from leaks or discharges of oil from that vessel, wherever such leaks or discharges occur, although a statement of damage to the environment, apart from the loss of profit resulting from such damage, will be limited to the cost of reasonable restoration measures actually taken or which will be taken, and b) the cost of preventive measures and losses from damage subsequently caused by such measures. Article V of the aforementioned Convention establishes another limit, this time economic.

It is apparent from both rules that the extent of the compensation, in accordance with that quasi-objective, legal and valued liability, is the so-called clean-up operations and damage to property, which includes the objective and reasonable costs [of] the clean-up operations, damage to property, salvage operations and any operations consisting of replacing the property destroyed as a result of the event that gave rise to the civil liability [and], in addition, economic losses regarded as losses that are a consequence of the spill, that is, purely economic losses caused to persons who were affected by the spill not physically but in terms of their commercial activity. This means the commercial activity that was damaged by the occurrence of the event giving rise to the liability where this loss of activity has a causal connection to the accident. There should also be included damage to the environment and, in this context, [this] includes the costs of measures reasonably adopted for the regeneration, recovery and repair of the environment affected by the spill. From this perspective, the damage which the ruling refers to and that the Supreme Court described as “that derived from the feelings of fear, anger and frustration that affected a lot of Spanish and French nationals but also from the mark that may have been left by the notion that catastrophes of this or a greater magnitude could affect the victims themselves at

any time" (letter k of number 6), is not to be compensated by the Fund insofar as its obligation to compensate concerns, according to its rules, reasonable measures to restore and repair those directly and objectively affected by the spill, those whose industrial and commercial professional activity has been damaged by the spill and repair and restoration of the environment. Accordingly, and as the appellant seeks, purely material damage must be stated to be the limit of the Fund's compensation, excluding other damage which does not derive wholly from the physical damage that was caused.

A second section of the appeal concerns the presumption that the Fund itself shall be responsible for distributing the compensation. The appellant maintains that, just as the rule that establishes civil liability, Article IX of the CLC 92, provides that the State bodies which are competent to award the compensation shall be the only bodies with competence to settle all issues relating to the pro rata application and distribution of the fund, so this rule does not apply to the sums administered by the Fund, since Article 18.7 of the Fund's Regulatory Convention provides that it is for the assembly "to make decisions on distribution amongst the claimants of the amount available for compensation under Article 4.5".

The ground is dismissed. First, because Art. 117 of the Constitution provides that it is for judges and courts to judge and to enforce judgments and that rule is clear in its allocation of competence for the enforcement of a court judgment. But, in addition, Article IX of the CLC 92 and Article 7 of the Fund's Regulatory Convention are clear in recognising the powers of national bodies entrusted with the power to decide on enforcement in terms of the legal consequences of an event submitted to the jurisdiction of the courts. In any event, the judgment given by the Court in La Coruña has already decided this issue, in a section which has not been the subject of an appeal and is therefore final.

**TEN.** The second ground argues breach of the right to effective legal protection because of the arbitrary nature of the assessment of the evidence in relation to the claims of the Spanish State, the French State and the Regional

Government of Galicia, because it "ignored the requirements of reasonableness and of equality of evaluation of the submitted evidence".

The chosen method of appeal is breach of the principle that prohibits arbitrariness, which is encompassed in the fundamental right to effective legal protection. The submissions on which the ground is based relate to the fact that there are three expert reports in the case: the report of the *Consorcio de Compensación de Seguros*, the report of the court experts and the report prepared by the Fund which is the appellant here. It disputes the other expert reports, those prepared separately from the report of the appellant Fund, which it accuses of arbitrariness, failure to explain the causal chain, etc., since its own evidence, the expert evidence and the evaluations made by the Fund's experts, is the proper evidence which sets forth the convictions and states that they are null and void. It then provides various examples, but does not conclude these on the basis that they are countless, to challenge specific sections of certain compensation headings, such as the costs incurred by the boats in Algeciras Bay, or the need to re-provision some beaches with sand, which are not causally connected to the spill but which are due to the natural features of the beach itself. If it had disputed these specific compensation headings, we could work out to what extent the invoice corresponds to the occurrence of the spill, but the appellant does not do this but cites the reasonableness[4] of its expert report, as compared with the unreasonableness of the other expert evidence that the court has examined, and it does this in relation to the claims of the Spanish State and those of the French State and the Regional Government of Galicia.

The ground is dismissed. The function of evidence evaluation is within the competence of the court which, as the appellant states, has taken into account the expert evidence that it mentions and has appraised it piece by piece, looking at the degree to which it is convinced by said evidence and, from the point of view of an overall assessment of the evidence, the reasonableness of the

[4] Translator's Note: "racionalidad" – generally, "reasonableness". However, under Article 120 of the Spanish Constitution, cited later in the source text, there is a requirement for grounds of judgments to be given and this invokes a secondary meaning of this term, where "racional" means "well-founded" or "well-based", so the meaning may be construed as relative to the grounds given for a judgment or in an expert report, but it is stressed that "reasonableness" is the more usual interpretation of this term.

statement of conviction. Thus, it refers to the objectivity of certain expert evidence and the logical nature of some petitions since they correspond to the expert reports that the court has appraised. Seen thus, there is no unreasonable appraisal but an evaluation subject to the contributions of the experts who based their work on the documents in the claims respectively made. The fact that the causal connection is sometimes not determined is, as stated in the appeal at this ground, because of the evidence to the effect that the damage caused is the damage that must be compensated, and this originates in the spill, the accident that is the subject matter of these proceedings. We find that the decision is not arbitrary and that the evidence appraisal functions have been conducted on the basis of the submitted documentation and an expert analysis of each heading involved. There is another issue, which the appellant does not raise, which is that the admissibility of each specific case could be disputed, in which case, it could adopt the method of error of fact in assessing the evidence [or in] verifying evidence of the factual grounds for compensation and of causality, but what is not feasible is to dispute the entirety of the declared compensation in general, unspecified terms. As a consequence, it is not proper to declare any error.

In relation to the claims of the autonomous government of Galicia and the French State, the court's statement refers to the credibility of the French State in its petitions made in the case. It is simply a statement of an objective fact, since this State and Spain belong to the Fund and so they can be assumed to be loyal to it, since they are members of it. But the court also declares that the stated claim for compensation adheres to criteria followed in the expert evidence, which represents a valuation of the size of the claim and its correspondence to similar acts. This cannot be disputed by the single argument that the expert evidence produced by the appellant is superior to that produced in the case because such a submission has no solid base and, in any event, it is not for the court of cassation to examine this.

Since this represents the essence of the appeal, certain clarifications must be offered. The ground is in fact aimed not at disputing the potentiality of the decision but at a re-evaluation of the evidence starting with the expert report produced by the Fund which it regards as more in keeping with the remedy of

damage. To this end, it does not hesitate to dispute the suitability of the experts of the *Consorcio de Compensación de Seguros*, or to question the valuation criteria applied by the court, since it describes the content of the report submitted by the *Consorcio de Compensación de Seguros* as facts in common knowledge when, according to the appellant, this is a not a true expert's report but "simply an arithmetical operation to add the amounts set out in transnational invoices, certificates and agreements". It also argues that, in certain headings, the compensation claims have been increased without justification and this adds to the arbitrary nature that it alleges.

The position of the court of cassation is not that of a court of appeal in which the subject matter of the proceedings is to be raised again so that it can reappraise the evidence and determine, in this case, the specific compensation. The court of cassation hears appeals lodged before it based on application of the law, error of law, breach of fundamental rights and error of fact, when a document is submitted to the court of cassation demonstrating an error. The appellant's intention to instigate a new appraisal of the evidence is not proper to a cassation appeal because it does not bring before us an error in a particular valuation but raises general issues on the suitability of the experts, the unreasonableness of certain assessments and surprising increases in compensation claims, and these are matters that this Court cannot address or assess because it was not present in the proceedings and, in this case, it has no direct contact with the sources of the evidence and so it cannot make an overall evaluation of the evidence in the terms of reasonableness[5] required by Article 120 of the Constitution and Article 741 of the Criminal Procedure Act. The appeal suggests open disagreement with the assessment of the evidence by the court competent to undertake this and this issue is outside the competence of the court of cassation. The court of first instance examined the evidence in two stages, during the proceedings, when the bases of compensation were fixed, setting out the victims and damage, and the stage where compensation was determined, to which this appeal is restricted.

[5] Translator's Note: see Note 4, above.

However, we will examine its attempts at re-examination. First, it contests the preference that the court, in its system of assessing the evidence, has given to the report of the *Consorcio de Compensación de Seguros*. It argues that this report is a mere count of invoices and does not represent expert evidence. On the contrary, this Court was informed, during the appeal process, by the State Legal Service that the report of the *Consorcio de Compensación de Seguros* was requested by the State Legal Service to rationalise the expert evidence produced in the case and that the *Consorcio de Compensación de Seguros,* a public entity specialising in the quantification of damage derived from catastrophes, is a public body specialising in the compensation system, inasmuch as the State makes certain payments in advance and is compensated for them, has assessed the compensation headings and has rejected many of them. Furthermore, it has also taken into account the reports of the other experts and compared them with its own and drawn up a report, without doubt an expert report, on the damage caused by the spill.

The appellant Fund states, with a view to reducing the persuasive content of the expert evidence, that it is party-produced expert evidence, and this is true as with the Fund's experts, since the Fund is part of the State structure. However, the specialist qualifications of the experts belonging to the *Consorcio de Compensación de Seguros* were not disputed at the appropriate time of the proceedings, when the expert evidence was produced, nor were they questioned by the court, which does now cast doubt on the experts of the present appellant (page 179 of the judgment).

It also states that the experts of the *Consorcio de Compensación de Seguros* have not examined the issue of causality of the damage. It furthermore disputes certain headings such as, for example, the protective booms that were not used to contain the spill. These arguments are also dismissed. The causality of the damage has not been seriously disputed because the headings of compensation arise from the catastrophe caused by the spill, which is a well-known fact. With regard to headings such as the containment booms that were not ultimately used, this is an expense that derived from the spill and they were acquired to reinforce the battle against the spill and its effects. It is correct that the court of first

instance uses, to establish that the expense is admissible, a criterion that it calls the criterion of appropriateness, and which may not be the proper principle to explain that those booms were acquired to prevent the damage and were installed at several points along the coast. The spill might have taken several directions and it was necessary to prevent the damage that could be caused by it with the risk that it might reach those areas. The court considers that the cost of the booms was necessary and had a causal connection to the spill. The fact that they were, unfortunately, not effective because the spill did not reach any of the areas where they were installed does not remove the causal connection between the expense and the spill because this was an expense aimed at preventing the occurrence of the damage with a reasonable chance of effectiveness. The appellant's main argument against the deliberations on damage and its compensation is not, therefore, the absence of a causal connection, and this connection is usually clear, but the reasonableness of the expense. Here, we are obliged to apply the report of the State Legal Service which had already told the court of first instance, in its document of 7 July 2016, the reasons for and reasonableness of the expense, distinguishing between costs incurred by the Ministries responsible for cleaning up, costs incurred for extraction of the fuel from the wreckage, aid, which includes changes to social security and fishing taxes, etc. and the heading concerning taxes, including VAT, which we referred to when considering the ground of the State Legal Service. The discussion has considered each of these items specifically and the court has taken into account the documented and accounted budget entries, as the Fund has on occasion questioned the appropriateness thereof, finding that there is disproportion between what the State has asked for and the opinion of the appellant's representative. The issue having been raised in these terms, we cannot discuss the admissibility of the expenses incurred for the activities carried out by the Ministries responsible for cleaning up because the point was to remedy the damage caused immediately. The extraction of the fuel, as well as having a causal connection, was a necessary expense, which is documented by the corresponding payment invoices. In relation to aid, which was a much-disputed matter subject to intense debate on enforcement, the court has verified the causal connection between the spill and the activities of the fishing sector and other activities relating to the damage. The acquisitions of protective booms are, of course, causally connected to the spill because they were

acquired in order to avoid the damage and this was effectively achieved by anticipating their use should the spill reach the enclaves where they were placed.

This Court, in this decision, confirms that the criteria required if the expense is to be found admissible [are met?] and that the amount thereof is reasonable, and it has also been demonstrated that the court made use of the evidence examined. We can verify this by examining the proceedings and finding that these involved factual and legal discussion, typical of court orders, and that the decision derived from reasonable evaluation of the evidentiary activities carried out, as explained with reasoning in the decision. It is not appropriate to dispute in this venue the criteria for reasonableness of expenses when they have been justified and have a causal connection to the spill.

A second section concerns the complaint that it makes concerning the increase of the State's claim for compensation. The appellant maintains that the *Consorcio de Compensación de Seguros* initially established the sum of €777,952,720 which, not on the basis on any expert evidence, it argues, was changed by another petition for €934,827,921, which led to a sum of €811,887,758 being allowed by the court. The State Legal Service states, in reply to that claim and complaint on cassation, that, in its document of 7 July 2016, pages 8 and 9, it mentioned the change in its compensation claim based, amongst other reasons, on its study of the expert evidence produced by the Fund, now appealing, which included certain headings that had not been valued by the *Consorcio*, thus leading to a change in the compensation claim that is justified and that was part of the subject matter of the proceedings after the document submitted on 7 July 2016, which took place in the presence of both parties, so that there was full knowledge of the claim being made, and it is at that stage that issues proper to contentious litigation should have been raised.

Finally, the argument that the appellant adduces in relation to a budget item of 128 million euros for aid for temporary lay-off lacks any basis worthy of consideration since the appealed ruling excludes it at page 18.

The ground is therefore dismissed.

**ELEVEN.** In ground three, it argues breach of the fundamental right to effective legal protection established in Article 24.1 of the Constitution "in relation to the guarantee of inviolability and immutability of final court decisions, since the appealed ruling ignores the bases and criteria established in the Judgment of the Supreme Court".

The chosen method of appeal is to question the compensation provisions stated in the Ruling, challenging the arbitrary nature and inconsistency of the Judgment of this Court which fixed the bases to which execution of the judgment would be subject. Its appeal concentrates on certain headings which we have analysed in the preceding ground, such as the protective booms and the increased compensation of the State.

In any event, this does not accord with the method used for the appeal. As we have said, the content of the fundamental right is complex as regards the due process, access to justice, appeals and enforcement and, also, the grounds of the decision, allowing the defendant to ascertain and assess the reasonableness of the decision and enabling him to appeal at another jurisdictional level. It is not feasible to use this ground to contest the decision of the court which has, effectively, applied the criteria established to serve as the basis of the compensation when it determined amounts.

**TWELVE.** In ground four, it again raises the object of appeal put forward in the first ground, that is, the designation of the material damage caused as the limit of the Fund's compensation, excluding from this moral damage or what is called pure environmental damage. The ground is simply a consequence of the first ground, which was allowed in the terms that we stated at that stage and so we refer to the arguments made then, since the damage was excluded from the compensation obligation of this appellant. All the above is without prejudice to the points we will make when we consider the first ground of the next appellant who disputes the admissibility of moral damage.

The issue that it raises in respect of what it calls inconsistency based on the excessive nature of the claim for compensation that it mentions in relation to the compensation to the Regional Government of Galicia is another matter. It argues, as the basis of its claim, that the Regional Government of Galicia sought in the proceedings compensation of €1,275,458 but, on enforcement, it sought €751,555 for developing the Sogarisa facilities, which this appellant considers inadmissible because those facilities were not part of the subject matter of the proceedings.

The ground must be allowed because this heading of compensation was not brought before the tribunal at the proper time when the claim based on civil liability was made and, accordingly, the allowance of this heading breaches the principle of party disposition that governs this matter.

**THIRTEEN.** It argues a fifth ground in which it alleges breach of Article 24.1 of the Constitution because there is a "contradiction in the inherent logic of the appealed decision specifically between the legal grounds and the ruling in relation to the VAT claimed by the Spanish State and in relation to the aid for temporary lay-offs for the fishing sector, also claimed by the Spanish State".

This is a material error that should have been corrected by clarification of the judgment. As a result of the sum stated in favour of the State for compensation, 128,100,029 euros should be deducted by way of compensation for the fishing sector for temporary lay-offs, although, because the ground argued by the State Legal Service was allowed, the €43,635,860 corresponding to VAT should be maintained, which makes it a total of 805,037,739 euros.

**FOURTEEN.** In this ground, it argues breach of its fundamental right to effective legal protection under Article 24 of the Constitution "because the

appealed decision ignores the bases and criteria established in the Judgment under execution and because the assessment of the evidence is arbitrary". It continues its argument of this ground by stating that the ruling establishes unfounded compensation, accepting without discrimination and without genuine grounds expert reports that do not meet the minimum requirements laid down in our case law as regards proof of consequential loss and, in addition, it ignores the criteria and bases set forth in the Judgment under execution. It then finds fault with the expert evidence produced by the company SACE, stating that the criteria used to determine the expert opinion are not suitable for expert evidence. In its view, the methods employed cannot reasonably be used to calculate the basis thereof and it questions the specific compensation allowed in the Ruling based on this report that it discredits.

The ground suffers from the same defects that we saw in relation to the appeal when it addressed the compensation for the State, the French State and the Regional Government of Galicia. The appellant declares its disagreement with the compensation, saying that the establishment thereof conflicts with documents that the appellant puts forward. By putting them forward, it is seeking a new declaration from this Court on the basis that the declaration in the Judgment is erroneous.

The appeal might be declared viable if the appellant were to produce a document proving error. For the purposes of the appeal on cassation, this is a document proving an error because its contents are irrefutable proof of the fact, or expert evidence in the terms that we have declared in our case law. What is not admissible on cassation is to seek a re-evaluation of the evidence, or a new examination of expert evidence, and to state, as a consequence, a belief other than that obtained by the court. We must remember that that function corresponds to the courts of first instance, having regard to the examination of the evidence, and also of the expert evidence, and the other evidentiary activity, followed by a decision deciding on the basis of that overall examination, whether the conditions stated in the judgment or in the enforcement ruling are met. This Court does not have that involvement in examination of the evidence and cannot assess it or

dispute it because it does not have sufficient information as to whether or not the items of

expert evidence and the knowledge of the techniques used in the reports are adequate. Our review on cassation is not an evaluation but a confirmation of the reasonableness thereof.

The ground is therefore dismissed.

**APPEAL OF MARE SHIPPING AND APOSTOLOS MANGOURAS**

**FIFTEEN.** The legal representatives of both appellants, the insurance company and the person convicted in the event argue 25 grounds of appeal which are in turn reproduced by the defence of the other insurance company, in which they dispute the legal correctness of the appealed Ruling on the basis that the Judgment and the enforcement Ruling are not consistent.

We will here make a preliminary point concerning the nature of the court procedure whereby a final judgment precedes a subsequent order for enforcement of the judgment in the area of civil liability. In repeated case law of this Court, including the order which is the origin of this case, STS 865/2015 of 14 January, we have stated that a Judgment that finally decides the criminal aspect of a case must provide the essential evidence that will determine the legal consequence as regards civil liability. In the case of this appeal, grounds 70 et seq. of the aforementioned Judgment state the extent, content and essential bases of enforcement. Regardless of this, we have to admit that, precisely because, when the criminal matter submitted to the court was decided, the specific and necessary evidence was not available in its entirety so as to allow resolution of the civil consequences of the event, in respect of which criminal liability had been established, the enforcement Ruling had to be addressed at a later stage, which is always burdensome, in order to establish the specific civil liability arising from the crime in accordance with the bases established in the Judgment that authorised later enforcement. This is because it is sometimes not possible to determine the

extent of the effects of the event that gave rise to the criminal liability that has already been declared or because it is not possible to assess quantification and the extent of damages, or for a multitude of reasons, which reveal the need to address the economic consequences of the crime at a later stage. However, as stated in the case law to which we refer, the scope of the decision as to civil liability must be subject to the premises laid down in the Judgment being enforced and, obviously, to the content of the rules governing civil liability. In this case, the relevant issue is the establishment of the event giving rise to civil liability and also the effects caused as a consequence of this originating event, and the claim for compensation that has been lodged, but this does not mean that, in certain specific cases, we cannot incorporate effects causally connected to the event that gave rise to the civil liability that were not taken into account at the time the principal case was heard because of any prevailing circumstances but that were addressed at the time of enforcement of the judgment. It is necessary, as stated in Judgment 865/2015, for the parties making a claim to prove the causal connection of the damage and, in order to so prove, the evidence envisaged in the procedural rules will be required.

Their first ground alleges breach of the fundamental rights contained in Article 24.1 of the Constitution and their argument actually relates to the fundamental right to effective legal protection. The appellants consider that this breach applies because the enforcement Ruling, the object of this appeal, ignores the content of the Judgment of this Court to which we have referred, Judgment 865/2015, insofar as it states as the basis for the compensation claim that the court, when enforcing the judgment, should have regard to the petitions made in the documents of final conclusions and to the evidentiary rules which the Judgment itself refers to. Specifically, they claim that, in section a), the appealed decision does not adhere to the quantitative limit established in ground 71 of the judgment of the Supreme Court, which states the criteria for determining civil liability, the maximum limit of which may not exceed the petitions set forth by

the parties seeking the compensation in their final conclusions. Their specific submission is that the Regional Government of Galicia has been awarded compensation for developing the facilities for recovering the spill that was not mentioned in its document requesting compensation. In the same ground, they contest the compensation fixed for Julio Gago, who was given compensation of €12,535 when he asked for €12,030. In section b), they dispute the settlement of compensation for moral damage to the State which was not in the compensation claim, in contravention of the argument in ground 73 of the Judgment which requires that moral damage shall have been expressly claimed. In section c), their complaint focuses on the settlement of compensation for an event outside the time limit declared in the Judgment since the fishing and shellfishing activity was officially forcibly suspended until 17 May 2003. In view of that decision as to time limits, the Ruling set out the expert report of the "Empresa de Servicios de Auditoría y Consulting de Empresas" (SACE) which extends the effects of the suspension because of the damage to the month of December 2004. In section d), they argue breach of their right because the court of first instance fixed civil liability without considering the rules laid down in the grounds of judgment STC 865/2015, which states the need for the parties to prove the causal connection and the actuality of the damage, which, in their opinion, has not happened in relation to the claim lodged by the Regional Government of Galicia and the compensation formulated[6] by the maritime risk mutual insurance company (MURIMAR), who only produce one document to prove their damage. Similarly, in section e) of this first ground, they argue that the causal relationship between the damage and the spill has not been demonstrated, as is required by the Judgment of this Court, and they consider that only the IOPC reports examine the causal connection, and the *Consorcio de Compensación de Seguros* and SACE do not. Finally, in section f) of the appeal document, they state that, in accordance with the sections in the Supreme Court Judgment where the Spanish State was awarded environmental damages, in ground 72 of the Judgment, proof of damage of this nature was required and the Judgment granted a level of payment at 30% of the declared damage. This is a percentage calculation against total direct pecuniary

[6] Translator's Note: it is not clear in the source text whether Murimar gave and/or sought compensation.

expenses, which, according to this appellant, is a breach of the rules established in the Judgment under grounds for assessment of environmental damage.

The ground will be dismissed. The method of appeal that the appellants use is not based on legal infringement but on effective legal protection. This fundamental right is, we repeat, complex in nature and, according to repeated case law, it involves a right for people to be able to go to the court of justice to defend their rights and to obtain from the court a decision based on law, after their complaint, or their claim, has been heard, according to the rules of due process, with the assurance of a stage for submissions and evidence. The content of this right also extends to the rules on appeals pursuant to the procedural rules. This right is put into practice by means of the procedural rule that determines the due process. It is not an absolute right because there are procedural rules that attach to it, according to which the opposing interests of appellants and persons with liability in the case must sometimes be considered. Moreover, the court order must examine the subject matter of the proceedings, must be consistent with the petitions made therein and must give the grounds for this decision, thus ensuring observance of the right to justice and to review by a higher instance of the decision handed down. In any event, we must remember that not all procedural irregularities mean that the right has been infringed because it is necessary to prove the level of prejudice to the right to a defence which is, in the end, the needful right for legal protection, so, in order to prove infringement of the right, there must be an irregularity and an inability to defend oneself must be shown. In cases that require, in addition to an irregularity committed by the court, that rectification enabling the essential content of the right to be remedied shall not have taken place, so that, even if there has been an inability to defend oneself, there will not be infringement of legal protection if that inability to defend oneself has been corrected or there has been the possibility of rectifying it [7]. We say this because the appellant relies on effective legal protection as the basis of its claim, and this has been given. Thus, with regard to the content of the complaint concerning the grant of compensation to the Regional Government of Galicia, we

[7] Translator's Note: incomplete sentence in the source text.

find that the court, in ground seven of the Ruling, explains that the compensation that it is allowing for repair of the facilities is given by virtue of the agreement between the *Consorcio de Compensación de Seguros* and the Regional Government of Galicia for repair and recovery. Accordingly, it is a sum that the Regional Government had waived because it was paid by the *Consorcio de Compensación de Seguros*, which has to be given a remedy and compensated for its damage, and it was established that the compensation is for repair of the stations since the amount of the compensation was paid by the State Administration or by the *Consorcio de Compensación de Seguros*. So, it cannot be argued that civil liability has been fixed in excess for the Regional Government's claim, since the court explains the grounds for deciding civil liability and the case, without prejudice to the points we made when addressing the fourth ground of the IOPC's appeal. With regard to the €500 in excess in the compensation to Julio Gago, the sum is truly insignificant.

In respect of the claims against the State as regards the economic amount, the sum of the compensation, the claim brought by the Public Prosecutor's Office and, in particular, by the State Legal Service, greatly exceeds the sum fixed in the appealed ruling and so, in terms of consistency, there is cover for the settlement of the civil liability determined in the appealed ruling. This cover eliminates any risk of inconsistency. With regard to the compensation, it is true that there may be external inconsistency insofar as there has not been any specific claim for compensation for the heading of moral damage. However, we should not be induced into error by the "nomen iuris" by thinking that, because the term "moral damage" has not been used, there has been no claim under this heading. The Judgment of this Court, Judgment 865/2015, envisaged an overall heading for moral damage and, although, at that stage, it was already known that there was no economic claim under this specific heading in the criminal and civil charges, this was, however, borne in mind and was valued in the expert report, identified in the case as the report of the University of Santiago de Compostela issued by Mrs Loureiro, which established a system of calculation of environmental damage which took into account the services provided and the evaluation of damage to the system and the damage originated and caused to the ecosystem as a whole, which was affected by the spill. In this report, an appraisal

is made of that damage and certain deliberation criteria are laid down that extend beyond purely pecuniary considerations and any directly derived from removal of the damage caused and remedy thereof and include those affecting the ecosystem and the damage that the spill caused to it. In the terms of the report, which the court has regarded as relevant to the damage derived from the crime, the damage that it determines goes beyond purely remedial damage, or damage fixed "plastically" as a direct consequence of the crime. Reference is sometimes made to feelings of anger, worry, etc., showing not just an issue of material damage, unforgettable by all, but also the overall damage to the ecosystem which it will have to recover from over time and which is therefore causing effects that do not arise solely and directly from the spill but that are effects derived from the offence found by the criminal ruling, which is enforced by way of civil liability, to have been committed. This is recognised in the Judgment of the Provincial High Court and also the Judgment of this Court, which draws them together under the general, not in the legal sense, concept of the term moral damage and which, of course, includes all of the damage that, although not really the direct effect of the spill and not originating therein, is a consequence of the spill. Furthermore, the appealed decision did not take into consideration the claim made by the State but effected its calculation according to a criterion set out in the actual Judgment of this Court, fixing it prudentially at 30% of the pecuniary damage. There is a dual content to that declaration. On the one hand, the fear, anger and frustration derived from the spill and, also, the mark that may have been left by the notion that catastrophes of this or a greater magnitude could affect the victims themselves at any time, and, on the other hand, taking into account the whole process of regeneration of the ecosystem and the need to remedy it not by means of specific acts alone but using general ecosystem activities. Therefore, the determination of the damages goes beyond purely pecuniary loss, damage suffered because of the effect of the spill on the coast, known as tar clean-up, and relates to the recovery of the ecosystem and the damage caused to it, fixing liability for repairing this damage. The claim was made to the court and was based on disputed expert evidence that established certain compensation

criteria that the court has accepted, although not in the amount that was claimed. This consists of the declaration of a heading of moral damage that includes damage caused and goes beyond the mere causation of damage that can be remedied during the clean-up operations.

With regard to the claim made in the appeal concerning the absence of proof of damages claimed, on the basis of the argument that only documentary evidence was produced, it is clear that this argument is outside the requirements of effective legal protection on which the appeal is based. The content of this allegation of breach of the right to effective legal protection cannot support the appeal because what the court did was, precisely, to assess the documentary evidence that was produced. Of course, the causal connection between the damage and the spill is a matter that does not have to be specifically proven because the cause-effect relationship is self-evident and well-known.

In respect of the quantification of moral damage in the terms that we have stated for this heading, in relation to the appellant's allegation, the court relied on the expert evidence submitted for the purpose and appraised [it in?] the terms set out in the grounds of the Ruling, which explains it. The decision at pages 14 and 15 et seq. examines that expert evidence and determines the amount according to a percentage criterion, and it is also the criterion applied in the Judgment of this Court.

**SIXTEEN.** The second ground of appeal of these appellants is also based on breach of the right to effective legal protection, giving rise to an inability to defend oneself, "because of the arbitrary nature of the decision when determining and quantifying the compensation established in favour of various claimants, since any one evaluation is chosen from amongst those considered in the proceedings, with no reasonable basis or without reasoned and reasonable justification of such choices". This ground of appeal is argued on the basis that the court of first instance had available what it calls official expert reports prepared by court-appointed experts, by the *Consorcio de Compensación de*

*Seguros*, by the company SACE and by the IOPC, and it states that, since there were various expert reports, "the court, when deciding compensation, randomly chose an expert report without applying any uniform criteria and providing no justification as to why it made that particular choice", and it refers to ground seven, an extensive ground within its list, in order to give substance to the appeal.

The ground is dismissed. The function of the court of first instance is to assess the submitted evidence rationally and to set it out reasonably in the grounds, in accordance with the rules on reasoned opinion that it sets forth and states in the grounds. It cannot be replaced in this function by an assessment that, although lawful, is made by a party to the proceedings, in this case the party declared to have civil liability, since that function lies with the court. In the expert evidence produced by the *Consorcio de Compensación de Seguros*, the court-appointed experts, the Fund's experts and others, the court finds evidence to support the compensation for the damage caused by the oil spills, etc., appraising the expert reports that are a consequence of the complaints and statements on damage made by those affected. The fact that the court did at times indicate contradiction between official expert reports is nothing other than a necessary judgement on the experts who have provided expert opinions which the court has evaluated along with the other evidence submitted. The disagreement in compensation amounts is not an abuse of the fundamental right to effective legal protection which is, as we have set out above, something other than what the appellant argues. The court's function is explained in the grounds of its decision, basically the documents produced, proving the claim and the expert evidence on cause.[8] The fact that the appellants disagree does not indicate a breach of the right to legal protection that has been given in the case.

**SEVENTEEN.** In the third ground of appeal, the appellants argue breach of their fundamental right to effective legal protection "on the basis of clear and manifest error with regard to the deduction of certain amounts when calculating compensation (VAT, aid and compensation of the IOPC)".

[8] Translator's Note: *de la causa* – or: *in the case*

The ground is dismissed. The issue concerning payment of VAT and compensation for aid was addressed in this Judgment when dealing with the appeal of the State Legal Service and the French State in relation to value added tax and its reconciliation with the principle of "restitutio in integrum", which we have already examined. Accordingly, since this issue has already been resolved, we can reproduce those arguments, in this case, to dismiss this ground. Irrespective of this, it is clear that the sums received by way of advance payments are sums that form part of the compensation and, when final payment is made, they must be taken into consideration to be set off against the sums that are declared as the amount of the compensation.

**EIGHTEEN.** In the fourth ground, they reproduce the above arguments concerning what they call "arbitrary application of the criteria for application of the compensation established in the appealed decision since, without any justification or reasoning, some have certain amounts deducted [for sales] and [others[9]] do not have the same or similar items deducted". The ground is an extension of the above ground and it is clear that sums previously paid on account will be offset against enforcement of the final compensation and so they form part of the content of the compensation, irrespective of the fact that sums already paid will be offset on enforcement.

**NINETEEN.** In ground five, the appellants claim breach of their right to effective legal protection "because of the arbitrary nature of the appealed decision when determining and quantifying certain compensation because its existence and extent are declared without any supporting evidence". This is a very general ground of appeal on which it elaborates in its arguments concerning the compensation awarded to the State, which is based on the list of damage, the expert assessments made by the *Consorcio de Compensación de Seguros* and also by the court-appointed experts and the experts of the Fund for compensation of damage caused by oil spills, and so the compensation is justified because it relates to damages with a causal connection to the spill and is based on evidence laid out in the expert reports produced. The appellants' disagreement as to the amount of

[9] Translator's Note: *importes ventas y notas* – literally, *amounts sales and notes* – presumably intended to read *importes de ventas y otras* [others]? Otherwise the phrase makes no sense.

the compensation does not affect effective legal protection since this has been declared and the court justifies it in ground seven of the ruling on the basis of the reasons that led it to determine and fix the compensation in line with the expert evidence produced.

**TWENTY.** In ground six of the appeal, they again argue breach of their fundamental right to effective legal protection "because of manifest abuse of authority or inconsistency of the appealed decision because of the dual compensation for environmental damage and moral damage which was not claimed by this applicant". The ground is a repeat of the previous grounds since they are again complaining about the absence of a claim for compensation for moral damage which we have answered in previous grounds of this Judgment.

**TWENTY ONE.** In ground seven, they again argue breach of their fundamental right to effective legal protection because of "infringement of the due process with all the guarantees because priorities are determined for the evidence and because evidence put forward by claimants was not examined and no reasons were given for the refusal to do so". The appellant maintains that "it asked, in the proper time and manner, for certain evidence to be examined" but this was not done.

The appealed Ruling mentions that particular argument in the grounds of the decision. Specifically, in grounds one and two of the court's Ruling, it declares that, during the open enforcement procedure, the parties were notified to define and fix their claims for compensation and to prove causality. This request to the parties for a hearing fulfils the requirements for an effective adversarial process that should apply to all court orders. However, the fact that the court of first instance provided for the adversarial process to fix and define the compensation claims does not mean the commencement of a new period of time for evidence in respect of facts that have already been declared proven and in respect of a compensation claim the essential bases of which have already been decided. This is not the commencement of a new process because the proceedings and their procedural object have already been determined. It is a matter of

specifying what was already claimed during the trial of the facts. Enforcement is not the commencement of a new procedure to fix and determine damages but the enforcement of already declared damages and their quantification, regardless of the fact that those damages or those claim evaluation procedures [are] not fixed in detail but they may be enforced in terms of the bases of their calculation. An attempt to re-open a process to determine damages and fix compensation is not the purpose of the enforcement of the judgment because, here, we start with certain already established facts and the compensation bases, at least, in relation to bases, have already been fixed.

**TWENTY TWO.** In the eighth ground of appeal, the appellants argue breach of their rights to effective legal protection, which they define as follows: "my clients were not served, for the purposes of establishing a proper defence, with the claims by certain claimants to whom the Ruling gave compensation".

The ground must be dismissed. The argument on which the ground is based is that, in relation to the claims for compensation made by those who claimed, these claims were sometimes not served or were served late, and they were served at the request of the appellants so as not to give rise to the lack of a defence. Once service had taken place, the appellants put forward arguments that they considered appropriate, on 13 November, and, according to the ground, "it was most unlikely that these could have been considered (or even read) by the Provincial High Court if we bear in mind that, early on 15 November 2017, the appealed Ruling had already been published". They state that their document setting out the dispute as regards the claims made could hardly have been read by the High Court in time to serve as grounds for the Ruling here appealed. In short, they suggest a theory as to the content of the dispute and whether the court of first instance could actually have taken their arguments into account and this theory, although suggestive, is not evidence of breach of their right to effective legal protection in the terms that they argue because the decision fixing civil liabilities was being conceived from the end of the criminal case and the beginning of enforcement, incorporating the expert evidence from the summary proceedings and the arguments of the parties as to the right claimed and the objections thereto.

**TWENTY THREE.** In the ninth ground of the appeal, they again argue breach of their right to effective legal protection, to a process with all the guarantees, "since there were no enforcement proceedings that were actually and truly adversarial and so my clients were deprived of an action with all the guarantees". They base this allegation on the fact that the arguments of the present appellants were ignored.

There is no relevance to this ground in terms of the appeal on cassation. The appellants consider that, speaking generally, since their arguments were not taken into consideration, they were completely ignored and so there has been an infringement of the rules of due process, on the basis of absence of an adversarial process. This ground must be dismissed. An effective adversarial process is a demonstration of the right to a defence and it means that any court order requires a claim and confutation by the party whom it prejudices, so the statements by both parties of their respective interests in a lawsuit form part of the object of the decision and may be taken as the basis of the claim. The purpose of enforcement is to fulfil the order made in a judgment that has stated the legal consequences of tried facts. The Provincial High Court did not give its order in the terms requested of it in the charges and issued an order for acquittal that was reviewed on appeal, and this Court handed down a Conviction which requires, in respect of the civil consequences, that the High Court, in any enforcement proceedings that were started, and on an adversarial basis, should fix the civil liability deriving from the crime. So, this was not an attempt to re-open the process for fixing and determining the civil liability claims but a determination of the sums derived from the crime for which the conviction was issued on the basis of the proven facts and the reasoning given. This right to contest was established from the time when the court asked the parties to define civil liability and gave rise to the debate concerning the claims made. This function is performed by evaluating the claims, the facts declared proven and the expert reports produced, thus fixing the substance of the legal consequences of the crime for which the conviction was handed down.

**TWENTY FOUR.** Grounds ten, eleven, twelve and thirteen all allege breach of procedure because of improper refusal to allow evidence, in ground ten, because VAT was not deducted from the compensation granted to the State, in ground eleven, because the sums deposited by the IOPC compensation fund were deducted, in ground twelve, and because of the evaluation of the expert evidence, in ground thirteen. We refer to previous grounds as we have given the relevant response to the grounds argued on the basis of breach of the fundamental right to effective legal protection in the same terms as those here argued.

**TWENTY FIVE.** In ground fourteen, the appellants argue another breach of procedure under Article 851.1 of the Criminal Procedure Act in relation to the order to pay compensation for the defence costs of the Spanish State because they consider that those costs should be regarded as included in the legal concept of procedural costs.

This argument has little or nothing to do with the right to contest referred to in section one of Article 851 of the Criminal Procedure Act. Procedural defect pertaining to the right to contest facts declared proven involves a declaration of procedural defect because the factual account affirms and denies, at the same time, facts that are relevant in terms of admissibility so that they are difficult to understand and it also makes it difficult to respond in the appeal on cassation in view of that conflict. In this case, there are no proven facts in respect of which such a dispute may be stated because legal costs that constitute expenses necessary for the proceedings, which must be paid by the party against whom an order for costs has been made, are one thing and the expenses that public bodies have incurred or paid in order to exercise their rights in the courts, so that these public institutions have needed the support of professionals, who have earned certain rights that are to be compensated, are another matter altogether and they have nothing to do with the procedural costs.

**TWENTY SIX.** Also on the basis of procedural defect as regards the right to contest, reference is made to the fees of the American lawyers in proceedings heard before the courts of the United States. As in the previous case, this is not a traverse and, in any event, the ruling does not refer to the payment of this.

**TWENTY SEVEN.** We effected an overall consideration of grounds 16, 17 and 18 which, this time, argue procedural defect in relation to Article 851.3, omissive inconsistency, in which the appellants again raise the issue of deduction of VAT, of European Union aid and of advance payments made by the IOPC and also the advance payments received by the State from the European Union. We have answered these points in the previous grounds.

**TWENTY EIGHT.** In ground nineteen of the appeal, the appellants argue error of fact in the evaluation of evidence, alleging "the existence of uncontradicted documentary evidence that proves recognition by the French State that it is not possible to prove all the damage claimed that is, nevertheless, regarded as indemnifiable in the appealed Ruling".

They present their basis for this ground by referring to communications exchanged between the representatives of the French State and the IOPC in which they state that, in no section of the *concurso de las competencias*[10] relating to the Fund and the French State was it possible to say that certain entries could not be documented in relation to the advance payment of sums. These are communications that have nothing to do with the total amount of the claim to which the appellants themselves refer when they state "that, even if we admit for purely dialectical purposes that the documentary evidence was sufficient to prove the damage", a point that is disputed by the appellants who stress that, in those

[10] Translator's Note: *concurso de las competencias – competitive bidding*. Since this is clearly not appropriate here, and *competencias* means *powers*, and *concurso* means *concurrence, meeting, competition*, this may mean a concurrence of powers, a clash of powers or proceedings to determine powers.

communications, the French State itself revealed that it could not prove some of the damage.

These are two different levels of communication, on the one hand relating to the determination of damage, and the appellant itself considers that there is documentary evidence to prove it, and, on the other hand, the dealings between the French State and the compensation Fund, unrelated to the criminal proceedings and directly indemnifiable by the Funds in accordance with their Convention.

The ground is therefore dismissed.

**TWENTY NINE.** In ground twenty of the appeal, the appellants argue error of law in relation to Article 849.1 of the Criminal Procedure Act because they consider that Articles 109, 110, 113 and 115 of the Criminal Code were improperly applied "because the appealed ruling ignores the legally established criteria and requirements for determining the appropriateness and quantification of compensation resulting from civil liability arising from the crime."

As the appellants themselves state [in] the appeal, the ground is set forth as additional and complementary to grounds one and twenty four of their appeal and thus it complements and adds to the grounds that have been examined or are going to be examined. The ground reproduces the content of the Judgment of this Court and the articles which they argue have been improperly applied and they seek, by way of conclusion, [a declaration of] inadmissibility of compensation established on the basis of expert evidence other than that of the IOPC, or that received by the Regional Government of Galicia, the French State, the maritime risk mutual insurance company and, in short, all the other compensation referred to throughout their appeal.

The ground, which has been examined in other grounds, is dismissed. The appealed Ruling records the actual occurrence of damage and the extent thereof, and all expert reports agree in affirming the substance of the remedy. The damages to the State are proven by the documentary evidence and the expert

reports that the court has evaluated, highlighting the evidence from the compensation Fund, the IOPC, the *Consorcio de Compensación de Seguros*, and Santiago University, and the evidence from the court-appointed experts. With regard to the amount of the compensation, the Court has noted the disagreement between the expert opinions and, in particular, the one produced by the compensation fund, and it explains the reason why it relies on some expert opinions and not others. With regard to moral damage, this is explained in the grounds of the original judgment, the judgment of the Supreme Court and the Ruling here appealed, in the terms that have already been examined. Quantification of the compensation results from the evaluation of the documentary and expert evidence and, as stated in the judgment of this Court, 865/2015, where it exceeds the amounts of the certificates, the evidentiary activities will have to be considered since the proof of damage is not only established by the certificates proving costs but by evidence established in the laws of procedure. With regard to the submission as to use of objective computations applied to fix compensation, this is a criterion for fixing the "quantum" of the compensation using bases that allow this to be done.

It is sometimes difficult to reach a specific conclusion as to the amount of the debt, the amount of the damage caused, and so the rules make use of systems of objective computation, either to fix the amount of the debt or to fix the amount of damages, always using bases that will admit inference and chains of logic. In this case, these methods are based on expert evidence and referred to in the appealed Ruling at page 18 of its contents.

The ground is therefore dismissed.

**THIRTY.** In ground twenty one of the appeal, the appellants argue error of law in relation to Article 849.1 of the Criminal Procedure Act, on the basis of improper application of Article 1.6 of the International Convention on Civil Liability for Oil Pollution Damage (Convention CLC 92) and Article 339 of the Criminal Code, as regards the computation of environmental damage. It bases its complaint on the establishment of a percentage amount to determine damages. The ground has been examined in objections of a similar nature in previous

complaints in this appeal where it was decided that correction in application of the amount and of the compensation heading[11]. The limitations that they rely upon, and which were examined when the appeal lodged by the IOPC was studied, do not apply to these appellants, the convicted and civilly liable parties, since their liability is unlimited and is not subject to the limitations referred to in the Convention that they argue has been improperly applied, which we have replied to when considering the Fund's appeal.

**THIRTY ONE.** In ground 22 of the appeal, the appellants argue error of law because of improper application of Article 4 of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, the so-called Fund Convention, "because the appealed Ruling infringes the principle of proportional distribution". The ground is dismissed. When we considered the appeal lodged by the IOPC, we answered the claim made in the ground argued in a similar vein to that which is now presented by a party lacking in standing for this type of objection because objections and the method of distribution of compensation do not affect these appellants.

**THIRTY TWO.** In ground 23, the appellant argues non-application of Article III.3 of the International Convention on Civil Liability (CLC 92) to the proven facts and non-application of Article 114 of the Criminal Code "because the acts of third party victims are not regarded as events that would exonerate from or offset liability". In their argument of the ground, the appellants seek set-off of blame or a declaration of fault on the part of the State that would reduce civil liability. They seek this by stating that, even though the director general of the merchant navy was absolved from his criminal liability, this does not mean that he has been absolved of civil liability.

The ground is argued on the basis of error of law and, here, we have to start with respect for the proven facts and the pronouncement as to criminality in the judgment, which does not indicate any criminal liability on the part of any public official. So, this must be upheld and it is not appropriate to find liability on

[11] Translator's Note: incomplete sentence in the source text.

the part of the State or to reduce the declared liability. The appellants base their argument on a non-existent assumption as to determination of a liability that was declared not proven in the judgment. Enforcement of the judgment is in the proper terms and they cannot rely in this enforcement motion on facts that have not been declared proven and which therefore do not give rise to the civil liability, even on a set-off basis, that the appellant seeks.

**THIRTY THREE.** In ground 24 [one[12]] of the objection, the appellants argue error of law "because of breach of Article 18.2 of the Organic Law of the Judiciary" because the appealed Ruling ignores the bases and criteria laid down for determination and quantification of the compensation established in the Supreme Court Judgment of 14 January 2016".

The ground is dismissed and we refer to the arguments set down in the first ground of objection of these appellants since they again allege inconsistency between the provisions of Judgment 865/2015 and the enforcement Ruling that they are challenging at this stage of the proceedings. The ground is dismissed and we repeat the arguments already set forth.

**THIRTY FOUR.** Ground 25 argues error of law in relation to Article 849.1 of the Criminal Procedure Act and states that Articles 123, 124 and 126.1 of the Criminal Code in relation to Articles 239 et seq. of the Criminal Procedure Act are criminal rules that have been improperly applied "since there is no express order for costs other than that given in the Supreme Court Judgment of 14 January 2016 [but] the costs of the State Lawyer and of the expert of the Spanish State are declared indemnifiable by my clients".

The ground is a repetition of the contents of ground 14 of their appeal document which we have responded to in ground 25 of this judgment. The ground is therefore dismissed.

[12] Translator's Note: is this word added in error?

**APPEAL BY THE CONAON OWNERS MUTUAL INSURANCE ASSOCIATION**

**THIRTY FIVE.** The appellant's petition for review is similar to the petition of the previous appellant, as we can see from reading its document of formalisation, and, for this reason, we refer to the previous grounds of this Judgment which may be reproduced in relation to this appeal.

The similarity of the grounds of appeal is highlighted in all the appeals of the parties to the proceedings and so we refer to the arguments in the previous appeal when dismissing this one.

**ORDER**

By reason of all the above, in the name of the King and by the authority conferred by the Constitution, this court has decided:

**1. To allow** the appeal on cassation lodged by the **Public Prosecutor's Office** against the ruling of 15 November 2017, given by the Court in La Coruña, Section One.

Payment of the procedural costs of its appeal is declared *ex officio*.

**2. To dismiss** the appeal of **Mr José Ramón Docampo García.**

**To order** this appellant to pay the costs of his appeal.

**3. To dismiss** the appeal of the **Sociedad Cooperativa AMEGROVE de mejillones S.A. and PATRIARCIS S.L.**

**To order** these appellants to pay the costs of their appeal.

**4. To allow** the appeal of **Mr José Ramón Lema Anido.**

Payment of the procedural costs of his appeal is declared *ex officio*.

**5. To allow** the appeal of the **French State**.

Payment of the procedural costs of its appeal is declared *ex officio*.

**6. To dismiss** the appeal of **155 victims represented in the proceedings by court representative Mr Fernando Leis Espasandin.**

**To order** these appellants to pay the procedural costs of their appeal.

**7. To allow** the appeal lodged by the **State Legal Service**.

Payment of the procedural costs of its appeal is declared *ex officio*.

**8. To allow in part** the appeal of the **International Fund for Compensation for Oil Pollution Damage (IOPC).**

Payment of the procedural costs of its appeal is declared *ex officio*.

**9. To dismiss** the appeals lodged **by MARE SHIPPING and APOSTOLOS MANGOURAS.**

**To order** these appellants to pay the procedural costs of their appeals.

**10. To dismiss** the appeal lodged by **THE LONDON OWNERS MUTUAL INSURANCE ASSOCIATION.**

**To order** this appellant to pay the procedural costs of its appeal.

This decision and any decision given after[13] the aforesaid Hearing are to be served for the relevant legal purposes, and the case shall be returned.

This decision is to be served on the parties and inserted in the official publication of laws.

[13] Translator's Note: source text says *a continuación* ***a*** which would mean that the order is to be served **to** the Hearing. Changed to *a continuación* ***de*** – **after** [the Hearing].

Thus ordered and signed.

Andrés Martínez Arrieta Juan Ramón Berdugo Gómez de la Torre Alberto Jorge Barreiro

Andrés Palomo Del Arco Carmen Lamela Diaz

# Annex 2

INTERNATIONAL MARITIME ORGANIZATION

E

LEGAL COMMITTEE
106th session
Agenda item 13

LEG 106/13
11 January 2019
Original: ENGLISH

# WORK PROGRAMME

## Proposal to add a new output under the work programme on "Unified Interpretation on the test for breaking the owner's right to limit liability under the IMO conventions"

**Submitted by Greece, the Marshall Islands, International Chamber of Shipping and International Group of Protection and Indemnity Associations**

**SUMMARY**

| | |
|---|---|
| *Executive summary:* | The co-sponsors consider that there is a need to reaffirm the principles underlying the IMO liability and compensation conventions, particularly with respect to the shipowner's right to limit liability, given (a) the fundamental importance of this right, which underpins the conventions and (b) that the long-term sustainability of the liability and compensation system depends upon uniform implementation consistent with the intention of the conventions, rather than an application or interpretation that varies from country to country. The co-sponsors therefore propose that the Committee considers a new work output for the development of an aid to interpretation of one of the key principles underlying the system by means of a Unified Interpretation of the test for breaking the shipowner's right to limit liability. This would ensure consistency among States Parties while continuing to recognize that the courts in States Parties are ultimately the final arbiters. |
| *Strategic direction, if applicable:* | 1 and 6 |
| *Output:* | Proposal for a new output |
| *Action to be taken:* | Paragraph 26 |
| *Related documents:* | LEG.1/Circ.9; resolutions A.1110(30) and A.1111(30) and IOPC Fund resolution No. 8 |

## Introduction and background

1 This document is submitted in accordance with paragraph 4.7 of the *Organization and method of work of the Legal Committee* (LEG.1/Circ.9) on the submission of proposals for new outputs, taking into account resolution A.1111(30) on *Application of the Strategic Plan of the Organization* and proposes a new output to develop a Unified Interpretation of the test for breaking the owner's right to limit liability in the 1992 CLC Protocol, the 2010 HNS Protocol and the 1996 LLMC Protocol.

2 The Legal Committee has developed, over time, a comprehensive framework of liability and compensation conventions for ship-source pollution damage and other maritime claims: the 1992 CLC Protocol and IOPC Fund Convention, on which subsequent conventions have been modelled; the 2001 Bunkers Convention; the 2007 Nairobi WRC; the 2010 HNS Protocol; and, in terms of limitation of liability, the 1996 LLMC Protocol (the "Conventions").

3
The Conventions (with the exception thus far of the 2010 HNS Protocol, which has not yet entered into force but is expected to do so shortly), are among the most successful IMO conventions in terms of achieving their objectives of providing an effective, responsive and fair compensation system to claimants and, with the large number of ratifications across all regions of the globe, they can be said to be a truly global regime. The regime has been successful because of the carefully negotiated compromise between all of the parties: governments, the shipping industry and the oil industry, balancing their obligations and interests into a coherent package.

4 The success of the Conventions regime as a whole is due to the radical measures contained within the model first established in the 1969 CLC and the 1971 Fund Convention, which were novel at the time of their adoption, to ensure prompt compensation of claimants without the need for legal recourse. The measures and compromises in those Conventions that are designed to achieve these objectives include the strict liability of the shipowner, the channelling of liability to the shipowner irrespective of fault and compulsory insurance backed by State certification. Underpinning these measures is the shipowner's right to limit liability as a quid pro quo for acceptance of strict liability, with the intention that such a right is virtually unbreakable and with the owner's insurer entitled to rely upon the limit of liability irrespective of a finding of "recklessness" and with material knowledge on the shipowner's part.

5 As with all international instruments, continuing success is dependent upon all States Parties implementing and applying the Conventions in a uniform manner that is consistent with the aims and objectives agreed at the time of adoption, in order to ensure that the system remains fair for all parties and, most importantly, that it is applied equally and equitably to all claimants.

6 This has been recognized by the Organization in the drafting of the Conventions. For example, the preamble to both the 1992 CLC and the 1992 Fund Convention expressly States:

> "Desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases".

7 This intention was reinforced with regard to those particular instruments in 2003 in Fund resolution No. 8, adopted in May 2003 (Resolution on the Interpretation and Application of the 1992 CLC and 1992 Fund Convention), a copy of which is set out in annex 1. It confirms the importance of implementing and applying the regime uniformly in all States Parties for its proper and equitable functioning and to ensure that claimants are given equal treatment with regard to compensation. It also draws attention to the numerous decisions of the governing bodies of the IOPC Funds on the interpretation of the Conventions and emphasizes the importance of due consideration to these decisions by national courts.

8 Inconsistent application or interpretation, either through domestic implementing legislation or by decisions taken by national courts that differ in scope from the intention of the Conventions, could result in confusion and uncertainty as to the amounts payable under the Conventions and to an unequal treatment of claims. This would be highly undesirable for claimants seeking clarity and prompt compensation in the aftermath of an incident where damage has arisen as a result of ship-source pollution. A number of past cases would suggest

that this can also lead to protracted and unnecessary legal recourse, which is to the detriment of claimants and conflicts with the objectives of ensuring prompt payment of claims.

9 With a number of years of experience now in the application and interpretation of the Conventions since their entry into force, the co-sponsors believe that it is incumbent on the States Parties to collectively seek to ensure that such conflicts are avoided, to the extent possible and appropriate, through the work of the Legal Committee.

**IMO's objectives**

10 The Strategic Plan for the Organization for the six-year period 2018 to 2023 (resolution A.1110(30)) sets out the mission statement, which states that "The mission of the International Maritime Organization (IMO), as a United Nations specialized agency, is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation. This will be accomplished by adopting the highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships, as well as through consideration of the related legal matters and effective implementation of IMO Instruments, with a view to their universal and uniform application." The proposed new output will contribute to achieving the goals and carrying out the mission of the Organization.

**Need**

11 The co-sponsors are of the view that a Unified Interpretation agreed by the Legal Committee on the test for breaking the owner's right to limit liability under the Conventions regime would greatly assist in ensuring the proper implementation and application of the Conventions and would also promote the equal treatment of claims in States Parties. While the Conventions have been developed on the basis of shared liability and insurance provisions, the co-sponsors believe that a focus on the test for breaking the owner's right to limit liability is relevant and timely, given that limitation provides the foundation of the Conventions and the recognition that limitation is inextricably linked to the insurability of an owner's liability.

12 The success of the Conventions is based on reciprocity, and reciprocal treatment can only be achieved against the background of harmony in the application and interpretation of the Conventions. Revisiting the intentions of the drafters of the Conventions of this fundamental principle and developing a Unified Interpretation, accordingly, would assist in ensuring the continuing success of the Conventions and the carefully negotiated compromise between all of the parties, which is the foundation of the regime and balances the obligations and interests of the various parties into a coherent package.

13 Furthermore, the co-sponsors believe that such a Unified Interpretation would assist regulators, drafters of legislation, claimants and national courts in the States Parties to the Conventions, given that several years have passed since the Conventions were adopted. The adoption of such a Unified Interpretation would not in any way fetter the decision-making authority of those courts but would assist in the implementation and application as originally intended by States. Clarifying and re-affirming the intention behind this fundamental principle can only be of benefit to all interested and concerned parties, including those claimants who suffer losses arising from ship-source pollution damage and for whom certainty and prompt payment of compensation is paramount.

**Analysis of the issue**

14 The shipowner is entitled to limit its liability under the Conventions (article V(1) of the 1992 CLC, article 6 of the 2001 Bunkers Convention, article 10(2) of the 2007 Nairobi WRC, article 9(1) of the 2010 HNS Protocol and article 1(1) of the 1996 LLMC Protocol). However, under the 1992 CLC Protocol, 2010 HNS Protocol and the 1996 LLMC Protocol, the shipowner may lose the right to limit liability if it is proved that:

> "…the damage / loss resulted from his personal act or omission, committed with the intent to cause such damage / loss, or recklessly and with knowledge that such damage / loss would probably result."[1]

15 It is noteworthy that the above-mentioned test for breaking the shipowner's right to limit liability, which was first introduced in the 1976 LLMC Convention, replaced the test of "actual fault or privity" in the earlier versions of the LLMC and CLC regimes, namely the 1957 Brussels Limitation Convention and the 1969 CLC. The previous test was found unsatisfactory by States, as it led more readily than was intended to litigation cases, with the accompanying costs for claimants, and denial of limitation.

16 In developing the current test for breaking the shipowner's right to limit liability, the Legal Committee was guided by two principal considerations: firstly, that due account should be given to the availability of insurance cover for the limits and, secondly, that those limits should not be easily "broken". The previous test of "fault or privity" had been problematic in some jurisdictions, creating uncertainty and consequential difficulty in obtaining insurance cover and it was readily accepted by States that the entitlement to limitation should be guaranteed save in the most extreme of cases. The current wording was also agreed on the basis that clearer language was necessary to avoid differing interpretations.

17 Ultimately, the current test was agreed on the basis of a number of assumptions, including that the limit would be virtually unbreakable and, therefore, references to fault and privity and also to "gross negligence" that had been proposed during negotiations could be deleted, and acknowledging the importance of aligning the right to limitation of the insurability of an owner's liability and thereby seeking to ensure, as far as possible, the continuing availability of insurance. It was recognized in the drafting of the test that conduct which denies the shipowner the right to limit liability could also entitle the shipowner's insurer to deny insurance cover (the "wilful misconduct" rule).

18 As a result, the conduct considered to meet the test for breaking the shipowner's right to limit liability should not be lower in culpability than that intended in the Conventions. In addition, it was not the intention of the drafters of the Conventions that different interpretations be given to the word "recklessly" or for there to be an inconsistent application of the totality of the requirements set out in the test, which requires the conduct to be accompanied by "knowledge" that such damage would occur as a result of the conduct. The conduct of parties other than the shipowner, for example the master or the crew, is irrelevant and should not be taken into account, as this would be contrary to the provisions of the Conventions.

19 Sight of these important principles may have been lost given the length of time that has passed since the initial adoption of the revised test in the 1976 LLMC Convention, which has since been replicated in the other Conventions. The co-sponsors are therefore of the view that the Committee is well placed to revisit the intention of the drafters of the Conventions on the shipowner's right to limit liability in order to re-affirm the objective of consistent and uniform

[1] Articles V(2), 9(2) and 4 of 1992 CLC, 2010 HNS and 1996 LLMC, respectively.

application, both in terms of application and interpretation of this fundamental right to limitation and the test for breaking the right to limit liability.

**Analysis of implications**

20 There would be no cost to the maritime industry or administrative requirements arising from this output. However, the consequences of not addressing the issues discussed above could threaten the long-term sustainability of the liability and compensation system and may lead to adverse impacts on all parties concerned, including governments and other third party claimants, shipowners, insurers and reinsurers. The checklist for identifying administrative requirements, as set out in annex 2, has therefore been completed on this basis.

**Benefits**

21 The proposed action would seek to reaffirm the principles underlying the IMO liability and compensation Conventions, particularly with respect to the shipowner's right to limit liability, given (a) the fundamental importance of this right, which underpins the Conventions, and (b) that the long-term sustainability of the liability and compensation system depends upon uniform implementation, consistent with the intention of the Conventions. A Unified Interpretation on the test for breaking the owner's right to limit liability would ensure consistency amongst States Parties to the benefit of all parties concerned, while recognizing that the courts in States Parties are ultimately the final arbiters.

**Industry standards**

22 There are no industry standards related to consistent interpretation and application of the Conventions. In May 2003, the IOPC Fund adopted Fund resolution No. 8, Resolution on the Interpretation and Application of the 1992 CLC and 1992 Fund Convention.

**Output**

23 The co-sponsors invite the Legal Committee to consider the issues raised in this document and to agree on a new output to develop a common understanding of the test for breaking the shipowner's right to limit liability by means of a Unified Interpretation of the shipowner's right to limit liability under the Conventions.

24 The proposed output would be: a Unified Interpretation on the test for breaking the owner's right to limit liability as contained in the Conventions.

**Urgency**

25 Two sessions are estimated to be necessary to complete the work. The co-sponsors consider that there is urgency in addressing the issue of inconsistent interpretation and application of the test for breaking the owner's right to limit liability by means of a Unified Interpretation. Therefore, it is proposed that the output should be placed on the 2018-2019 biennial agenda (and in due course the 2020-2021 biennium). The proposed date for completion of the output is 2021.

**Action requested of the Committee**

26 The Legal Committee is invited to:

.1 take note of the information provided in this document; and

.2 agree to include a new output on its work programme to develop a Unified Interpretation on the test for breaking the owner's right to limit liability under the Conventions.

***

# ANNEX 1

## RESOLUTION No. 8 ON THE INTERPRETATION AND APPLICATION OF THE 1992 CIVIL LIABILITY CONVENTION AND THE 1992 FUND CONVENTION (May 2003)

THE ADMINISTRATIVE COUNCIL, ACTING ON BEHALF OF THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND, 1992, SET UP UNDER THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1992 (1992 Fund Convention)

**NOTING** that the States Parties to the 1992 Fund Convention are also Parties to the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 Civil Liability Convention),

**RECALLING** that the 1992 Conventions were adopted in order to create uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

**CONSIDERING** that it is crucial for the proper and equitable functioning of the regime established by these Conventions that they are implemented and applied uniformly in all States Parties,

**CONVINCED** of the importance that claimants for oil pollution damage are given equal treatment as regards compensation in all States Parties,

**MINDFUL** that, under Article 235, paragraph 3, of the United Nations Convention on the Law of the Sea 1982, States shall cooperate in the implementation of existing international law and the further development of international law relating to the liability for and assessment of damage caused by pollution of the marine environment,

**RECOGNIZING** that, under Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties 1969, for the purpose of the interpretation of treaties there shall be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,

**DRAWING ATTENTION** to the fact that the Assembly, the Executive Committee and the Administrative Council of the International Oil Pollution Compensation Fund 1992 (1992 Fund) and the governing bodies of its predecessor, the International Oil Pollution Compensation Fund 1971 (1971 Fund), composed of representatives of Governments of the States Parties to the respective Conventions, have taken a number of important decisions on the interpretation of the 1992 Conventions and the preceding 1969 and 1971 Conventions and their application, which are published in the Records of Decisions of the sessions of these bodies [<2>], for the purpose of ensuring equal treatment of all those who claim compensation for oil pollution damage in States Parties,

**EMPHASIZING** that it is vital that these decisions are given due consideration when the national courts in the States Parties take decisions on the interpretation and application of the 1992 Conventions,

[<2>] IOPC Funds' website: www.iopcfunds.org

**CONSIDERS** that the courts of the States Parties to the 1992 Conventions should take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions.

***

**ANNEX 2**

**CHECKLIST FOR IDENTIFYING ADMINISTRATIVE REQUIREMENTS**

This checklist should be used when preparing the analysis of implications required in submissions of proposals for inclusion of outputs. For the purpose of this analysis, the term "administrative requirements" is defined in resolution A.1043(27), as an obligation, arising from a mandatory IMO instrument, to provide or retain information or data.

**Instructions:**

(A) If the answer to any of the questions below is **YES**, the Member State proposing an output should provide supporting details on whether the requirements are likely to involve start-up and/or ongoing costs. The Member State should also give a brief description of the requirement and, if possible, provide recommendations for further work (e.g. would it be possible to combine the activity with an existing requirement?).

(B) If the proposal for the output does not contain such an activity, answer **NR** (Not required).

(C) For any administrative requirement, full consideration should be given to electronic means of fulfilling the requirement in order to alleviate administrative burdens.

| | | |
|---|---|---|
| 1. Notification and reporting?<br>Reporting certain events before or after the event has taken place, e.g. notification of voyage, statistical reporting for IMO Members | **NR** | □ Start-up<br>□ Ongoing |
| Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes) | | |
| 2. Record keeping?<br>Keeping statutory documents up to date, e.g. records of accidents, records of cargo, records of inspections, records of education | **NR** | □ Start-up<br>□ Ongoing |
| Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes) | | |
| 3. Publication and documentation?<br>Producing documents for third parties, e.g. warning signs, registration displays, publication of results of testing | **NR** | □ Start-up<br>□ Ongoing |
| Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes) | | |
| 4. Permits or applications?<br>Applying for and maintaining permission to operate, e.g. certificates, classification society costs | **NR** | □ Start-up<br>□ Ongoing |
| Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes) | | |
| 5. Other identified requirements? | **NR** | □ Start-up<br>□ Ongoing |
| Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes) | | |
| | | |

# Annex 3

**The October 2018 sessions of the governing bodies – In brief**

*2 November 2018*

The governing bodies of the International Oil Pollution Compensation Funds (IOPC Funds) held sessions from Monday 29 October to Thursday 1 November 2018 at the headquarters of the International Maritime Organization (IMO) in London. Seventy States, representing 65 Member States of the 1992 Fund, 24 Member States of the Supplementary Fund and 5 observer States, as well as 13 observer organisations, attended sessions of the 1992 Fund Administrative Council, the 1992 Fund Executive Committee and the Supplementary Fund Assembly. On Tuesday 30 October, the opportunity was taken to hold a special session to celebrate the 40th anniversary of the IOPC Funds.

**1992 Fund Executive Committee (71st session)**

The 1992 Fund Executive Committee was informed of one new incident which had occurred in British Columbia, Canada and noted information provided by the Secretariat on a number of recent developments in respect of ongoing incidents involving the Fund. Information was provided on all open incidents involving the IOPC Funds. In particular, recent developments in the following incidents were reported.

**Incident in Canada (October 2016)**

On 13 October 2016, the articulated tug-barge (ATB) composed of the tug *Nathan E. Stewart* and the tank barge *DBL 55* ran aground on Edge Reef near Athlone Island, at the entrance to Seaforth Channel, approximately 10 nautical miles west of Bella Bella, British Columbia, Canada. The tug's hull was eventually breached and approximately 110 000 litres of diesel oil was released into the environment. The tug subsequently sank and separated from the barge.

A first nation community consisting of five tribes has brought a legal action against the owner, operators, the master and an officer of the *Nathan E. Stewart/DBL 55* ATB. The claimants also include as third parties, among others, the Ship-source Oil Pollution Fund in Canada, the 1992 Fund and the Supplementary Fund and in October 2018 the Director was served with proceedings. Even if this case was proven to fall under the 1992 Civil Liability and Fund Conventions, there is no indication that the damages would exceed the shipowner's liability limit under the 1992 CLC. The Director intends to monitor the case and report on developments to future sessions of the Executive Committee.

***Prestige* (Spain, November 2002)**

In November 2017, the Court in La Coruña, Spain delivered a judgment on the quantification of the compensation due in respect of the *Prestige* incident. The total amount awarded by the Court is, after a correction in January 2018, €1 650 046 893. The 1992 Fund and other parties have filed an appeal before the

Supreme Court. The Spanish Supreme Court is expected to deliver its decision on the appeals before the end of 2018. The Director presented a document to the 1992 Fund Executive Committee which examines the impact of the judgment by the Spanish Supreme Court on the claims made by Spain, France and Portugal and identifies, on a provisional basis, the amount that the 1992 Fund could pay to the victims in the three countries. When summarising the discussion during the session, the Chairman of the Executive Committee noted that the main issue was to ascertain how to adapt the Court's decisions to the amount available for compensation and pointed out that there was general support for this matter to be discussed between the Director and Member States.

***Hebei Spirit*** **(Republic of Korea, December 2007)**

Almost 130 000 claims have been registered in this case. The Courts have awarded a total of KRW 433 billion in compensation and only two claims remain pending. The total amount available for this incident under the 1992 Conventions, KRW 321.6 billion, is insufficient to pay all established claims in full. The shipowner's insurer (Skuld Club) has paid some KRW 186.8 billion in compensation. Under a Special Law, the Government of the Republic of Korea undertook to pay compensation to all claimants in excess of the Skuld Club's and the 1992 Fund's limits and has been paying all claimants the full established amount of their claims, subrogating those claims against the 1992 Fund. The 1992 Fund has been making compensation payments to the Republic of Korea, with KRW 107 billion paid. The 1992 Fund Executive Committee noted the latest developments and decided to maintain the level of payments at 60% of the amount of the established losses and to review this at its next session.

***Agia Zoni II*** **(Greece, September 2017)**

Clean-up operations following this incident concluded at the end of 2017. The *Agia Zoni II* presently remains at the salvor's shipyard, likely destined for scrapping. The salvors have submitted claims to the 1992 Fund, which are presently being assessed. In total the 1992 Fund has received 232 claims amounting to €80.65 million and USD 175 000 and has already made compensation payments totalling some €10 million. The 1992 Fund's experts are assessing a large number of other claims and are awaiting further information from many claimants to enable assessments to be completed.

The details of the investigation into the incident by the public prosecutor have not yet been released. In July 2018, the 1992 Fund was informed that the district attorney was also investigating the terms of the granting of the antipollution services agreement to the clean-up contractors. Some concerns were expressed during the discussions at the 1992 Fund Executive Committee session about the circumstances surrounding the incident and whether the 1992 Fund should await the outcome of the Greek authorities' investigation into its cause. However, the Director clarified that this had not been the practice of the Funds in previous incidents and noted that although the circumstances of the incident were unusual, it would be wrong to speculate until the Greek authorities had completed and published their reports into the cause of the incident.

**Other incidents**

The Secretariat also provided information in respect of the *Solar 1* (Philippines, August 2006), *Redfferm* (Nigeria, March 2009), *Haekup Pacific* (Republic of Korea, April 2010), *Alfa I* (Greece, March 2012), *Nesa R3* (Oman, June 2013), and *Trident Star* (Malaysia, August 2016) incidents. It was also reported that the *Volgoneft 139* incident (Russian Federation, November 2007) had been closed since compensation to all claimants had been paid. The *Double Joy* (Malaysia, August 2014) was also closed since all claims arising from the incident had been settled by the shipowner/insurer.

**1992 Fund Administrative Council (18th session) and Supplementary Fund Assembly (15th session)**

During their simultaneous sessions, the governing bodies took a number of decisions and took note of a wide range of information provided in relation to compensation matters, treaty matters, financial policies and procedures and secretariat and administrative matters. Decisions included:

***Election of members of the 1992 Fund Executive Committee***

In accordance with 1992 Fund Resolution N°5, the 1992 Fund Assembly elected the following States as members of the 1992 Fund Executive Committee to hold office until the end of the next regular session of the 1992 Fund Assembly:

| | | |
|---|---|---|
| China[<1>] | Jamaica | Spain |
| France | Japan | Sri Lanka |
| Georgia | Mexico | Turkey |
| India | Singapore | United Arab Emirates |
| Italy (Chairman, Ambassador Antonio Bandini) | South Africa | United Kingdom |

**Budgetary matters and assessment of contributions**

The 1992 Fund Administrative Council made the following decisions relating to the 2019 budget and 2018 contributions:

- To adopt an administrative budget for the 1992 Fund of £4 692 577 for 2019.
- To levy contributions to the General Fund of £5.9 million, payable by 1 March 2019.
- To reimburse £3.675 million to the contributors to the *Volgoneft 139* Major Claims Fund, by 1 March 2019, with the balance on the Major Claims Fund to be transferred to the General Fund.
- To levy contributions of £1.675 million to the *Alfa I* Major Claims Fund, payable by 1 March 2019.
- To levy contributions of £26 million to the *Agia Zoni II* Major Claims Fund, with £10 million payable by 1 March 2019 and £16 million, or part thereof, deferred for payment no later than 1 September 2019, if it proves necessary.

The Supplementary Fund Assembly adopted an administrative budget for 2018 of £49 200.

**2010 HNS Convention**

On the basis of the recent progress by States towards ratification of the Convention and in particular the ratifications by Canada, Denmark, Norway and Turkey, the Director is of the view that the 2010 HNS Convention is now likely to meet the criteria for entry into force in 2021 or 2022 and that the work carried out by the 1992 Fund Secretariat to set up the HNS Fund and to make preparations for the first session of the HNS Fund Assembly should now enter a new phase. The Director presented a document containing the specific administrative tasks and other areas on which he believes the 1992 Fund Secretariat should now focus. The 1992 Fund Administrative Council agreed with the Director's proposal to undertake the tasks listed in the document (IOPC/OCT18/8/2) and to report on its progress to the 1992 Fund Assembly on a regular basis.

***Other decisions***

The governing bodies also took decisions regarding the following:

- The approval of a request for observer status from the organisation Cedre (Centre of Documentation, Research and Experimentation on Accidental Water Pollution).
- Following a full review, the approval of the continuance of observer status of each of the 16 international non-governmental organisations currently holding that status.
- The establishment of a Supplementary Fund Administrative Council

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[<1>] The 1992 Fund Convention applies to the Hong Kong Special Administrative Region only.

Information noted included:

***Compensation matters***

**Implementation of the 1992 Civil Liability Convention and the 1992 Fund Convention**

In recent years, upon the request of some Member States, the Secretariat has examined and provided comments on national legislation implementing the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention. The Secretariat presented a document to the governing bodies detailing some of its observations, in particular pointing out that legislation is not always updated with the latest limitation amount of the shipowner's liability under the 1992 CLC and the maximum amount of compensation payable under the 1992 Fund Convention. The Director invited Member States to review their national legislation currently in force and offered the Secretariat's assistance in that regard if they so requested.

***Financial reporting***

**Report of the joint Audit Body – Risk management (Insurance Problems)**

The joint Audit Body is currently reviewing the risks arising from incidents involving the IOPC Funds where the ships were insured by insurers that were not members of the International Group of P&I Associations. The Audit Body reported to the governing bodies on the initial stage of this risk review which had been undertaken in close cooperation with the Secretariat. After some discussion of this interim report, the Audit Body stated that it would continue to examine this matter and will report to the governing bodies at a future session, with proposals for a variety of tools to deal with the different problems arising.

**Celebratory session and reception to mark the 40th anniversary of the IOPC Funds**

The IOPC Funds took the opportunity of its meeting of the governing bodies to formally celebrate its 40th anniversary. A celebratory session was held during the afternoon of 30 October 2018, at which the three former Directors, Dr Reinhard Ganten, Mr Måns Jacobsson and Mr Willem Oosterveen, were each presented with a special award in recognition of their valuable contribution to the work of the IOPC Funds.

The session was attended by the Secretary-General of IMO, Mr Kitack Lim, Secretaries-General Emeriti, Mr William O'Neil and Mr Efthymios E. Mitropoulos and other eminent persons from the maritime and shipping industry, State representatives, organisations and companies with whom the IOPC Funds has worked closely over years, as well as a large number of former members of the Secretariat. The celebrations continued with a reception in the evening.

**Future meetings**

The governing bodies decided to hold the next regular sessions of the 1992 Fund Assembly and the Supplementary Fund Assembly during the week of 28 October 2019. They also agreed that the next sessions of the governing bodies would take place during the week of 1 April 2019.

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Note: This is a summary of key aspects of the sessions held and does not reflect the sessions in full. A comprehensive Record of Decisions may be obtained via the Document Services section of the IOPC Funds' website at www.iopcfunds.org.

# Annex 4

# VTMIS

## Places of Refuge

## EU Operational Guidelines

Version 5 - Final 1 February 2018

## *Preface*

***Following recent maritime incidents involving ships in distress in waters outside the jurisdiction of any one State, the Member States of the European Union, together with the European Commission and the European Maritime Safety Agency (EMSA), decided to review the framework for co-operation and co-ordination between States in such cases, to improve the existing arrangements.***

***As a matter of principle, each State involved in the response operation should examine their ability to provide a place of refuge.***

***These Operational Guidelines have been prepared in a spirit of enhanced co-operation and coordination among all parties involved, including Member States' Authorities and concerned Industry.***

# Background

All States Parties to the UN Convention on the Law of the Sea (UNCLOS) have an obligation to protect and preserve the marine environment. In order to comply with this obligation, States should draw up and implement a National Contingency Plan for response to any maritime incident.

According to the IMO Guidelines on Places of Refuge[1], when a ship has suffered an incident, "the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers; and to repair the damage. Such an operation is best carried out in a place of refuge as it is rarely possible to deal satisfactorily and effectively with a marine casualty in open sea conditions." A place of refuge is a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment. It may include a port, a place of shelter near the coast, an inlet, a lee shore, a cove, a fjord or a bay or any part of the coast.

Because of the many variable factors involved (e.g. sea state, weather and condition of the vessel, required and available facilities), and the variety of risks involved when bringing a ship in need of assistance into a place of refuge a decision to grant access to a place of refuge can only be taken on a case-by-case basis.

Since 2009, under the terms of the VTMIS Directive[2], EU Member States have been required to designate **"one or more competent authorities, which have the required expertise and the power, at the time of the operation, to take independent decisions on their own initiative concerning the accommodation of ships in need of assistance."[3]** In setting up a system of competent authorities for managing places of refuge requests, the Directive also crystallises some of the recommendations of the IMO Guidelines into obligations for the different parties involved in such incidents.

Building on this framework, the EU Operational Guidelines provide practical guidance for the competent authorities (CA) and the main parties involved in managing a request for a place of refuge from a ship in need of assistance[4], including where an incident occurs on the high seas or outside of the jurisdiction of any one Member State.

The EU Operational Guidelines do not cover SAR operations. The provisions of the SAR Convention[5] take priority over these Guidelines at all times.

The EU Operational Guidelines do not apply to any incidents on inland waterways.

The EU Operational Guidelines, although non-mandatory in nature, are intended to support the more uniform application of the underlying legal provisions in Directive 2002/59/EC and must not be understood to imply any new or replace any existing legal obligations.

[1] IMO Resolution A.949(23) GUIDELINES ON PLACES OF REFUGE FOR SHIPS IN NEED OF ASSISTANCE
[2] Directive 2002/59/EC on Community vessel traffic monitoring and information system, as amended.
[3] Article 20 (1) of Directive 2002/59/EC, as amended by Directive 2009/17/EC.
[4] As defined in Directive 2002/59/EC Article 3(v): "'ship in need of assistance' means, without prejudice to the provisions of the SAR Convention concerning the rescue of persons, a ship in a situation that could give rise to its loss or an environmental or navigational hazard".
[5] International Convention on Maritime Search and Rescue, 1979

They are drafted with a real operational situation for a vessel in need of assistance in mind. They aim at a robust **operational** process leading to well advised and, where possible, quicker decision making. At the same time they should contribute to promoting positive attitudes – within Governments, authorities, and Industry for the purposes of Places of Refuge, in the interest of the protection of human life, maritime safety, security and the environment. A key element for these purposes is timely and clear communication between the parties involved, in particular for cross-border situations.

The Guidelines support the requirement for national plans for accommodation of ships in need of assistance to include '*procedures for international coordination and decision-making*' and the attainment of the objective for Member States and the Commission to cooperate in drawing up concerted plans to accommodate ships in need of assistance, as required by the VTMIS Directive.

As a matter of principle, each State involved in the operation should examine their ability to provide a place of refuge. A place of refuge request cannot be refused for commercial or financial reasons, nor should commercial interests become the main driver for the handling of PoR requests, or the selection of a potential PoR. Unless deemed unsafe, there should be no rejection without inspection.

# Context

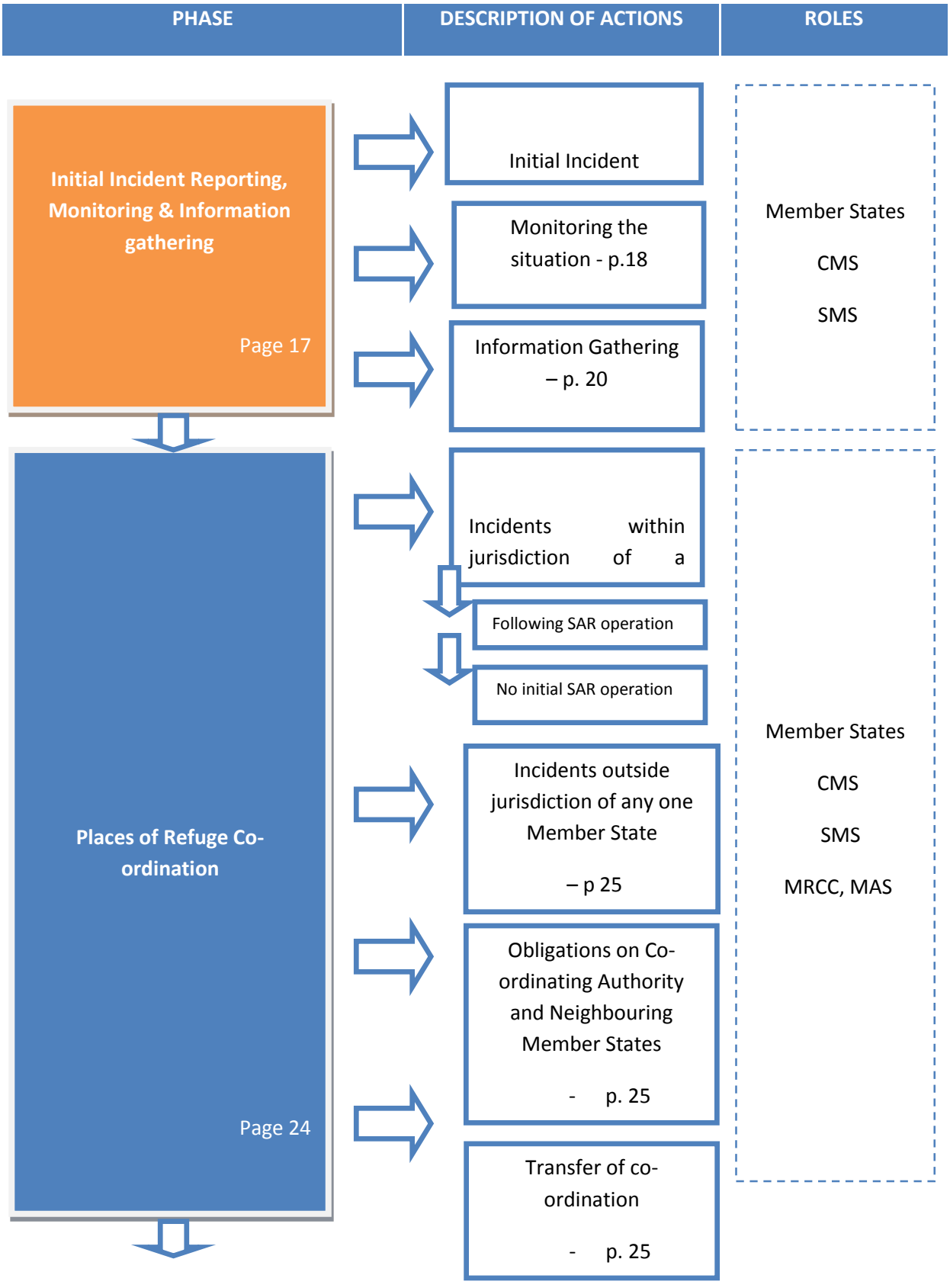
Many times situations leading to a request for a place of refuge involve only one Member State and will be handled by the same State, under its jurisdiction. There may however be cases where a purely national situation may turn into a situation involving neighbouring Member States or Member States in the vicinity of the incident. These Operational Guidelines should complement national plans and apply to situations where it is likely that more than one State may become involved, or where the incident falls outside the jurisdiction of any Member State.

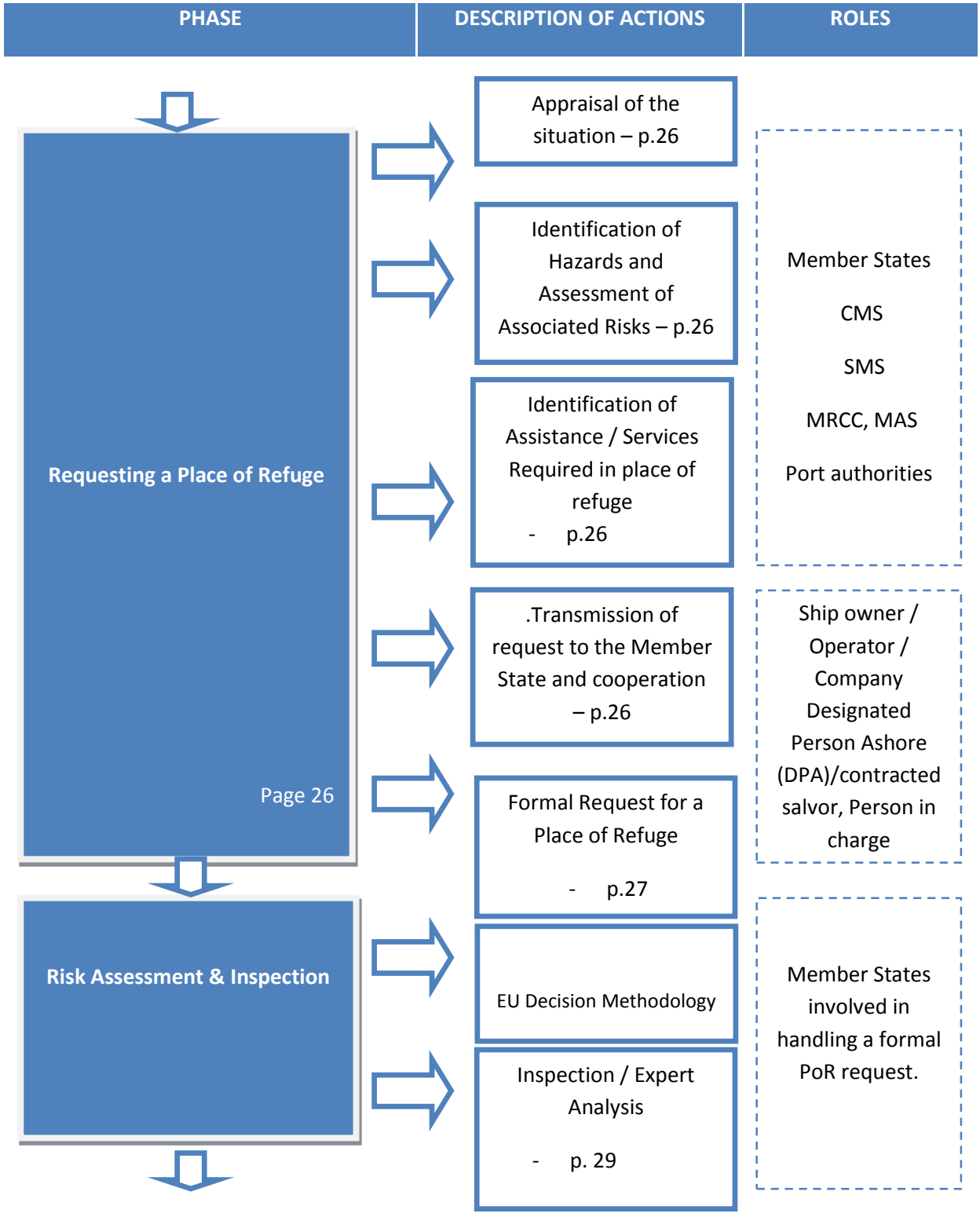
It is important to note that there are obligations on Member States under the VTMIS Directive, to monitor any potential situation, and an obligation on Masters to report any such incidents, before they turn into a place of refuge situation.

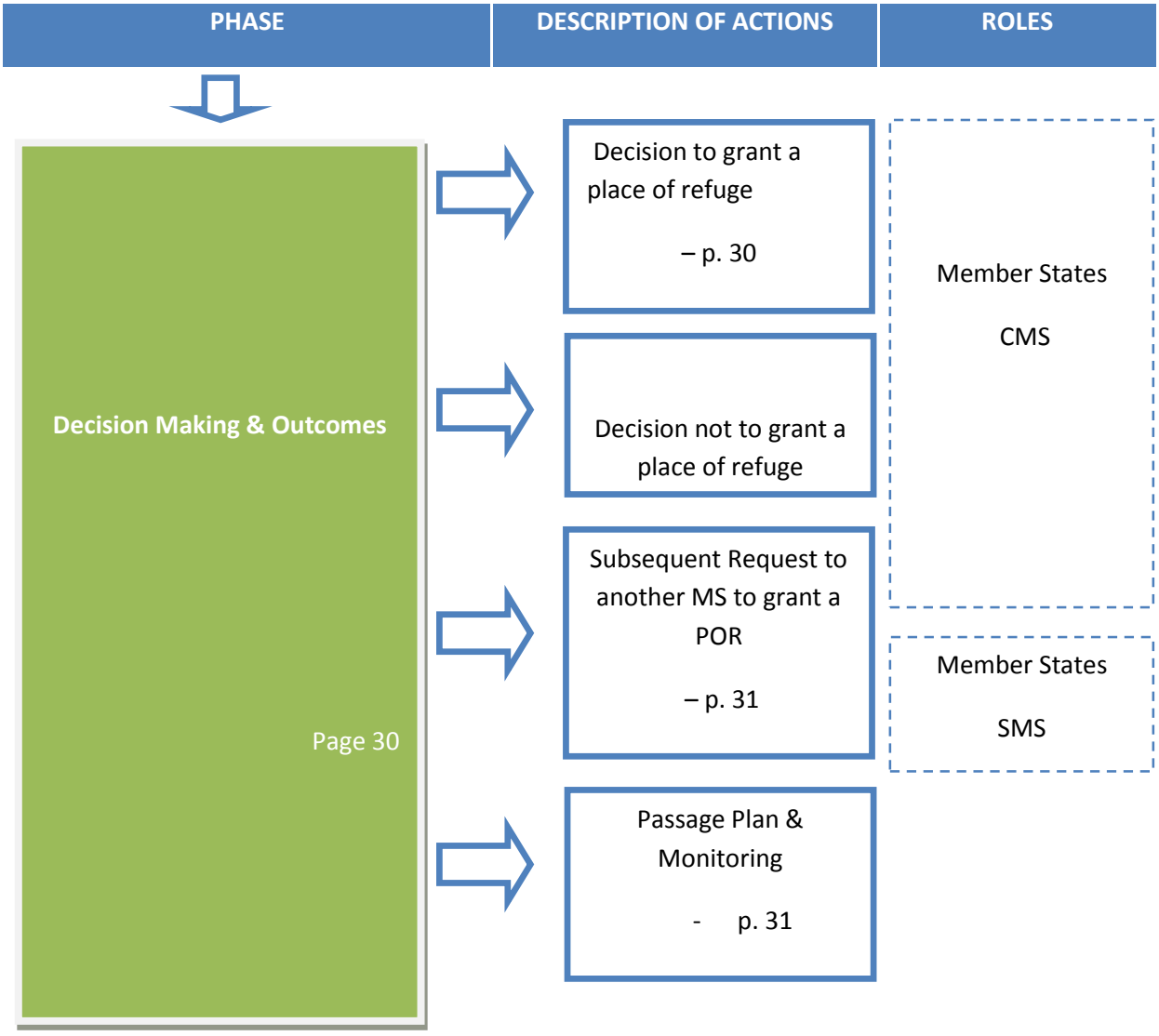
Flowchart and sequence:

# POR GUIDELINES – FLOW CHART (QUICK REFERENCE)

## OPERATIONS




PHASE
DESCRIPTION OF ACTIONS
ROLES
Requesting a Place of Refuge
Page 26
Risk Assessment & Inspection
Appraisal of the situation – p.26
Identification of Hazards and Assessment of Associated Risks – p.26
Identification of Assistance / Services Required in place of refuge
- p.26
.Transmission of request to the Member State and cooperation – p.26
Formal Request for a Place of Refuge
- p.27
EU Decision Methodology
Inspection / Expert Analysis
- p. 29
Member States
CMS
SMS
MRCC, MAS
Port authorities
Ship owner / Operator / Company Designated Person Ashore (DPA)/contracted salvor, Person in charge
Member States involved in handling a formal PoR request.


PHASE
DESCRIPTION OF ACTIONS
ROLES
Decision Making & Outcomes
Page 30
Decision to grant a place of refuge
– p. 30
Decision not to grant a place of refuge
Subsequent Request to another MS to grant a POR
– p. 31
Passage Plan & Monitoring
- p. 31
Member States
CMS
Member States
SMS

## INDEX

**Please click HERE for index of the document – page 67**

## DEFINITIONS

| | | |
|---|---|---|
| **Roles and Responsibilities of Key Players in relation to a request for a Place of Refuge** | Responsibilities of Member States | Responsibilities of the Co-ordinating Member State (CMS)<br>Responsibilities of the Supporting Member States (SMS)<br>Role of Maritime Assistance Service and Maritime Rescue Co-ordination Centre<br>The Flag State |
| | Responsibilities of other involved parties | The master<br>Persons responsible for the vessel at the time of the incident<br>The Classification Society<br>The Salvor<br>Port & Harbour Authorities<br>Insurers |

## ADDITIONAL INFORMATION

| Topic | Details | Scope |
|---|---|---|
| **Financial Security** | Operational action points | Procedures in the national plans, information gathering aspects, decision making |
| **Media and Information Handling** | Key Principles<br>Key interest groups<br>Key actions for persons handling incident | Media handling procedure |

| | | |
|---|---|---|
| **Lessons Learned** | National & Regional De-briefs<br>Places of Refuge CA Co-operation<br>Exercises & Workshops | Best practices promotion |

## APPENDIXES

| Appendix | Title | Scope |
|---|---|---|
| **A** | **List of MAS / MRCC** | **Operations** |
| **B** | **List of Competent Authorities** | **Operations** |
| **C** | **Formal Place of Refuge Request Form** | **Operations** |
| **D** | **Decision Making Tool** | **Operations** |
| **E** | **Integrated Maritime Services** | **Tools Available at EU level** |
| **F** | **Member State Handover Co-ordination Form** | **Operations** |
| **G** | **SITREP Template** | **Operations** |
| **H** | **International and European Law – relevant rules** | **Information** |
| **J** | **List of Websites/Contacts** | **Information** |
| **J** | **Financial Liability and Compensation** | **Information** |

## OTHERS

| |
|---|
| **List of Definitions** |
| **List of Acronyms** |

# Chapter 1

# Roles and Responsibilities of Key Players in relation to a request for a Place of Refuge

## 1.1. Responsibilities of Member States

Each Member State shall:

- designate one or more competent authorities which have the required expertise and the power, at the time of the operation, to take independent decisions on their own initiative concerning the accommodation of ships in need of assistance;
- establish assessment procedures for acceptance or refusal of a ship in need of assistance in a place of refuge, in their plans for the accommodation of ships in need of assistance. Plans must also include procedures for international coordination and decision-making, which should be consistent with these Guidelines for the handling of requests for assistance and authorising, where appropriate, the use of a suitable place of refuge;
- examine their ability to provide a place of refuge;
- ensure due publicity for the name and up-to-date contact details of the competent authorities;
- ensure availability of information on plans for other neighbouring States and all parties involved in a response operation;

### 1.1.1. Member State's Competent Authority

Responsible for:

- Taking independent decisions on the need for, and location of, a place of refuge for a particular ship in need of assistance
- Overall command and control of incident, taking steps leading up to accommodation in a place of refuge, including the ones listed in Annex IV of the Directive e.g. may direct a vessel in need of assistance to place(s) of refuge when judged appropriate
- Liaising with authorities likely to get involved and ensure that information on any potential hazard arising from the incident to other State(s) is made available to the other State(s) as soon as possible.

Direct access to the by the Member States designated competent authorities is via:

http://www.emsa.europa.eu/implementation-tasks/places-of-refuge/download/3941/2630/23.html

*---- Click to come back to PoR Quick Reference ----*

### 1.1.2. Co-ordinating and Supporting Member States

The Maritime Assistance Service (MAS) or the authority (or authorities) as referred to in Articles 20.1 and 20a.2(a) of Directive 2002/59/EC, as amended, which has assumed co-ordination, will be known as the Co-ordinating Member State (**CMS**). Other Member States supporting the CMS will be known, for the purpose of these Guidelines, as Supporting Member States (**SMS**).

### 1.1.3. Responsibilities of the Co-ordinating Member State (CMS)

The CMS will be responsible for:

- Ensuring that the competent authority (CA) is in charge of overall co-ordination of the incident;
- Initiating their national PoR procedure, in order to identify a potential site on their territory;
- Being the main point of contact for liaison with representatives of the involved parties, including the ship owner and/or operator, master, P&I club, salvors, and if necessary, the operator of a port of refuge;
- Where necessary, coordinating the response to the PoR request with potential Supporting Member States (SMS), in order to gain their assistance;
- Issuing SITREPS and alerting SMS and EMSA Maritime Services of the incident, actions taken to date and proposed plans;
- Determining whether a Member State Co-operation Group and a Secretariat should be set up for the incident;
- Organising evaluation teams: search for transportation, constitution of teams, in collaboration with the other states involved;
    - Undertaking a thorough analysis of the factors listed in these Guidelines in order to decide whether to allow a ship in need of assistance to proceed to a place of refuge (see Chapter 5); and
    - Communicating the results of that analysis, once complete, to the other authorities concerned and to the shipowner.
- Ensuring that those authorities who may become responsible for the vessel once in a place of refuge are:
    - informed as early as possible of that possibility;
    - involved in the risk assessment process and are given all relevant information.
- Following a balanced assessment of all the factors involved, providing a place of refuge whenever reasonably possible; OR

Where appropriate, initiating a dialogue to formalise the transfer of co-ordination to another State.

NB: The CMS considering a formal PoR request should not enter into direct contact with different port authorities or shore based authorities in another State. All information exchanges must go through the competent maritime authorities in the State concerned.

*---- Click to come back to PoR Quick Reference ----*

### 1.1.4. Responsibilities of the Supporting Member States (SMS)

The Member States supporting the CMS in handling the PoR request procedures include:

- those nearest the vicinity of the vessel in need of assistance;

and, if necessary,

- the Flag State;

Each SMS should:

- Ensure that any relevant incident related information is passed to the CMS without delay;
- Be prepared to plan in parallel and proactively assess possible alternative options should the CMS be unable to grant a PoR.
- Be prepared to examine any requests from the CMS for assistance (logistical, expertise or evaluation);
- Be prepared to examine a request for a place of refuge within their jurisdiction by the CMS or the salvor as mandated by the owner;

In particular,

- Neighbouring Member States should examine the possibility of granting a place of refuge in their territory – even though the incident, at the time, is taking place outside their area of jurisdiction.

### 1.1.5. Role of Maritime Assistance Service and Maritime Rescue Co-ordination Centre

In some EU Member States, the Maritime Assistance Service (MAS) and the Maritime Rescue Co-ordination Centre (MRCC) can be one and the same, or have been co-located and are available 24/7 to act as a single point of contact (SPOC) for refuge requests. **A list of MAS/MRCCs in EU Member States can be found [link to Appendix A].**

In the event of any maritime incident[6], the ship's master and/or the salvor shall contact the appropriate MRCC/MAS, as designated in each EU Member State, to report the incident and initiate the necessary follow-up actions.

In emergency situations other than those defined in the SAR Convention, the Maritime Assistance Service (MAS):

[6] *c.f.* Article 17 in Directive 2002/59/EC as amended

- provides communication facilities for ships in need of assistance.

In emergency situations as defined in the SAR Convention, including one that subsequently arises from efforts to assist a ship in need of assistance:

- the national or regional Maritime Rescue Co-ordination Centre (MRCC) is responsible for communication and the management of the search and rescue operation;
- the Maritime Assistance Service (MAS) should monitor developments, in case a need for a place of refuge arises, or if other measures (such as counter pollution activities) are required.

Once the SAR functions are completed, communication and incident management normally transfers to the MAS.

*---- Click to come back to PoR Quick Reference ----*

## 1.2. Responsibilities of other involved parties

### 1.2.1. The master

The master has the command of the vessel and remains in command of the vessel even when a salvage operation is underway, until such time that the master has relinquished his command and it comes under the responsibility of the salvor.

The master shall:

- inform the competent authorities (of the nearest coastal State(s)) of the incident as soon as possible issuing an incident report with at least the following details: (1) the ship's identity, (2) the ship's position, (3) the port of departure, (4) the port of destination, (5) Information about the on-board cargo, (6) the address from which additional information may be obtained on any oil and dangerous cargo on board (i.e. copy of cargo manifest) to the extent known, (7) quantity, location and type of bunkers on board, (8) the number of persons on board, and (9) details of the incident;
- inform the shipowner or the operator of the ship, in accordance with the ISM Code, of the incident;
- cooperate fully with the CAs;
- communicate all requested or pertinent information to CAs ; and

The master should (with the assistance of the company and/or the salvor where necessary):

- assess the situation and identify the reasons why the ship needs assistance;
- carry out an appraisal of the threats (e.g. from fire, explosion, grounding etc.); and then
- estimate the consequences of the potential casualty, if the ship were to:
  - remain in the same position;
  - continue on its voyage;
  - reach a place of refuge; or
  - be taken out to sea.

The master (and/or the salvor) should (See further Chapter 4 on Requesting a Place of Refuge):

- identify the assistance required from the coastal State in order to overcome the inherent danger of the situation;
- make contact with the coastal State (through the coastal State's MAS/MRCC – See **Appendix A**) in order to transmit:
  - the master's appraisal of the situation (to the best of the masters's ability or knowledge at the time of the situation)
  - the hazards and risks identified
  - the assistance required
  - the particulars required under the international conventions in force
  - if there is an emergency response services (ERS) onboard;
- undertake any relevant response actions to minimize the consequences of the casualty.

*---- Click to come back to PoR Quick Reference ----*

### 1.2.2. Persons responsible for the vessel at the time of the incident

- Ship operators, ship agents & charterers

For the purposes of these Guidelines, 'ship operator' is the owner or manager of a ship[7], 'ship agent' is any person mandated or authorised to supply information on behalf of the operator[8], and 'charterer' is the bareboat charterer of the ship.

The operator shall contact the CA and remain available for consultation and cooperation with the CA, as soon as it is informed of the incident.

The operator decides which external specialists, such as salvors, to contract to assist with the required response measures handling an incident.

It is important that ship charterers and/or agents contact the CMS at earliest opportunity to discuss the incident and provide relevant information.

Ship operators must cooperate fully with the CMS, in accordance with existing national and international law.

- Cargo Owners/shippers

For the purposes of the Guidelines, 'shipper' is any person by whom or in whose name or on whose behalf a contract of carriage of goods has been concluded with a carrier[9].

Initial requests for information about on-board cargo should be directed to the master in the first instance, who should have information of cargo on board, including its location and ownership through documentation on board, notably the ship and cargo manifest and the bill of lading (in the case of tankers Material Safety Data Sheets –'MSDS' – will be used), and can, identify the bill of lading issuers, shippers and others who can be contacted for the purposes of identifying the cargo.

[7] Article 3(b) of Directive 2002/59/EC as amended, OJ L 208, 5.8.2002, p.10.
[8] Article 3(c), idem.
[9] Article 3(d), idem.

If the master has relinquished his command and/or is no longer in a position to provide the information, Cargo owners/ shippers have the most accurate information on cargo, which is particularly important in the case of dangerous goods.

It is important to ensure that commercial interests do not become the main driver for the handling of PoR requests, or the selection of a potential PoR.

### 1.2.3. The Flag State

The Flag State should be asked to cooperate with the CMS, if there is a need for specific information on the ship's certificates and any other relevant documentation (i.e. safety and pollution prevention). There is an obligation on CMS to keep the Flag State aware of any developments. The Flag State can also acts as SMS.

### 1.2.4. The Classification Society

Many classification societies have set up emergency response services (ERS) (ERS can provide information on damage stability and residual strength etc to the ship's crew, salvors or the CMS.). Whereby the ship classification society has available a shore-based ERS it should be forthwith notified to the CMS. If the vessel in question carries an Emergency Response-Service, the availability should be notified to the CMS by the operator as soon as possible.

Following an incident, it is imperative for the classification society to be involved in the information gathering and risk assessment stage, in particular when a formal request for a place of refuge has been made, and to provide any information. A clear line of communication should be established between ERS and CMS. As the International Association of Classification Societies recommends, ERSs are to provide rapid technical assistance to the Master and to other authorities.[10]
The CMS should have access to all information that he deems necessary, i.e. ERS modelling, cargo manifests, etc. From the early critical stages through to repair, ERS provides support by evaluating the technical aspects of the casualty and identifying concerns and possible courses of action.

### 1.2.5. The Salvor

The duties of the Salvor are set out in Article 8 of the International Convention on Salvage 1989, which is incorporated into Lloyd's Open Form[11], and will apply when no contract is in place. If a contract other than Lloyd's Open Form is in place responsibilities will be different and will be specific to each casualty.

After the master has relinquished his command, the salvor is responsible for:

- Keeping the co-ordinating authority/CA fully informed about the condition of the vessel and the progress of the salvage operation.
- Cooperating fully with the CA in ensuring the safety of the ship, of persons, and the protection of the marine environment, by taking all appropriate measures.[12]
- Submitting an outline salvage plan showing immediate intentions (detailed plan to be provided later) to the CA for approval before operations commence.

[10] IACS Recommendation N.145 (May 2016)", see at http://www.iacs.org.uk/document/public/Publications/Guidelines_and_recommendations/PDF/Rec._No._145_pdf2856.pdf
[11] The most commonly used contract is the Lloyd's Open Form which places onerous obligations on the salvor including a commitment to use 'best endeavours' and 'to prevent and minimise damage to the environment'.
[12] see Article 19(1) and Annex IV of VTMIS Directive

- (If there is an ERS in place), the salvors will be in direct contact with the classification society to provide them with updates on the condition of the vessel.

The salvage team is led by the Salvage Master and will range in size depending on the incident. It may include Salvage Engineers, Naval Architects, Divers and Specialists, including Cargo Specialists.

### 1.2.6. Port & Harbour Authorities

Depending on circumstances and following the risk assessment a port or harbour may be identified as a potential PoR.

If a port or harbour is identified as a potential PoR for a vessel in need of assistance, the following issues will need to be considered:

- The availability of a suitable Berth, designated Emergency Reception Berth, or otherwise, place to accommodate the vessel.
- The risk to safety and/or human health, particularly if the port or harbour is in close proximity to populated areas.
- Technical considerations of the port's operations (e.g. assessment of the potential risk of lengthy disruption, the vessel blocking or restricting access through navigation channels, damage to infrastructure).
- If the CA responsible at sea changes to the Authority responsible in the port or harbour, the continuity of all operation towards the vessel seeking a place of refuge regarding the vessel / port interface should be maintained without any loss. (Vessel/port Interface regarding waste management, cargo handling, safety and security etc. diverts from service on intact vessels.)

### 1.2.7. Insurers

**Protection & Indemnity ('P&I') Insurance** covers a wide range of liabilities including personal injury to crew, passengers and others on board, cargo loss and damage, oil pollution, wreck removal and dock damage. Generally, P&I Clubs also provide a wide range of services to their members on claims, legal issues and loss prevention, and often play a leading role in the management of casualties. Hence, establishing communication with the P&I Club as early as possible during an incident is important as they can be instrumental in obtaining relevant information from the ship operator.

In an incident, they may be asked to provide financial guarantees which may include guarantees for damages or losses to ports during the accommodation of a ship in need of assistance. (See Appendix J for more details)

**Hull & Machinery ('H&M') Insurance** covers damage to the vessel's hull, machinery and equipment. This is often covered by two or more underwriters; hence, it is sufficient to obtain the contact details of the lead hull insurer, who is authorised to act on behalf of all followers. (See Appendix J for more details)

**Cargo insurance** covers damages to the cargo on board the vessel, including cargo contributions to the general average. (See Appendix J for more details)

*---- Click to come back to PoR Quick Reference ----*

# Chapter 2

# Initial Incident Reporting, Monitoring & Information gathering


## 2.1. Initial Incident Reporting

With a view to preventing or mitigating any significant threat to maritime safety, the safety of individuals or the environment, member States shall monitor and take all appropriate measures to ensure that the master of a ship sailing within their SRR/EEZ or equivalent, reports to the coastal station responsible for that geographical area.

Insofar as the vessel intends to call, or has called, in a European (EU) port, or has passed the Mandatory Reporting Systems (MRS) located in the waters of EU Member States; the relevant data on the vessel (e.g. persons on bard, HAZMAT, ETA, ETD etc.) is available through the SafeSeaNet system (SSN) and allows their distribution to the relevant authorities along the planned route of the ship. Depending on the situation, there may already be some information available in the SSN that can be used, in accordance with incident reporting requirements and guidelines[13]. The CMS will gather any new or additional information deemed necessary for the safe handling of the PoR request and will bring anything relevant to the attention of any other involved parties, whether public or private.

If not already available, as soon as it is practicable, when the PoR request is received, the following information should be collected by the CMS and circulated to other states who are, or who may become involved (SMSs):

- ship's particulars: type, name, flag, IMO number
- vessel position
- Last and next port of call
- nature of the damage reported
- cargo on board
- total persons on board
- condition of the vessel at the end of the SAR operation (if appropriate).

[13] The Incident Reporting Guidelines (link: http://emsa.europa.eu/documents/technical-documentation.html) describe how incidents covered should be reported and exchanged between Member States through the SafeSeaNet systems.

**Situation Reports (SITREPS)**[14]

The CMS should draft and share situation reports (SITREPs) within the SSN system using the format in **Appendix G** on a regular basis, and to all other involved parties including to the master/salvor, at least at the following stages of the operation:

a) At the end of the initial information gathering phase, subsequent to the alert being given. These initial SITREPS should report on initial measures taken.
b) Upon receipt of the report of an evaluation / inspection team.
c) During the risk assessment process: successive SITREPs should be issued if new information about the vessel in need of assistance becomes available, or if any actions on the part of one Member State makes it necessary to formalise the information with all other parties involved.
d) When a decision on whether or not to grant a place of refuge is made.
e) Arrival of the damaged ship in the place of refuge

SITREPs allow the formalisation and recapitulation of data that should already be made available through other EU information systems e.g. SafeSeaNet.

*---- Click to come back to PoR Quick Reference ----*

## 2.2. Monitoring the situation

The EU has a number of operational information systems which gather, organise, integrate and exchange/share the data relative to vessels, its cargo and passengers with the purpose of facilitating the information sharing and cooperation between Member States.

**The CMS should therefore consult SSN during the initial alert phase. The SMSs, if not already aware, once they have been made aware of the incident, should keep themselves updated via SSN.**

During an operation, SSN can be used as follows:

### 2.2.1. Obtaining information relative to the vessel and cargo:

SSN provides updated information on the vessel identification, number of persons on board, voyage, incident reports, dangerous and polluting goods (Hazmat) carried on board if she has previously sent mandatory reports or if she has fulfilled her obligations prior to calling at an EU port.

### 2.2.2. SafeSeaNet, information system relative to the event:

[14] The SITREP is the same as currently exchanged via SSN and the example provided in appendix 1 to the SSN IR Guidelines (Version 2.1, date: 07.07.2016) which includes a specific section related to the PoR specific information. Further guidance can be found in Annex G.

- Use of SafeSeaNet by the CMS:

The CMS uploads the following on SSN with automatic notification of all other parties involved (as attachments):

- The information on the vessel involved and their representatives.

- Information on their site(s) regarded as potentially suitable places of refuge.

- Operational SITREPs (**Appendix G**, SITREP template including a section for PoR relevant information)

- Once the necessity of a place of refuge is ascertained or confirmed, the CMS defines a new list of addressees allowing for information sharing with the flag state (if EU), neighbouring Member States with whom operational agreements are in force, and neighbouring states liable to be involved in the process.

***Note**: the definition of an address list allows an automatic notification to the selected addressees. Every time new information is entered and distributed to the same address list, CMSs re kept informed of all new entries in SSN.*

- Successive updates on SSN: each updated SITREP is available in SSN as an attachment (SSN shows only the latest attached document) and triggers an automatic notification to all CMSs selected. Those addressees need to open the attached document in order to read the SITREPs. In case these addresses are e-mail recipients, through this e-mail they will receive the necessary information to search for the SITREP details in the SSN central system.

- Validation, as SITREPS, of the information gathered by other member states. Validation means: confirmation and recognition of the information as pertinent to the situation and the operational parameters at hand.

### 2.2.3. Relative to dangerous, polluting and toxic goods

SSN provides the identification and details of the dangerous and polluting goods carried on board:

**HAZMAT CARGO**[15] – Some of the data elements which have to be reported in accordance with the VTMIS Directive and FAL Form 7 may be obtained from:

[15] According to Directive 2002/59/EC, as amended, Dangerous Goods means:
- goods classified in the IMDG Code,
- dangerous liquid substances listed in Chapter 17 of the IBC Code,
- liquefied gases listed in Chapter 19 of the IGC Code,
- solids referred to in IMSBC Code Appendix 4 – materials with Group (B) or (A+B)
- Also included are goods for the carriage of which appropriate preconditions have been laid down in accordance with paragraph 1.1.6 of the IBC Code or paragraph 1.1.6 of the IGC Code;

while Polluting Goods means:
- oils as defined in Annex I to the MARPOL Convention,
- noxious liquid substances as defined in Annex II to the MARPOL Convention, and
- harmful substances as defined in Annex III to the MARPOL Convention.

- the SafeSeaNet (SSN) Central HAZMAT Database (CHD).

A public open access is available to industry representatives and the general public, but with limited functionalities. Such guest users may access the application through the EMSA MAP using the general credentials mentioned in bold for guest users in the following EMSA webpage on Reporting of HAZMAT in SafeSeaNet.

http://www.emsa.europa.eu/related-projects/reporting-of-hazmat-in-safeseanet.html

Additional information relative to some dangerous good can be found in:

- MAR-ICE network

MAR-ICE can provide upon request product specific information, trajectory forecasts of released chemicals and related risk assessments. The service is available 24/7 and can be accessed by maritime administrations through **a dedicated MAR-ICE Contact Point.** The MAR-ICE contact numbers and activation procedures have been distributed to the relevant national maritime administrations. Below the link to EMSA MAR-ICE network web page:

http://emsa.europa.eu/chemical-spill-response/mar-ice-network.html

- MAR- CIS

MAR-CIS (MARine Chemical Information Sheets): EMSA's datasheets of chemical substances (primarily liquids) frequently transported in European waters. They contain concise and relevant information on the behaviour and properties of chemicals including maritime specific information (e.g. IMDG code, IBC code, GESAMP, seawater solubility, case histories, etc.) for supporting emergency responders to plan response operations safely and to minimise the potential adverse impacts to the environment and to the public. **MAR-CIS is only accessible through SSN**.

### 2.2.4. Integrated Maritime Services

[See Appendix E]

*---- Click to come back to PoR Quick Reference ----*

## 2.3. Information Gathering

It is critically important for a master, operator, owner or salvor to provide the authorities with correct/accurate information, and in a timely manner, as this will assist the CA in making the correct decision for the benefit of all.

It is imperative that commercial interests do not prevent the competent authorities from having access to all relevant and accurate data.

The operator, the master of the ship and, as the case may be, the owner of the dangerous or potentially polluting goods carried on board, are under an obligation to cooperate fully with the competent authorities.

### 2.3.1. Information sources and accessibility

It is essential that the CA makes an assessment of the situation and associated risks, using the available relevant information. The information required may be available from a number of sources, including the master.

All information received should be checked against all available sources, e.g. SafeSeaNet, THETIS and any other local systems which are used by neighbouring ports or States, as well as P&I Clubs. Other information can also be sought e.g. CleanSeaNet, such as oil spill modelling data, information on the residual strength of the vessel, weather forecast, etc. It is recognised that some place of refuge events present time-critical scenarios where the ability to collect and fully analyse all available data and involve all parties has to be balanced against the speed of response required.

### 2.3.2. Contacts

Competent Authorities and Member States should maintain good contacts with the Industry to facilitate information gathering. A list of contacts can be found in **Appendix I** and should include:

- Classification Societies who can also provide information on the availability of ERS (to evaluate vessel's residual stability and damage calculations)
- Flag administrations
- Ship agents
- P & I Clubs
- ITOPF
- Salvage companies
- Maritime experts and surveyors
- Lead hull underwriter

Through the master, ship operator and/or salvor, or directly it is possible for the CA to access information provided by the ERS including information on:

- the residual strength of the vessel;
- outflow of oil and/or other substances (i.e. HNS) and water ingress;
- intact and damaged stability, including assessments at intermediate stages;
- floatability of the vessel;
- grounding forces, including the effects of tide.; and
- information on insurance coverage

### 2.3.3. Information on insurance coverage

Possible sources of information on the insurance cover for vessels in need of assistance include THETIS and EQUASIS. EQUASIS (http://www.equasis.org/EquasisWeb/public/HomePage) provides a very useful tool for competent authorities, because the database already includes, *inter alia,* information on whether a vessel has insurance or not and, if so, the identity of the insurer (if the insurer is a member of the International Group of P&I clubs). In addition, a ship's insurance cover arrangements can be verified by obtaining clarification directly from the operator and or the insurance provider. Details of the insurance arrangements for ships entered in one of the International Group of P&I Clubs can be checked immediately through the relevant Club's publicly available ship search facility or 24 hour emergency telephone number (http://www.igpandi.org/Group+Clubs).

Once cover arrangements for the ship concerned are verified, the CA will have access to the identified insurance provider who will respond under the relevant IMO convention/s or national legislation. International Group Clubs may also provide a Letter of Undertaking following consultation with the affected State.

### 2.3.4. Actions in case of absence of proof of insurance

If the vessel in need of assistance cannot present proof of valid insurance, the State considering a request to accommodate the ship in a place of refuge can still request insurance information, or proof of a bank guarantee, directly from the company/ shipowner[16].

Pending the request for a proof of insurance or a financial guarantee, the CA shall, in accordance with existing EU law[17], continue with the analysis of the PoR request and identify the best course of action for the protection of human life and the environment.

In practice, the search for proof of insurance must continue in parallel with the other steps in considering the PoR request.[18]

Lack of proof of adequate insurance cover[19] cannot in and of itself form sufficient reason to refuse such a request.[20]

*---- Click to come back to PoR Quick Reference ----*

[16] The shipowner/company must place itself at the disposal of the CA throughout the incident, in accordance with Article 19 (3) of Directive 2002/59/EC as amended, and relevant provision of the ISM Code.
[17] Article 20c (2) of Directive 2002/59/EC.
[18] Article 20c (1) of Directive 2002/59/EC.
[19] In accordance with Article 6 of Directive 2009/20/EC, OJ L 131, 28.5.2009, p. 128.
[20] Article 20c (1) of Directive 2002/59/EC.

# Chapter 3

# Places of Refuge Co-ordination

Many times situations leading to a request for a place of refuge involves only one Member State and will be handled by the same State, under their jurisdiction. There may however be situations progressing into a situation involving neighbouring Member States or Member States in the vicinity of the incident. These Operational Guidelines should complement national plans and apply to situations where it is likely that more than one State may become involved, or where it is outside of the jurisdiction of any one Member State. The principle is that each State involved starts to examine their ability to provide a place of refuge and that, in the interest of resolving the situation, there is direct contact between those CAs involved to decide who is best placed to take the coordinating role.

## 3.1. Incidents within jurisdiction of a Member State

### 3.1.1. Place of refuge request - following SAR operation

When a Place of Refuge (PoR) request immediately follows a SAR operation, the search and rescue region (SRR) in which the incident occurs should be the starting point for deciding who is responsible for the initial coordination of the PoR request. This is to ensure continuity of coordination throughout the handling of the incident.

As the case may be, the State whose MRCC has been coordinating the SAR phase should remain in charge of incident coordination, unless and until an agreement has been reached to transfer co-ordination to another coastal state.

If the initial position of the vessel making the PoR request is inside waters under the jurisdiction of the same Member State whose MRCC was co-ordinating the SAR operation, that Member State should retain co-ordination until the operation is completed and/or there is an operational requirement/agreement to handover to another Member State.

If the position of the vessel is outside waters under the jurisdiction of the Member State that was co-ordinating the SAR operation at the point a PoR request is made, then the Member State under whose jurisdiction the vessel now is shall take over co-ordination from presently co-ordinating Member and from then on be the CMS, unless otherwise agreed. Information gathering and transfer should be done as described in Chapter 3.

*---- Click to come back to PoR Quick Reference ----*

### 3.1.2. Place of refuge request – no initial SAR operation

If a PoR is requested when no SAR operation has taken place, the deciding factor should be the Maritime Assistance Service (MAS) declared by the state in whose area of jurisdiction the vessel is located. If there is no MAS declared, in the first instance the Member State with jurisdiction over the

waters in which the vessel is located (eg. through a declared EEZ) should co-ordinate the PoR request unless and until an agreement has been reached to transfer coordination to another coastal state.

## 3.2. Incidents outside jurisdiction of any one Member State

For PoR requests arising from an incident commencing outside the jurisdiction of any one Member State, the Search and Rescue Region (SRR) will be the deciding criterion for determining who should take on the co-ordination role in the first instance. The state in whose SRR the vessel is located will be deemed in charge of the coordination of the event in the first instance, even though there may or may not be a SAR component to the operation.

The Member State in whose SRR the vessel is located at the time of the PoR request should retain the coordination of the response to that request unless and until an agreement has been reached to transfer coordination to another coastal State in the region, which might grant a place of refuge.

Member States who are involved by virtue of geography, or because they are home to some of the vessel's interests, support the action by co-operating with the co-ordinating state to: gather information; share expertise; provide logistical assets; participate in the risk assessment; and search for potential places of refuge in their territory.

*---- Click to come back to PoR Quick Reference ----*

## 3.3. Obligations on Co-ordinating Authority and Neighbouring Member States

When it has been decided that taking the vessel to a place of refuge is the most appropriate course of action, the Co-ordinating Member State should work with neighbouring states (using the **Decision Methodology in Appendix D**) to identify the nearest, most appropriate PoR, which may be in another state.

**At all times, the principal focus should remain the protection of human life and the environment and the reduction of the hazard to navigation.**

## 3.4. Transfer of co-ordination

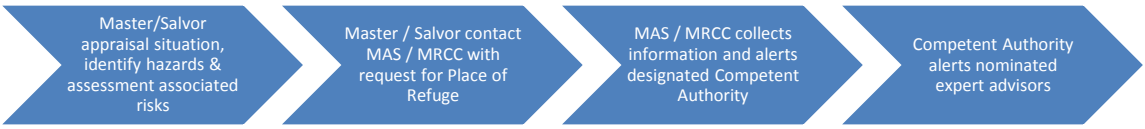
Responsibility for co-ordinating the incident may be transferred, depending on the evolution of the situation aboard the vessel, or depending on agreements reached between the States involved i.e. the State able to offer a place of refuge. However, for reasons of operational continuity, it may be appropriate for the initial CMS to assume coordination throughout the entire process, with the agreement of the other coastal State(s) concerned.
The transfer of coordination to another coastal state is accomplished with a formal notification, preferably in an electronic format, from the state taking over coordination to the state initially in charge of the event (see **Appendix F**).

*---- Click to come back to PoR Quick Reference ----*

# Chapter 4

# Requesting a Place of Refuge

**Where the safety of life is involved, the provisions of the SAR Convention should always take precedence. This chapter applies where a ship is in need of assistance, without prejudice to/ independently of SAR**




## 4.1. Process

When a decision has been taken by a master, Salvor or other party in charge of the ship to make a formal PoR request, without prejudice to the CA's right to take the decision, the following **process** should be followed:

### 4.1.1. Appraisal of the situation

The master should, where necessary with the assistance of the company and/or the salvor, identify the reasons for the ship's need of assistance. (See **Appendix C**)

### 4.1.2. Identification of Hazards and Assessment of Associated Risks

Having made the appraisal, the master, where necessary with the assistance of the company and/or the salvor, should estimate - taking into account the potential future risks - the consequences of the potential casualty taking into account both the casualty assessment factors in their possession and also the cargo and bunkers on board. (See **Appendix C**)

### 4.1.3. Identification of Assistance / Services Required in place of refuge

The master and/or salvor should identify the assistance they require from the coastal State to overcome the inherent danger of the situation. (See **Appendix C**)

### 4.1.4. .Transmission of request to the Member State and cooperation

The formal request for a place of refuge shall be transmitted by the master using the fastest means available to the coastal State MAS/MRCC as designated in **Appendix A** and using the Request Form in **Appendix C**.

A formal request for a place of refuge may also be made by:

- Ship operator / company Designated Person Ashore (DPA)/contracted salvor

- Any other person who is in charge of the ship at the time, and is recognised by national law

The respective coastal State shall ensure that, where applicable, the request is forwarded to the CA as designated in **Appendix B**.

Unless *in extremis*, formal requests should be made to one CA only, through the national point of contact (MAS or MRCC), and should not be forwarded directly to ports or harbours, unless agreed with the MAS / MRCC and CA. The CA should always be informed if a third party was involved.

Simultaneous requests to other MAS/MRCC should not be made.

*---- Click to come back to PoR Quick Reference ----*

## 4.2. Formal Request for a Place of Refuge

The formal request should include the information in **Appendix C** and should be made in writing or recorded in another way. The request should be sent either directly to the CA or via the MAS, MRCC, VTS or any other Station nominated by the individual Member State who would then immediately forward it to the CA, in accordance with local arrangements.

Any other information that the CA might require, for example, to ensure compliance with local legislation, such as cargo manifests, stowage plans and the salvor's outline salvage plan should also be forwarded, together with the Formal Request Form.

As a matter of principle, while each state involved in the operation should examine their ability to provide a place of refuge, the final decision on granting a place of refuge is solely the responsibility of the Member State concerned. However, each State should share any information relative to the potential places of refuge they are examining with the other States involved.

## 4.3. Member States' Plans for allocating a Place of Refuge

To help the efficient management of a PoR request involving more than one state, as the situation may demand or upon request, Member States share the methodology and the relevant parts of their national plan with their neighbouring states[21].

*---- Click to come back to PoR Quick Reference ----*

[21] If requested by Member States, those receiving information shall be bound by an obligation of confidentiality.

# Chapter 5

# Risk Assessment & Inspection


## 5.1. EU Decision Methodology

The EU Decision Methodology (EDM) aims to provide a structured and logical decision making process in a response to a request from a vessel in need of assistance. The process can be used as a checklist or flowchart which provides the sequence of steps to be followed to enable a place of refuge assessment to be properly carried out. The EDM is a recommended process across the EU, which can be supported and implemented through individual Member States national plans. It can be used by all Member States potentially or actually affected by an incident, providing a common foundation on which each Member State can conduct its own risk assessment.

The quicker the decision has to be taken, the priorities to be considered in the decision making process must be those which are considered to be key from a socio economic, public health and environmental perspective.

It follows that the Risk Assessment (RA) must be carried out with great pragmatism in scenarios where quick decision making is essential. In scenarios with a great number of unknowns the responders risk assessment should be carried out with an appropriate safety margin. In some response scenarios the risk assessment(s) to be carried out must be dynamic in a potentially fast changing scenario. In such scenarios the ability for the response team to rapidly re-assess may be crucial. In some straightforward scenarios some steps may be unnecessary and therefore be omitted.

For the decision-making process to be reported in a transparent and reproducible way, the process must be documented precisely, including all considerations which were suggested and ultimately not included.

The EDM follows IMO Resolution A.949(23) Guidelines on places of refuge for ships in need of assistance. The EDM is designed exclusively for the use of Member States involved in handling a formal PoR request.

The allocation of a place of refuge shall, as far as possible, be made on the basis of actual verified information, within a stipulated time period. The rigour and duration of the process for collecting information, evaluating and considering alternatives, ahead of making a decision on a place of refuge, are affected by both the magnitude and urgency of the accident. Some incidents may present such urgency that responders have only hours and minutes to determine the response rather than days for consideration.

The EDM procedure describes the process methodology with the aim of having a pre-agreed and readily reproducible means of determining best practice for place of refuge identification. Every

maritime incident is different to some extent; the permutations for the range of possible scenarios mean that the factors to be considered ought to be broken down into logical information/data sectors. Depending on the situation at hand, the appropriate data needed to feed the EDM is described in **Appendix D**.

**Implementation of EDM: Skills and tools: Who are the key information providers and how do responders engage, collaborate and communicate operationally?**

The nature of the incident will determine which kind of information is key and what is desirable overall. The information requirement will determine the group of individuals (representing the data sources) providing that information. The most appropriate individuals will be specialists in their skill area and fully able to contribute effectively to the EDM process in challenging and dynamic situations. Notwithstanding the involvement of this group, the CA remains responsible for taking all final decisions in respect of the PoR request.

*---- Click to come back to PoR Quick Reference ----*

## 5.2. Inspection / Expert Analysis

Where it is deemed safe to do so and where time permits, an inspection team designated by the CMS should board the ship requesting a PoR, for the purpose of gathering evaluation data to support the decision making process (EDM).

The team should be composed of persons with expertise appropriate to the situation. Where one or more Member States may be involved with the incident, and where other parties may be potentially involved, then the formation of a multi-national or 'regional' inspection team should be considered. The CMS will retain responsibility for selecting the appropriate team members and inviting participation from other Member States. Due care should be exercised to ensure that formation of a multi-national / regional team does not delay the deployment of the inspection team.

The analysis or inspection should include a comparison between the risks involved if the ship remains at sea and the risks that it would pose to the place of refuge and its environment. Such comparison should cover each of the following points:

- safeguarding of human life at sea;
- safety of persons at the place of refuge and its industrial and urban environment (risk of fire or explosion, toxic risk, etc.);
- risk of pollution (particularly in designated areas of environmental sensitivity);
- if the place of refuge is a port, risk of disruption to the port's operation (channels, docks, equipment, other installations);
- evaluation of the consequences if a request for place of refuge is refused, including the possible effect on neighbouring States; and
- due regard should be given, when drawing the analysis, to the preservation of the hull, machinery and cargo of the ship in need of assistance, as well as possible risks to navigation.

*---- Click to come back to PoR Quick Reference ----*

# Chapter 6

# Decision Making & Outcomes

## 6.1. Competent Authority Final Decision


### 6.1.1. Decision to grant a place of refuge

The decision by a State to grant a place of refuge on their territory should be immediately communicated to all parties involved and should include any practical requirements set as a condition of entry.

### 6.1.2. Decision not to grant a place of refuge

Before taking any decision, the necessary risk assessments and/ or inspection visits should always be completed. Unless deemed unsafe, there should be no rejection without inspection. The State that receives a request to provide a place of refuge cannot refuse for commercial, financial or insurance reasons alone.

Whilst each MS should remain sovereign in their decision, if a CA is unable to accept a request for place of refuge, it should immediately communicate to the other parties involved and to the shipowner/operator the information on which its decision has been made, including any assessment relating to:

- Safety persons on board and threat to public safety on shore;
- Environmental Sensitivities;
- Lack of availability of suitable resources at desired PoR and concern over structural stability and ability for ship to make successful safe transit to same;
- Prevailing and forecast weather conditions, ie. Lack of sheltered area for proposed works;
- Physical limitations and constraints incl. bathymetry, navigational characteristics;
- Foreseeable consequences escalation, i.e. pollution, fire, toxic and explosion risk;
- Any other reason.

Copies of the Member State's Risk Assessment and/or Inspection Report(s) should also be made available as appropriate.

*---- Click to come back to PoR Quick Reference ----*

### 6.1.3. Subsequent Request to another MS to grant a POR

When the risk assessment carried out following an incident concludes that a place of refuge on another Member State's territory is the only solution in order to preserve the safety of the vessel involved, the safety of navigation and to protect or mitigate the risks to the environment, the CMS unable to accept the request for a place of refuge for objective reasons shall forward all information relevant to the circumstances on which their decision is based to the State or States to whom the subsequent request [by the operator] is made. Forwarding all relevant information should greatly facilitate the risk assessment and decision making on the subsequent request if a hand-over has not been already agreed and a passage plan arranged between the CMS and the SMS.

### 6.1.4. Passage Plan & Monitoring

When a suitable place of refuge has been determined and agreed the CMS will assume responsibility for agreeing a passage plan with the requesting party and will engage with the SMSs as necessary, but in particular where the casualty may have to pass through or transit in close proximity to another MS's jurisdiction [(in accordance with relevant UNCLOS provisions)][22].

In order to be prepared to face potential difficulties during the transit to the designated place of refuge, Member States should consider on one or more backup places of refuge en route.

*---- Click to come back to PoR Quick Reference ----*

[22] Articles 194 and 195 of UNCLOS establish obligations of coastal States to prevent, reduce and control pollution to the marine environment caused – among other factors – by shipping, as well as not to transfer environmental hazards on to other sea areas. In addition, Articles 198 and 199 of UNCLOS lay down coordination rules for neighbouring States dealing with pollution incidents, including a duty to notify each other and to draw up joint contingency plans.

# Chapter 7

# Financial Security

Financial security, generally in the form of insurance, for maritime claims for specific types of damage and costs (e.g. oil pollution, wreck removal) covers a ship in need of assistance for potential liabilities, including potential economic losses incurred by third parties during the accommodation of a ship in a place of refuge.

Ships over 300gt are required (under Directive 2009/20/EC) to carry proof of insurance cover for maritime claims irrespective of the flag they fly when they enter a port under a Member State's jurisdiction, and – in some cases – when they operate in territorial waters of a Member State. Also, ships over 300 gt flying the flag of a Member State shall – in any event – have insurance cover in line with this requirement. This insurance cover may be in the form of an 'International Group of P&I Clubs Certificate of Entry' or another type of financial security, including self- insurance.

A certificate of insurance that is in line with EU law requirements must contain at least: the ship's name, IMO number and port of registry, the shipowner's name and principal place of business, the type and duration of the insurance, and the name and principal place of business of the insurance provider.

In addition, a ship will carry certificates of insurance issued for liabilities arising under a number of IMO Conventions that cover pollution prevention and clean up and costs arising from activities associated with a vessel in need of assistance, where such Conventions are in force in the Member State(s) concerned or where they are required by the State of the ship's registration.[23].

Information on potential liabilities and details of insurance cover pertinent to the accommodation of ships in need of assistance can be found in **Appendix J**.

## 7.1. Operational action points

On an operational level the issue of financial security/insurance, cost recovery and compensation can be reflected in **3 key action points**:

(a) Any **procedures** applicable to liability and financial security for places of refuge should be outlined **in the national plans** for the accommodation of ships in need of assistance, in accordance with existing EU law, which are available to the CA (not public) and **can be shared with parties involved** in the incident in hand;

(b) CAs can **seek proof of financial security in accordance with existing international and EU law** (see above Chapter 2 on 'Information Gathering'), but they cannot be exonerated from their **obligation to assess and respond in a timely manner to a request** for a place of refuge on the basis of the absence of a certificate of insurance in line with Directive 2009/20/EC;

(c) CAs **cannot refuse to accommodate a ship in a place of refuge on the basis of the lack of an insurance certificate in line with Directive 2009/20/EC** alone.

[23] The IMO publishes a comprehensive table on the status of ratification of all IMO Convention, which is updated monthly and can be found at: http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx

---- Click to come back to PoR Quick Reference ----

# Chapter 8

# Media and Information Handling

## 8.1. Media and Information Handling

The delivery of accurate, clear, timely and up to date information and advice to the public and other key stakeholders is an important aspect of the successful handling of any shipping incident. Media handling should be incorporated into national contingency planning and a media handling procedure should be developed.

## 8.2. Key Principles

- Media activity must not interfere with the management of the incident in any way; particularly it should not impede the operational activities of the emergency services. Media speculation should not be considered when making the decision to grant a place of refuge
- All steps should be taken to protect victims from press intrusion.
- Only factual information should be provided. There should be no speculation about causes, future developments, or actions.
- Information and advice should not be released by one organisation if it covers the area of responsibility of another, UNLESS the information (and its release) has been agreed by the responsible organisation.

## 8.3. Key interest groups

- Press and Media
- General public, including NGOs and civil society
- Ministers, national and local authorities, European Commission
- Shipping and insurance industries, ports, harbours, terminal operators

## 8.4. Key actions for persons handling incident

- KNOW who is responsible for activating media handling process/establishment of Media Team for the incident (on the understanding that the media team may be required for a longer duration)
- ARRANGE regular briefings between different response cells (eg. Salvage Control, MRC, onshore clean-up team etc.) – either in meetings, or by telephone/video conference.
- IDENTIFY the designated responsible person(s), who will:
    - liaise between CA and press;
    - take the lead in providing strategic SITREPS to national authorities and SSN;
    - communicate with key interest groups contacts when there are significant developments to report
- FOLLOW Key Principles at all times

---- Click to come back to PoR Quick Reference ----

# Chapter 9

# Lessons Learned

## 9.1. National & Regional De-briefs

Member States should hold a de-brief session after each significant incident.

As a minimum, the de-brief should consider the incident background, response factors (e.g. co-ordination, communications, risk assessment, decision making and any other aspects considered relevant. Depending on the nature of the incident, the debrief could either be for all the authorities and stakeholders involved, or smaller sub-groups could be convened to focus on particular aspects of the incident.

Where appropriate, neighbouring or other regional Member States should be invited to participate. If the debrief identifies issues that might be of wider interest, the outcomes from the debrief process could be shared at regional and/or EU MS level.

The methodology for the Debrief & Exchange could follow the IMO Resolution 949 annex 2 Guidelines for the evaluation of risks associated with the provision of places of refuge. Although the annex is meant to be used in the decision making process, the same list is useful to check the actions taken in the Debrief & Exchange.

Reference is also made to the Guidelines that were produced in the Consultative Technical Group under EMSA: *Common Assessment Framework for Lessons Learned: response during major oil pollution incidents at sea.*

It is recommended that a task manager is appointed to report on the evaluation, conclude on the outcomes and produce a list of action points aimed at improving procedures for the future handling of vessels in need of assistance.

## 9.2. Places of Refuge CA Co-operation Group De-brief

The group established under the VTMIS Directive (art.20.3) – the Member States Cooperation group on Places of Refuge – meets regularly to discuss and exchange expertise on all matters related to ships in need of assistance and places of refuge, including lessons learned usefully shared within the Co-operation Group with the aim to improve measures taken generally and pursuant to these Guidelines. Depending on circumstances such discussions may also involve industry stakeholders.

## 9.3. Exercises & Workshops

If it is thought appropriate, lessons learned from an incident could be the subject of a regional or national exercise, or a smaller exercise at a more local level e.g. port authorities. An exercise could focus on the handling of the whole incident, or it could concentrate on one or two aspects of what happened.
Exercises could either be “live”, or take the form of a table top exercise. In addition to National or Regional exercises, the EU may facilitate workshops and/or desk top exercises to disseminate lessons learned and to test any new procedures or protocols including IMS as appropriate.

N.B. It is recognised that these Operational Guidelines may place additional resource demands on CA's and it is fundamental to the success of an emergency response that such resources are in place, operational and exercised prior to any event.

*---- Click to come back to PoR Quick Reference ----*

# Appendix A

# List of MAS / MRCC

*---- Click to come back to PoR Quick Reference ----*

Direct access to lists of MAS/MRCC via this link

http://emsa.europa.eu/implementation-tasks/places-of-refuge.html

In situations involving also States outside the European Union the user can seek information using this link:
http://www.imo.org/en/OurWork/Safety/Navigation/Pages/PlacesOfRefuge.aspx

On this webpage, the circular can be downloaded by clicking on the circular number on the right hand side of the page.

**Attention** is drawn for the need to consult the latest revision of the IMO Circular, as it may have been revised.

**Attention** is also drawn to Article 22.2 of Directive 2002/59/EC as amended:

*Article 22*

*2. Each Member State shall ensure that the shipping industry is properly informed and regularly updated, notably via nautical publications, regarding the authorities and stations designated pursuant to paragraph 1[CA, port authorities and coastal stations], including where appropriate the geographical area for which they are competent, and the procedures laid down for notifying the information...*

# Appendix B

# List of Competent Authorities

*---- Click to come back to PoR Quick Reference ----*

Direct access to designated Competent Authorities (CA) in the European Union is via

http://emsa.europa.eu/implementation-tasks/places-of-refuge.html

# Appendix C

*---- Click to come back to PoR Quick Reference ----*

## Formal Place of Refuge Request Form

**Note: For Places of Refuge requests following SAR action it is likely that much of the ship/cargo/bunker information will already be held by the MRCC / MAS.**

| | Request for Place of Refuge |
|---|---|
| Date: | …… |
| | |
| From | Master: ……[MV NONSUCH]<br>Xxxx Salvage PLC |
| To | CA (via MAS/MRCC)*[24] …….. |
| | For attention of: Competent Authority |
| Section 1 | **Appraisal of the situation**<br>The master should, where necessary with the assistance of the company and/or the salvor, identify the reasons for his/her ship's need of assistance. [IMO Guidelines A.949(23) paragraph 1 of Appendix 2 refers]. |
| Section 2 | **Identification of Hazards and Assessment of Associated Risks**<br>Having made the appraisal above the master, where necessary with the assistance of the company and/or the salvor, should estimate the consequences of the potential casualty, in the following hypothetical situations, taking into account both the casualty assessment factors in their possession and also the cargo and bunkers on board:<br>- if the ship remains in the same position;<br>- if the ship continues on its voyage;<br>- if the ship reaches a place of refuge; or<br>- if the ship is taken out to sea. |
| Section 3 | **Identification of the required actions**<br>The master and/or the salvor should identify the assistance they require from the coastal State in order to overcome the inherent danger of the situation. [IMO Guidelines A.949(23) paragraph 3 of Appendix 2 refers]. |
| Section 4 | **Supporting Documentation** |
| Section 5 | **Any other Member States / Ports Contacted to Date** |

* See Section 1.1.5

| | |
|---|---|
| Section 6 | **Information from the MS/Port contacted**<br>[At the end of its assessment process]<br>The recipient CA should inform the requestor of its action<br>[*Using this space in the request*]. |

# Appendix D

*---- Click to come back to PoR Quick Reference ----*

# Decision Making Tool

Incident Pre-Planning

As part of their contingency planning work individual Member States should create inventories of key information providers with their contact details and available means to set up conferencing when initiated for response. Essentially: who are the key individuals with critical information and decision making capability?

**STEP 1 – Determination of relevant key data to feed the QDM**

Information gathered and already available (under chapter 2) should be used as far as is possible.

The assignment or rejection of a place of refuge is arrived at as a result of weighing the risks for public health and socio economic interests and the marine and coastal environment. A minimum amount of information is required for assessment even in cases of highest urgency.

**Key Data to be collected if not already available in the SSN System** (as far as available and depending on the situation at hand)

| Initial Information |
|---|
| ○ **Vessel and Crew**<br>○ Vessel Name and Flag;<br>○ Vessels Identification Number (IMO Number);<br>○ Type of vessel, cargo classification;<br>○ Number of persons on board; Is there a risk to safety;<br>○ Details of any casualties on board or in the vicinity of the ship;<br>○ Size, tonnage, length, beam and draft of ship;<br>○ Vessel position, course and speed.<br>○ Departure and destination ports.<br><br>○ **Nature of Incident**<br>○ Nature of the incident (collision, grounding, loss of structural integrity, etc.)<br>○ Damage assessment: structural and mechanical integrity of the ship:<br>○ Precise position of ship + close proximity to other ships, shallow water, shore or any other hazard; ability to anchor;<br>○ Course and speed (underway, making way, adrift or at anchor);<br><br>○ **Environmental conditions**<br>○ Weather, sea state and tidal conditions;<br>○ Ice conditions<br><br>○ **Pollution potential**<br>○ Type and quantity of bunker fuel on board;<br>○ Cargo details, including location on board. |

- Nature and quantity of any Hazardous or Noxious Substances (HNS) or cargo classed as Dangerous Goods (DG); packaging details.
- Actual pollution or potential for such;
- Observations to aid with estimation of release rates.

- **Environmental and Public Health Impact Assessment**
  - Statutory bodies involved
  - Proximity to human population
  - Key environmental threats
  - Key environmental sensitivities, shallow water, sensitive shorelines, environmental designations
  - Proximity to Ports / other ships

- **Owners/Insurers**
  - Name (s) registered owners or operators:
  - Name and contact details of hull insurers (or of the lead hull insurer authorised to act on behalf of hull insurers) and/or P&I Insurers
  - Name and contact details of Classification Society;
  - Name and contact details of the "Designated Person Ashore" as nominated on ISM documentation;
  - Name and address of agents or representatives.

- **Initial response / actions underway**
  - Response actions taken by the ship (salvors engaged or contracted);
  - Any other measures already taken;
  - Nature of Immediate assistance required;
  - Details of place of refuge request; what services required:
  - Inspection including diving, repair work, cargo transfer, etc.;

- **Master / Salvor's Initial Risk Assessment**
  - master's appraisal of vessel:
    - remains in initial position;
    - continues her voyage;
    - reaches a place of refuge;
    - is taken out to sea.

- **Future intentions**

**Data sources: where do we get the information from?**

Information on the vessel, position and HAZMAT available in the Union Maritime Information and Exchange system, SSN, should be used as far as is possible.

| Source | Information |
|---|---|
| Casualty Crew | Present condition of ship, all crew actions to date |
| Shipping company, owner, charterer | Initial condition of ship, status of insurance, drawings/specification |
| Class | Expert analysis of damage condition and proposals for mitigation |
| Inspection / Fact Finding Mission | Present damage condition, evaluation of human health/life impact environmental impact - real and potential. |

| | |
|---|---|
| ○ Salvors | Present vessel condition, Risk analysis, Salvage plan, |
| ○ Agent/Harbour | Cargo manifest / bunkers / HNS / container manifests. |
| ○ MAR-ICE, SAFESEANET, BAPLIE, CHEMDATA | Risk assessment for cargo (especially DG/HNS) original condition and cargo fate in the marine environment post-accident |
| ○ Statutory Environmental Bodies | Environmental status of area surrounding casualty and all PoR locations proposed with focus on key sensitivities, |
| ○ Public Health/regulators | Public health risk, atmospheric and marine modeling wrt cargo and bunkers. |
| ○ Coast Guard | Communications overall, weather forecast, ETV's, aerial surveillance, aids to navigation |
| ○ Port / Local Authority | Resources available in and adjacent to Port, berth availability, |

**STEP 2 – Preparation of an emergency incident analysis: Providing information in an appropriate reproducible structure to facilitate the PoR decision making process**

All relevant information available from STEP 1 is to be structured and presented in such a way to facilitate decision making on the best option(s) to deal with the casualty, which include consideration of a PoR. The likely consequences of each considered option should be reflected on individually according to time available. The search for possible and realistic PoR's can be ongoing in parallel with the emergency analysis. The qualitative confidence level for the data analysis is as good as the information available on the day and the methodology adopted.

Emergency analysis of the available data should consider adopting the following steps:

- Assimilating and prioritising key information. Which factors are key in terms of the threat they present and therefore must be agreed as highest priority and addressed most urgently?
- Assessment of realistic worst case scenario(s) and best potential means to mitigate.
- Rationale for responders promoting specific PoR recommendations and Port and Harbour Authorities rejecting / accepting a PoR request.
- Costs for all realistic options, ball park figures. Are the mechanisms/funds available to cover all options? (see chapter 7 and appendix K)
  - Costs for response
  - Cost covered by owner, insurer, P&I Club, cost ceilings?

**STEP 3 – Risk assessment for a vessel to remain at sea**

The decision about whether the vessel should be moved to sheltered waters or remain at sea is considered by taking account of the risks and benefits based on operational criteria

<u>Can the vessel remain at sea as an alternative to moving to a PoR</u>

- Risk to human life in case of evacuation / controlled disembarking
- Emergency Response promising?
- Environmental impact – worst case?
- Risk to socio-economic interests?

- Navigational limits for transit and other conditions?
- Weather forecast, including likely sea energy conditions.
- Possibility of transfer to neighbouring State with any operational benefit?
- Increased risk of damage to the vessel

**STEP 4 – Risk assessment for a vessel to be directed/ recommended to a PoR in a sheltered area or in a Port**

Vessel directed to a sheltered area (Place of Refuge)

Weighing-up of benefits and risks posed by the vessel entering harbour approach, the roads or channels on the basis of operational criteria: decision to allow the vessel approaching sheltered waters close the coast line.

A suitable Place of Refuge is to be selected on the basis of contingency plans and weighing-up of the likely relevant risks specific to the casualty, and the potential PoR location.

- Detailed RA for vessel remaining at sea.
- Risk of sinking?
- Risk to public health from casualty?
- For any proposed PoR? Can vessel reach in time?
- Socio-economic and environmental risks? Risk for fish farms? High cost risks?
- Risk for sensitive property / area?
- Shore side access and infrastructure available?
- Risk to navigation for routine marine traffic?
- Suitable weather conditions/ sea energy forecast?

Vessel moves to a Place of Refuge

Weighing-up of benefits and risks being posed by the vessel enters the harbour on the basis of operational criteria it is decided to allow the vessel entering the protected area of a port and can be reached by land based response forces.

- Detailed RA for vessel remaining at sea.
- Has a Place of Refuge been approved? Can it be reached in time?
- Can port accommodate vessel draught?
- Port facilities with likely mitigation measures, e.g. vacant suitable berth (with cranage).
- Risk to navigation? Risk of (significant) economic impact on the port? And/or local area?
- Risk of environmental impact en route and nearby PoR?
- Transfer to an alternative sheltered area available as an option?
- For any proposed PoR? Can vessel reach in time?

**Decision for assigning a specific PoR**

Once the technical decision on the most appropriate PoR is agreed it must be discussed with the relevant stakeholders, except in cases where a direction can be made in an emergency situation. In general, the decision is made following consultation which may include local harbour masters, the traffic control centres and other local authorities representing socio-economic and environmental interests as appropriate. The decision-making process will be supported by expert contributions of legal, environmental, nautical and other specialised disciplines.

The final decision will be made by the designated Competent Authority.

**Directing/ recommending a vessel to an agreed place of refuge**

Once the decision on the most appropriate PoR is taken it has to be transferred by an instruction to the Master or the Salvor in charge for the casualty and to the local authorities, the harbor master and other stakeholders in charge for the assigned PoR.

The CA is responsible to decide if a Place is to be allocated or not. Such a decision has to be taken in good time especially if a disaster has to be averted. The CA should therefore have the necessary power to intervene when required and to give the necessary directions. However, in view of the impact this may have on 3rd party port facility operators, it is recommended that such decisions are to be taken following consultation with Coast Guard and/or Navy, port authorities, harbour masters, local governments, environmental authorities, etc.

The allocation of a PoR is dependent on the actual situation and has to be chosen carefully, therefore the following has to be taken into consideration:

- Safety and protection of the persons on board
- Safety of the ship and cargo
- Proximity of residential areas and population density where the health and safety of human life in the vicinity of the ship is given priority
- Protection of the sea and coastal regions
- Protection of sensitive installations and the socio-economic impact on the area
- Wind and weather forecasts
- The impact on 3rd party privately operated terminals and/or facilities
- Suitable place for in water surveys taking into consideration underwater visibility and weather conditions to enable the assessment the vessel's structural integrity by divers
- Tidal conditions
- Sheltered anchorage areas for prevailing weather conditions and water depths
- Adequate manoeuvring space for handling a vessel under tow
- Access by land and sea to deploy salvage and pollution response equipment and proximity of such resources
- Security issues in relation to ISPS

This information should be readily at hand for the CA to use when necessary and when dealing with an incident.

The CA is to ensure that from the information it has in hand the situation is under control and is to establish confirmation of who is responsible for the ship at that time.

In the case where a ship is already at a safe PoR and there is a request to transfer that ship to another PoR, the entity responsible for the ship at the time should formally confirm that the ship is fit for the transfer. The CA should then confirm the status of the ship and, once all parties (including the CA for the proposed new PoR) agree, the transfer should be permitted in accordance with any conditions imposed by the relevant CAs.

# Appendix E

*---- Click to come back to PoR Quick Reference ----*

## Integrated Maritime Services

The integrated maritime services of the Union Maritime Information and Exchange System, allows Member States that so wish to make full use of the integrated vessel reporting information from terrestrial and satellite AIS, LRIT, VMS, as well as national vessel position data such as coastal radar and patrol assets. Services are being developed, and include access to meteorological and oceanographic data, as well as to automated behaviour algorithms.

IMS combines information from the various traffic and pollution monitoring systems operated at EMSA. In addition to the integrated position reports, and the Earth Observation related satellite imagery and oil spill alerts from CleanSeaNet the services provide access to Satellite-AIS data as well as fisheries VMS data (depending on strict user access policies), all of which considerably complement both the geographical extent and frequency of coverage for monitoring an incident and/or vessel (i.e. at the site of the vessel in need of assistance, en-route to PoR and at the PoR).

Integrated maritime services may support the PoR related activities, as follows:

- During the initial alert : the identification and positioning of the vessel involved (especially if outside T-AIS coverage), the collection of the information specific to the vessel (integrated ship profile) and her cargo, the detection and information of vessels close by or liable to assist, provision of EO satellite imagery, as well as access to relevant met-ocean information.
- During the operation: the follow up on the vessel's situation, progress on her transit towards a place of refuge, surveillance of traffic in close vicinity (impact on areas of dense traffic, etc.)

In addition EMSA provides an advanced Search and Rescue service to the EU Member States. The service is called the 'Enhanced SAR SURPIC' (Search and Rescue Surface Picture) and it can be used by maritime Search and Rescue authorities during rescue operations. The SAR SURPIC provides an overview picture of the ships present in any ocean region, worldwide. Nearby ships can then be contacted to go to the rescue of the seafarers in distress. The SAR SURPIC combines information on the position of ships from all available sources, including satellite AIS and LRIT. The system can also include the position information of fishing vessels from VMS.

# Appendix F

*---- Click to come back to PoR Quick Reference ----*

## Member State Handover Co-ordination Form

All sections are to be completed to ensure that information has not been mistakenly omitted, if a section is not required or not applicable an entry to that effect should be made.

| Identifier | Function | Information Required |
|---|---|---|
| A | **Identity of Casualty Vessel** | |
| | Name and call-sign of the vessel | |
| | IMO Number | |
| | Flag State | |
| B | **Reason for refuge**<br>(Brief details of issue affecting the vessel) | |
| C | **Member State Transferring Co-ordination** | |
| | Identity of Member State | |
| | Name and title/position of the Competent Authority | |
| D | **Member State Accepting Co-ordination** | |
| | Identity of Member State | |
| | Name and title/position of Competent Authority | |
| E | **Dates and times** | |
| | Date and time of agreement to transfer co-ordination | |
| | Agreed date and time of actual co-ordination transfer – if different from above | |
| F | **Position of co-ordination transfer** | |
| | Latitude & Longitude | |
| | Bearing and distance from conspicuous point landmark/port/harbour etc. | |
| | Anchorage latitude and longitude | |
| G | **Place of Refuge (if known)** | |
| | Name of agreed destination – port/harbour/anchorage | |
| H* | **Other Member State(s)** if there is a requirement for transit through other MS territorial waters | |
| | Identity of member state | |
| | Identity of member state | |
| I | **Transfer Completion - Member State Accepting Coordination** | |
| | Identity of Member State | |
| | Name and title/position of Competent Authority | |
| | Date and time of completion | |
| J | **Transfer Completion - Member State Transferring Coordination** | |
| | Identity of Member State | |
| | Name and title/position of Competent Authority | |
| | Date and time of completion | |

| | | |
|---|---|---|
| K | **Reason for not granting a Place of Refuge** | |

H* - Template to allow for additional member states to be inserted if/as required.

***Guidance***

*Transfer of Co-ordination*

*A formal transfer of co-ordination is required to ensure a seamless transition of co-ordination from one member state to another when a vessel is in urgent need of a place of refuge to ensure the safety of the vessel, its crew and cargo, thereby minimising the risk to personnel, potential pollution damage to the environment or a hazard to navigation.*

*A transfer of co-ordination should include relevant information focusing on the actual transfer of co-ordination between member states and should not include detailed information. Detailed and essential information relating to the incident and the casualty vessel(s) should have been previously, and continually, distributed by the use of the Place of Refuge Situation Report(s) and discussed prior to reaching an agreement to transfer co-ordination.*

*If a collision occurs and both vessels were in need of a place of refuge two separate templates would be required, one for each vessel. The inclusion of both vessels on the same template would only be appropriate if both vessels were being provided with a place of refuge by the same member state and be given refuge at the same location. As this situation would be extremely unlikely individual reports should be made for each vessel.*

*If a transfer of co-ordination is required on more than one occasion for the same incident, for example a casualty vessel passing through other Member States waters, the format should be repeated rather than attempting to include any additional transfers on one document.*

*There is a requirement to identify an agreed position, date and time of the proposed transfer of co-ordination. There is also a condition to acknowledge and document that the transfer of co-ordination has been completed and retained on file by both Member States.*

*There are four steps required to complete the transfer of co-ordination.*

*Procedure for completion of the Transfer of Co-ordination template:*

- *Transferring Member State is to complete the template up to and including section 'H', when done so they are to send to the Accepting Member State (and other Member States if applicable) by e-mail or facsimile.*

- *When the actual transfer of co-ordination has been completed the Accepting Member State is to complete section 'I' when done so send to the Transferring Member State.*

- *Transferring Member State to complete section 'J'.*

- *The completed template is to be sent back to the Accepting Member State as a formal notification and record of transfer completion.*

- *At the end of the assessment process, when transferring the coordination to another MS the reason(s) for not granting a PoR should be stated by completing section 'K'.*

# Appendix G

*---- Click to come back to PoR Quick Reference ----*

## SITREP Template - *including for Place of Refuge (POR)*

All sections should be completed to ensure that information has not been unintentionally omitted, if a section is not required, not applicable or details are unknown an entry to that effect should be made.

The first section is the original SITREP template as currently exchanged via SSN (and the information therein may already be available). The second section relates to the POR specific information (see also guidance below).

| | |
|---|---|
| Transmission (Distress/Urgency) | |
| Date and Time | |
| From | |
| To | |
| SITREP: number | |

| Identifier | Function | Information Required |
|---|---|---|
| A | Identity of casualty | IMO, number, Name of vessel, call-sign, flag state |
| B | Position | Latitude/longitude or bearing and distance from a mark |
| C | Situation | Type of message - e.g. distress/ urgency, date/time, nature of distress/urgency, e.g. fire on board, collision, medical evacuation, grounding flooding, abandon ship, capsizing, list, shifting of cargo, engine failure, structural failure, steering gear failure, electrical generating system failure, navigational equipment failure, etc. |
| D | Number of persons at risk | |
| E | Assistance required | A request by the co-ordinating station for specific assistance from one or more of the addressees |
| F | Co-ordinating MRCC | |
| G | Description of casualty | Physical description, owner/charterer, cargo carried, passage from/to, lifesaving appliances carried, etc. |
| H | Weather on scene | Wind, sea/swell state, air/sea temperature, visibility, cloud cover/ceiling, barometric pressure |
| J | Initial actions taken | By casualty and co-ordination centre |
| K | Search area | As planned by the co-ordinating MRCC |
| L | Co-ordinating instructions | OSC/ACO designated, units participating, communications, etc. |
| M | Future plans | |
| N | Additional information/conclusion | Include time SAR Operation terminated |
| O | Address where cargo information can be found | |
| **Place of Refuge (POR) Situation Report (POR Specific Information)** | | |
| PoR_1 | Report Number: | Ships name followed by the sequential number of the report (e.g. "*MV STARLIGHT - POR Situation Report No.01"*) |
| PoR_2 | Coordinating Authority/Member State: | Identification of the Coordinating Authority/Member State |
| PoR_3 | Ship Information | Ship type, length, breadth, draught, gross and deadweight tonnage, height (bridge/cabling clearance) etc., as required |

| | | |
|---|---|---|
| PoR_4 | PoR Status | i) Status Report<br>ii) Agreement<br>iii) Transfer/handover |
| PoR_5 | Transfer of Coordination Position | Coordinates: A 4-digit group giving latitude in degrees and minutes suffixed with N (north) or S (south) and a 5-digit group giving longitude in degrees and minutes suffixed with E (east) or W (west)<br>**or**<br>True bearing (first three digits) and distance (state distance) in nautical miles from a conspicuous point |
| PoR_6 | Course | True course as a 3-digit group |
| PoR_7 | Speed | Speed in knots and tenths of knots as a 3-digit group |
| PoR_8 | Port of Departure | Name of last port of call |
| PoR_9 | Entry in MS Area of Responsibility | Date, time[25] and point of entry into the member state's area of responsibility, if applicable, expressed as in (PoR_5). |
| PoR_10 | Route | Intended track, including waypoints, as specified by agreed passage plan |
| PoR_11 | Radio Communications | State full names of stations/frequencies guarded and main communications frequency for the incident. (see also field L above) |
| PoR_12 | Exit from MS Area of Responsibility | Date, time[1] and point of exit from member state's area of responsibility, expressed as in (PoR_5). |
| PoR_13 | Original Destination | Name of original port of destination |
| PoR_14 | PoR Destination | Name of place of refuge (e.g. port or area) |
| PoR_15 | Pilot | State whether deep-sea or local pilot is on board |
| PoR_16 | Next Communication Report | Date time group[1] of the next agreed scheduled communication report |
| PoR_17 | Current Draught | Maximum present static draught expressed as a 4-digit group in meters and centimetres. If draught is not consistent for the length of the vessel draughts are to be noted as Bow, Mid-ships, Stern, port and starboard as appropriate. |
| PoR_18 | Cargo and Quantity | Cargo and details of any dangerous cargo as well as harmful substances and gases that could endanger persons or the environment. Quantities should include individual weights and classification of multiple hazardous cargoes. |
| PoR_19 | Defect, damage, deficiency, limitations | Brief details of defects, damage, deficiencies or other limitations; radar, steerage, communications |
| PoR_20 | Pollution/dangerous goods lost and potential to lose overboard | Brief details of type of pollution (oil, chemicals etc.) or dangerous goods lost, or potential to lose, overboard including bunker fuel; position expresses as in (PoR_5). |
| PoR_21 | Weather Forecast | Weather forecast for the next 24 hours |
| PoR_22 | Ships Agent/ Representative | Ships P&I Club/H&M Insurers/charterers and/or owner |
| PoR_23 | Salvage / Towing | Name of Salvage and/or Towage Company if appointed |
| PoR_24 | Medic | Doctor, physician's assistant, nurse, personnel without medical training |
| PoR_25 | Persons | Number of persons on board by:<br>i) Passengers<br>ii) Crew<br>iii) Salvors<br>iv) Assessment team |
| PoR_26 | PoR Incident Details / Remarks | Any other information – including as appropriate brief details of the incident; explosive potential, structural integrity, health concerns, water ingress and of other ships involved either in the incident, providing assistance or salvage.<br>Maritime Security declaration of vessel's flag state |
| PoR_27 | Relay | Request to relay information, if necessary, to other member states and/or reporting systems. |
| PoR_28 | End of Report | End of Report |

[25] Date and Time format: "YYYY-MM-DDThh:mm:ssTZD". Where TZD = time zone designator (Z or +hh:mm or -hh:mm).

***Guidance***

*Detailed essential incident and ship information will be required by a Member State prior to agreeing to a formal Transfer of Co-ordination request, this information should be distributed by the use of a SITREP Template including Place of Refuge (POR) Situation Report.*

*Information that may be required by some Member States can be extensive and a template cannot be developed to include every eventuality or every member state requirement. The sections included in the template should satisfy the majority of Member States and their requirements however any additional requests for information received can be entered into section* 'PoR_25'*.*

*The template needs to include the relevant information without initially having to emphasise every detail (to be filled in as far as possible in the light of the given circumstances), the situation may be deteriorating and it is important to share the initial situation information with all participating Member States as soon as possible.*

*When further information is apparent whether by deterioration or improvement of the situation additional particulars should be entered onto the template and distributed appropriately.*

*Prior to a Transfer of Co-ordination agreement every effort should be made to ensure the template is completed with all details and forwarded to the Member State.*

*The most up to date SITREP including POR should be sent to the Accepting Member state, and other Member States, if involved, immediately following, prior to or at the same time as the Transfer of Co-ordination template document.*

*The POR Situation Report Number (PoR_1) are to include the ships name and be numbered consecutively, the initial report submitted by the original Co-ordinating Member State, should state the Ship Name(s) followed by No.1, example;*

*'MV STARLIGHT - POR Situation Report No.01'*

*Thereafter the Transferring Member State, which may be the original Co-ordinating Member State, will have the responsibility to provide updates on the situation until such time as a Co-ordination Transfer has occurred.*

*When the Co-ordination Transfer has been completed the Accepting Member State will assume responsibility for continuing to provide the latest information via the SITREP with POR Situation Reports to other Member States that have been involved.*

*When the ship has reached its final refuge destination (PoR_13) it is the responsibility of the new Co-ordinating Member State (Accepting Member State) to issue a final report using the next consecutive number and including 'Final' in the title, example;*

*'MV STARLIGHT - POR Situation Report No.05 & Final'*

*This will indicate to the other Member States involved that the operation to provide a safe haven for the ship has been completed.*

# Appendix H

*---- Click to come back to PoR Quick Reference ----*

## International and European Law – relevant rules

### International Law

### UN Convention on Law of the Sea (UNCLOS 1992)

*UNCLOS in Part XII on the "Protection and Preservation of the Marine Environment" contains a number of provisions that frame the general obligation of coastal States to prevent and fight pollution of the marine environment following incidents in their territorial sea or beyond.*

Article 192: "States have the **obligation to protect and preserve** the marine environment". Article 194(2): "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 and control **does not spread beyond the areas where they exercise sovereign** rights in accordance with this Convention."

*Article 194:"*1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection. 2. 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.3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent: (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping; (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels; [...]"

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

Article 198: "When a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations."

Article 199: "In the cases referred to in article 198, States in the area affected, in accordance with their capabilities, and the competent international organizations shall cooperate, to the extent possible, in eliminating the effects of pollution and preventing or minimizing the damage. To this end, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment."

Article 221: "1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to **take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests**, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences. 2. For the purposes of this article, "maritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo." (extra-territorial application)

Article 225: "In the exercise under this Convention of their powers of enforcement against foreign vessels, States **shall not** endanger the safety of navigation or otherwise create any hazard to a vessel, or **bring it to an unsafe port or anchorage**, or expose the marine environment to an unreasonable risk, shall not bring to an unsafe port or anchorage".

*In relation to liability of the State towards other States and of the State towards private parties, UNCLOS contains a few provisions which could be of direct relevance in cases involving accommodation of a ship in a place of refuge.*

Article 235(1): "States shall be liable in accordance with international law".

Article 304: UNCLOS provisions "are without prejudice to the application of existing rules and the development of further rules regarding **responsibility and liability under international law**".

The above-mentioned Articles simply make reference to the general international rules on State responsibility for internationally wrongful and non-wrongful acts that apply also in cases involving ships in need of assistance.

Article 232: It deals specifically with State liability for enforcement measures taken to protect the marine environment and provides that "**States shall be liable for damage or loss attributable to them arising from [enforcement] measures** taken (…) when such measures are unlawful or exceed those reasonably required in the light of the available information. States shall provide **recourse in their courts** for actions in respect of such damage or loss."

Article 235(2): It requires States to "**ensure that recourse is available** in accordance with their legal systems **for prompt and adequate compensation** or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction".

It is clear in the latter two provisions that international law only sets out the general framework for State liability to be developed in detail in national law.

### Salvage Convention 1989

Salvage Convention provides for the duty of a coastal state to take into account cooperation among the actors concerned to enable a successful salvage when taking up a decision relating to place of refuge matters.

Article 11: "State Party shall, whenever regulating or deciding upon matters relating to salvage operations, such as admittance to ports of vessels in need of assistance or the provision of facilities to salvors, **take into account the need for co-operation between salvors, other involved parties and public authorities** in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."

### Intervention Convention 1969

This instrument gives States broad rights to take measures on the high seas to prevent or mitigate or eliminate dangers arising from oil pollution casualties.

Article VI: a State that has taken measures "causing damage to others shall be obliged to pay compensation to the extent of the damage caused by the measures which exceed those reasonably necessary to achieve the end".

The same rule has been extended to apply to other forms of pollution than oil, through Article II of the **1973 Protocol** to the Convention.

The above provisions do not amount to a general obligation for coastal States to accommodate a ship in need of assistance, but their combined effect may impose certain obligations on them to find the most environmentally friendly and safest solution in a situation of distress.

### IMO Guidelines on Places of Refuge 2003 (Resolution A.949(23))

The Guidelines are not binding but have become the most important guidance document for such situations. In recognising "the need to balance both the prerogative of a ship in need of assistance to seek a place of refuge and the prerogative of a coastal state to protect its coastline", the Guidelines provide for a checklist of actions for the master of the ship and salvors to undertake when the ship needs assistance and a checklist of elements that the coastal authorities should take into consideration while deciding on the acceptance or refusal of a ship to a place of refuge. The purpose is to provide all parties involved with a framework enabling them to respond effectively and to correctly assess the situation of the ship in need of assistance.

The above mentioned rules apply to the situations when there are no persons in distress on board of the ship. In the contrary case (i.e. danger to human life), rules of **International Convention for the Safety of Life at Sea (SOLAS 1974)** and **International Convention on Maritime Search and Rescue (SAR 1979)** take precedence, as well as the IMO SAR Guidelines (Resolution A.950(23)).

### IMO/ILO Guidelines on Fair Treatment of Seafarers in the Event of Maritime Accident (IMO Resolution LEG.3(91))

The Guidelines give advice on steps to be taken by all those who may be involved following an incident: the port or coastal State, flag State, the seafarer's State, the shipowner and seafarers themselves. The emphasis is on co-operation and communication between those involved and in ensuring that no discriminatory or retaliatory measures are taken against seafarers because of their participation in investigations. All necessary measures should be taken to ensure the fair treatment of seafarers.

### International Convention on Civil Liability for Oil Pollution Damage as amended ('CLC') and International Convention Establishing the International Oil Pollution Fund as amended ('IOPC Fund'), as well as Supplementary Fund 2003

The CLC/IOPC system covers pollution damage occurred in consequence of carriage of oil (persistent hydrocarbon mineral oil) by the vessel. In particular, this damage is defined as: "loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur."

Anyone who has suffered prejudice due to damage caused by escape or discharge of oil from the vessel may claim compensation from the shipowner. The compensation should cover:

- any quantifiable damage, including damage to environment,
- loss of profit,
- preventive measures which are defined as "any reasonable measures taken by (…) after an incident has occurred to prevent or minimise pollution damage."

Compensation for “impairment of environment” other than loss of profit should be “limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken".

The Convention applies to the damage caused:

- in the territory of the State Party to CLC,
- its exclusive economic zone,
- with regards to preventive measures, it applies to them wherever they were taken.

It is a two-tier system of liability. The shipowner is responsible, on the basis of strict liability but with certain exceptions including acts of war, force majeure, fault entirely attributed to a third party and wrongful act of a governmental authority responsible for the maintenance of navigational aids, up to a certain limit depending on the tonnage of his ship. In case of a ship carrying more than 2,000 tons

of oil in bulk as cargo he has to maintain insurance to cover his potential liability (see more in the chapter on "Insurance and Liability").

The IOPC Funds of 1971 and 1992, created from annual contributions of oil importers by sea, provide compensation above the limit of shipowners' liability or if no liability of the shipowner arises (e.g. act of war or else if the shipowner is financially incapable to meet all obligations. The 1992 IOPC Fund provides compensation up 203 million SDR (~ € 227 million). In 2003 the IMO adopted the Supplementary Fund Protocol which increased available compensation to 750 million SDR (~ € 840 million).

### International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Oil Convention 2001)

**Bunker Oil Convention** applies to pollution damage resulting from the escape or discharge of bunker oil from the ship. In similarity to CLC Convention, the compensation covers:

- any quantifiable damage, including damage to environment,
- loss of profit,
- preventive measures which are defined in the same way as in the CLC.

Compensation for "impairment of environment" other than loss of profit should be "limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken".

Territorially, it applies to:

- pollution damage in the territory and the territorial sea of the State Party to the Convention,
- its exclusive economic zone (or an equivalent zone),
- to measures taken to prevent or minimise such damage wherever taken.

The Convention is based on the rule of strict liability of the registered owner of vessel. He is liable regardless of fault with only limited exceptions (similar to CLC above), but his liability is limited up to a ceiling calculated in accordance with the Convention on Limitation of Liability for Maritime Claims 1976 or 1996, as amended (in the text binding in a relevant state). Unlike CLC, there is no fund to provide for additional compensation. In relation to a ship with a tonnage greater than 1000 GT the owner obliged to maintain insurance.

### International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention 1996 and HNS Protocol 2010)

In May 1996 the IMO adopted the **HNS Convention** and in April 2010 it adopted an amending Protocol. None has entered into force yet.

The Convention creates a system of strict liability of the shipowner, similar to the CLC (see above) with an additional exception introduced for any failure of the shipper or other person to provide information on the shipped hazardous and noxious substances. HNS damage includes:

- loss of life or personal injury on board or outside the ship carrying the hazardous and noxious substances caused by those substances,
- loss of or damage to property outside the ship,
- loss or damage by contamination of the environment,
- the costs of preventive measures and further loss or damage caused by them.

Claims in respect of death or personal injury have priority over other claims.

It applies to:

- any damage occurred in the territory and territorial sea of the State Party,
- damage by contamination of the environment occurred in the exclusive economic zone or equivalent of the State Party
- preventive measures wherever they were taken, as well as
- damage, other than damage by contamination of the environment, caused outside the territory of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party.

The shipowner is liable up to certain limit calculated on the basis of the tonnage of the ship. The maximum amount available under this first tier is 100 million SDR (now around 112 million euro). He is required to maintain insurance or other financial security for this purpose.

In cases where full compensation is not available under the first tier, a compensation fund (HNS Fund) will provide compensation. The total maximum compensation is of 250 million SDR (~280 million euro) per incident. The fund will be financed by receivers of HNS substances transported by sea in the Member States in excess of certain thresholds.

### The Nairobi International Convention on the Removal of Wrecks 2007

**Wreck Removal Convention** was adopted in 2007 and has entered into force in April 2015.

The Convention holds the owner liable for the cost of locating, marking and removing the wreck. The liability is excluded in the event of an act of war or force majeure, as well as if the maritime casualty was intentionally caused entirely by a third party.

However, the owner can limit liability pursuant to any applicable limitation regime – it will mostly be the International Convention on Limitation of Liability for Maritime Claims, although a State Party may, when ratifying LLMC, specifically exclude the right to limit in respect of wrecks.

The Convention requires the owner of a ship of 300 GT or more to maintain insurance or another form of financial security to cover liability under the Convention.

### LLMC Convention – global limitation of liability

The **Convention on Limitation of Liability for Maritime Claims** provides for the right of shipowners (charterers, managers, operators, etc.) and salvors to limit their liability for a variety of maritime claims related to the operation of a ship (e.g. in respect of loss of life or personal injury and loss or damage to property, including damage occurred during salvage operations).

The limitation amount is calculated on the basis of the tonnage of the ship in question according to the method described in the Convention.

The Convention was first adopted in 1976, then the limits of liability where increased in 1996 and again increased in 2012 – the latter have entered into force in June 2015.

The only claims excluded from under the limits of LLMC are those regulated by special regimes, CLC and HNS, which define their own liability limits or wreck removal claims if the State signatory to LLMC specifically excluded them. Other claims, such as bunker oil pollution claims and any other claims as defined by national laws are subject to LLMC limits.

The right to the limitation of liability is considered very difficult to 'break' since its Article 4 provides only that "a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result".

It is important to note that LLMC does not provide for rules of liability, it only provides for financial limitation of liability once the liability itself has been ascertained according to applicable rules.

### European Union Rules

### Directive 2002/59/EC on Community vessel traffic monitoring and information system as amended ('VTMIS Directive')

Article 19 and Annex IV: establish the obligations of the parties concerned with an incident at sea threatening to safety of shipping or persons, or the protection of the environment. As far as the coastal State is concerned, the Directive contains in Annex IV a non-exhaustive list of measures to be considered by the Member States in the event of an incident. The shipowner, the operator, the master and the charterer are strictly held to cooperate with the national competent authorities in order to minimise the consequences of such incidents. Finally, the master of the ship involved in an incident at sea bears additional responsibilities of notification and cooperation with the competent authorities in case of an assignment of a place of refuge.

Article 20 requires Member States to designate one or more competent authorities to take independent decisions concerning the accommodation of ships in need of assistance. The authority

(or authorities) should have sufficient expertise and power to make a variety of decisions, among others to restrict the movement of the ship or direct it to follow a particular course, to give a notice to the master to end a particular threat to environment or maritime safety, to send an evaluation team on board of the ship or direct a ship to a place of refuge.

Article 20a requires Member States to draw up plans for the accommodation of ships in order to respond to threats presented by ships in need of assistance in the waters under their jurisdiction, including, where applicable, threats to human life and the environment. The plans should contain at least: the identity of the authority responsible for receiving and handling alerts (name and contact), the identity of the authority responsible for decisions on acceptance or refusal of a ship to a place of refuge, information on the coastline of Member States and all elements facilitating a prior assessment and rapid decision regarding the place of refuge, the assessment procedures for acceptance or refusal of a ship, relevant resources and installations, procedures for international coordination and decision-making and financial guarantee and liability procedures. Member States shall communicate on request the relevant information concerning plans to neighbouring Member States.

Article 20b states that on the basis of the national plan, the competent authority will decide on the acceptance of a ship in a place of refuge following a prior assessment of the situation. The ship will be admitted to a place of refuge if such an accommodation is the best course of action for the purposes of the protection of human life or the environment.

Article 20c notes the relevance of insurance or other financial security in accordance with Directive 2009/20/EC for the ship in need of assistance, which Member States may require to see evidence of. However, the absence of such certificate does not exonerate a Member State from the preliminary assessment of the situation and is not a sufficient reason to refuse to accommodate a ship in a place of refuge.

Article 21: Competent authorities of Member States involved in the management of an incident at sea shall broadcast relevant information to the parties concerned, and shall inform and exchange information with any other Member States with a potential interest in the case at hand.

Article 20d: Member States shall also cooperate, among themselves and with the European Commission in drawing up, if appropriate, concerted plans to accommodate ships in need of assistance.

### Directive 2009/20/EC on the insurance of shipowners for maritime claims ('insurance Directive')

All ships above 300 GT flagged in the EU Member States, as well as any other ships of the same tonnage flying a non-EU flag when they enter a port under the EU Member State's jurisdiction, have to have insurance adequately covering potential maritime claims subject to limitation under the LLMC. The amount of the insurance is calculated according to the rules in the LLMC 1996. Such insurance means indemnity insurance of the type currently provided by the International Group of P

& I Clubs and other effective forms of financial security and insurance (including proved self-insurance).

### Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage ('ELD')

The Directive introduces rules relating to pollution of the environment in general. Those rules can also be applied to pollution of marine environment in particular it provides that an operator of an "occupational activity" (which includes also transport by sea of hazardous materials) is obliged, in case of environmental damage or damage to protected species and natural habitats, as well as in case of an imminent threat of such damage, to undertake preventive and remedial measures.

**The rules do not apply to** environmental damage arising from an incident in respect of which liability or compensation falls within the scope of any of the international liability conventions, namely CLC and HNS. This means in practice that a competent authority should first consider the applicability of the above-listed international conventions before examining the relevant steps to take in accordance with national law transposing the ELD.

According to Articles 5 and 6 of the ELD preventive and remedial measures have to be taken in cooperation with a competent authority (different to the one established in accordance with Article 20 of the VTMIS) designated by the Member State for this purpose. The competent authority may require the operator i.a. to provide information, follow instructions, and undertake specific measures to address the environmental consequences of the incident at sea.

The operator shall bear the costs for the preventive and remedial actions and shall be responsible for the costs if such measures were taken by the competent authority with the exceptions of the situations when the damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place or when it resulted from compliance with a compulsory order or instruction emanating from a public authority. Even if the Directive provides for the strict liability of the operator, the Member States may allow the operator not to bear the cost of remedial actions when he was not at fault or negligent and the environmental damage was caused by an emission or event expressly authorised under applicable national law or by an activity which was not considered likely to cause environmental damage.

The Directive is without prejudice to the right of the operator to limit his liability in accordance with national legislation implementing LLMC, therefore, even if the shipowner is liable for the costs of preventive and remedial measures, his financial liability will in most circumstances be limited.

It is to be noted that the provisions of the Directive are directed to the Member States. They do not provide for any compensation rules for third parties, they only concern the liability of the operator towards the Member State for the costs incurred. They may potentially be applied to a place of refuge situation, in combination with the rules on limitation of liability. It is possible that in a case involving a ship in need of assistance both competent authorities (under the VTMIS and the ELD) will

be concerned. However, the allocation of liability toward the State can only follow the assessment and decision on the accommodation of the ship in need of assistance.

# Appendix I

*---- Click to come back to PoR Quick Reference ----*

## List of Websites/Contacts

| | |
|---|---|
| www.iacs.org.uk | International Association of Classification Societies |
| www.ics-shipping.org | The International Chamber of Shipping |
| www.igpandi.org | International Group of P&I Clubs |
| www.imo.org | International Maritime Organisation |
| www.marine-salvage.com | The International Salvage Union |
| www.iumi.com | International Union of Marine Insurance |
| www.equasis.org | Equasis |
| www.marine-salvage.com | International Salvage Union |
| www.itopf.com | The International Tanker Owners Pollution Federation |

[to be added]

# Appendix J

# Liability and Compensation

It is important to note that a ship will remain on risk throughout the period covered by the maritime casualty and in the event of an incident where a ship is in need of assistance and requests a place of refuge, the following three types of marine insurance cover will normally apply:

**Hull & Machinery (H&M) insurance**, **Cargo insurance** and **Protection & Indemnity (P&I) insurance**

The H&M insurance is the vessel's property insurance and covers: damage to the vessel itself, its machinery, the ship's proportion of salvage costs and the vessel's contribution to general average. Salvage costs are covered regardless of whether the Master remains on board or not during the operations.

Cargo insurance is also property insurance and covers all damages to the cargoes loaded on board and the cargoes' proportional share of general average, normally based on the York-Antwerp-Rules. Average bonds and guarantees are signed by the cargo owner and their insurers.

The P&I insurance covers the shipowner's liability to third parties such as personal injury to passengers and seafarers, damage to third party property, wreck removal costs, counter-pollution measures and clean-up operations, cargo damage etc. Hence, the P&I insurance is the most relevant one for the purposes of a place of refuge situation.

It is important to note that the ship's H&M, Cargo and P&I insurance covers are not prejudiced by a ship seeking assistance or a safe place of refuge whether that is in a sheltered haven, port or terminal.

**Potential liabilities & related costs**

Accommodation of a ship in a place of refuge may lead to the following types of damage or related costs, which are covered by a shipowner's insurance cover arrangements:

- physical damage to the environment,
- economic damage,
- personal injury or death,
- damage to property,
- wreck removal,
- clean-up costs,
- costs resulting from unloading, unpacking, storing, transhipping, etc. of cargo.

**Insurance Cover**

Insurance covering claims subject to limitation under the International Convention on the Limitation of Liability for Maritime Claims (see LLMC Convention – global limitation of liability) is mandatory in the EU for all ships over 300gt, when these are entering EU ports, or –in some cases – when these operate in the territorial waters of a Member State, or – in any event – when these are registered in a Member State.

Mandatory insurance is also a requirement under a number of IMO international conventions (see Appendix H) for the shipowner's liabilities for: oil, including bunker oil, as well as wreck removal and any activities undertaken to render the wreck - or any parts thereof - harmless. Liability in respect of pollution prevention, damage and clean-up of HNS is also a covered risk for P&I insurance providers (see International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention 1996 and HNS Protocol 2010).

Once cover arrangements for the ship concerned are verified, the CA will have access to the identified insurance provider who will respond under the relevant IMO convention/s or national legislation. International Group Clubs may also provide a Letter of Undertaking following consultation with the affected State.

*---- Click to come back to PoR Quick Reference ----*

# List of Acronyms

*---- Click to come back to PoR Quick Reference ----*

| | |
|---|---|
| CA | Competent Authority |
| CMS | Co-ordinating Member State |
| CS | Classification Society |
| DPA | Designated Person Ashore |
| CSN | CleanSeaNet |
| EEZ | Economic Exclusion Zone |
| EMSA | European Maritime Safety Agency |
| ERS | Emergency Response Service |
| GESAMP | Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection |
| H&M | Hull and Machinery |
| IACS | International Association of Classification Societies |
| IBC | International Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk |
| ICS | International Chamber of Shipping |
| IGP&I | International Group Protection & Indemnity |
| IMDG | International Maritime Dangerous Goods code |
| IMS | Integrated Maritime Services |
| ISU | International Salvage Union |
| IOPC Funds | International Oil Pollution Compensation Funds |
| ITOPF | International Tanker Owners Pollution Federation Limited |
| MAR-ICE | Marine – Intervention in Chemical Emergencies Network |
| MAR-CIS | Marine Chemical Information Sheets |
| MAS | Maritime Assistance Service |
| MRCC | Maritime Rescue Co-ordination Centre |
| MSS | Maritime Support Services |
| NCP | National Contingency Plan |
| QDM | Quick Decision Methodology |
| SERS | Ship Emergency Response Service |
| SITREP | Situation Report |
| SMS | Supporting Member State |
| SRR | Search and Rescue Region |
| SSN | The Union Maritime Information and Exchange System, SafeSeaNet |
| THETIS | EU Port State Control Inspection Regime database |
| VTS | Vessel Traffic Service |

| | |
|---|---|
| VTMIS | Vessel Traffic Monitoring and Information System (2002/59/EC) |

# List of Definitions[26]

*---- Click to come back to PoR Quick Reference ----*

| | |
|---|---|
| Flag State | "Member State whose flag the ship is flying" according to Directive 2009/21/EC on compliance with flag State requirements |
| Charterer | Bareboat charterer |
| Company | According to the ISM Code, point 1.1.2 it "means the Owner of the ship or any other organization or person such as the Manager, or the Bareboat Charterer, who has assumed the responsibility for operation of the ship from the Shipowner and who on assuming such responsibility has agreed to take over all the duties and responsibility imposed by the [ISM] Code." |
| Coordination | The organization of the different elements of a complex body or activity so as to enable them to work together effectively. |
| MAR-ICE | The network established by EMSA in close cooperation with the French institution Research and Experimentation on Accidental Water Pollution (Cedre) and the European Chemical Industry Council (Cefic). |
| MAR-CIS | The datasheets provided to requesting maritime administrations in case of emergencies through MAR-ICE. |
| SafeSeaNet | The Union Maritime Information and Exchange System |
| Salvor | The salvor is the party providing services to a vessel in need of assistance on a volunteer basis and who is responsible for the conduct of those services. |
| Salvage Operation | Means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever |

[26] For the purposes of these guidelines

# INDEX

# Annex 5

# DEVELOPMENT OF AN INTERNATIONAL LEGALLY BINDING INSTRUMENT UNDER UNCLOS ON THE CONSERVATION AND SUSTAINABLE USE OF BIOLOGICAL DIVERSITY IN AREAS BEYOND NATIONAL JURISDICTION (BBNJ)

## ICS[1], ECSA[2] AND ASA[3] POSITION PAPER

**July 2018**


## Summary

The global shipping industry has been following UN discussions regarding the development of a legally binding instrument under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) on the conservation and sustainable use of marine Biological diversity of areas Beyond National Jurisdiction (BBNJ).

Industry respectfully submits that when considering the new instrument, due regard is given to:

- the UN 2030 Agenda for Sustainable Development and, in particular, to ensuring a careful balance between sustainable use and protection of marine biodiversity;
- ensuring that the proposed Instrument is consistent with the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and, in particular, the provisions concerning the maintenance of freedom of the high seas, and rights of navigation enshrined in articles 87 and 90 of UNCLOS;
- fully respecting the carefully agreed balance between the different bases of jurisdiction under UNCLOS (flag State jurisdiction, coastal State jurisdiction and port State jurisdiction);
- fully respecting also existing, relevant legal instruments;
- ensuring that relevant global and sectoral bodies are not undermined. For the shipping sector, this is principally the International Maritime Organization (the IMO).


## Further information

Shipping powers the global economy, transporting raw materials, oil, gas and goods into homes, manufacturing plants and factories worldwide. Around 85% of world trade is carried

[1] ***The International Chamber of Shipping (ICS)*** *is the principal global trade association for the shipping industry engaged in international trade, representing shipowners and operators in all sectors and trades. Its membership comprises national ship-owners' associations in Asia, Europe and the Americas whose member shipping companies operate over 80% of the world's merchant tonnage. Its primary role is to represent shipowners with the various international regulatory bodies that affect shipping, including and most especially the International Maritime Organization and the International Labour Organization.*

[2] ***The European Community Shipowners' Associations (ECSA)*** *is a trade association whose membership comprises the national shipowner associations of the European Union and Norway and whose focus is representation at the EU regulatory institutions. Many of the members of ECSA are also members of the International Chamber of Shipping.*

[3] ***The Asian Shipowners' Association*** *is a trade association whose membership comprises eight national shipowner associations from the Asia-Pacific region.*

on ships. Shipping directly facilitates the growth of world trade, economic development, and the improvement of global living standards. The international shipping industry is therefore an important stakeholder in any agreement under UNCLOS. On a sectoral level, shipping should be considered an important partner to any new treaty that could affect maritime activities or the rights and freedoms of navigation established under UNCLOS.

In this respect, it is noted that General Assembly resolution 72/249 reaffirms that the new instrument to be developed should be fully consistent with the provisions of UNCLOS. This is welcome because the maintenance of freedom of the high seas, and rights of navigation enshrined in articles 87 and 90 of UNCLOS are principles that are vital to the smooth operation of shipping. UNCLOS also carefully balances the rights and obligations of flag States, coastal States and port States. In the context of regulating international shipping, this balance has worked well, as demonstrated by the steady improvement of shipping's safety and environmental performance.

This regime has been a success largely because while UNCLOS provides the basic legal framework for ocean governance, detailed regulation of the shipping industry is carried out by the expert body, the International Maritime Organization (IMO), operating under delegated authority from the UN. The global shipping industry strongly believes that this mandate should be duly recognised in any new agreement and IMO consulted as appropriate when developing regulations under the new instrument that affect shipping.

The IMO has developed a comprehensive framework of global conventions, which are enforced worldwide, through a combination of flag State inspection and port State control. In the interest of ensuring legal certainty, it will be important for governments considering the detail of the new instrument to take account of any potential overlap, duplication of, or conflict with existing IMO Conventions.

While discussions on the detail a new treaty have yet to commence, one area of potential regulation is the establishment of Marine Protected Areas (MPA) on the High Seas. To some extent, these areas already exist for shipping through the designation by IMO of Special Areas under MARPOL and Particularly Sensitive Sea Areas (PSSA). However, in the context of BBNJ this will be complicated by a large number of UN and regional agencies, each with the competence to agree marine protection measures. In all cases, it will be important to ensure that the establishment of MPA on the High Seas does not adversely affect ship routeing measures or impact the rights of freedom of navigation. Meaningful consultation with IMO and the shipping sector will lead to the input of specialised technical expertise and ensure that the balance is maintained between environmental protection and freedom of navigation.

Finally, there is no question about the global shipping sector's commitment to cleaner seas and it shares the objectives of the international community to protect and conserve the marine environment in a sustainable way. In this regard, ICS, ECSA and ASA stand ready to provide technical input in order to assist in the development of a new treaty.

# Annex 6

International Chamber of Shipping
Shaping the Future of Shipping

38 St Mary Axe London EC3A 8BH

Tel +44 20 7090 1460
Fax +44 20 7090 1484

info@ics-shipping.org | ics-shipping.org

To: Insurance Committee

26 March 2018

Dear Committee Members

I am writing to seek your views on cyber risks from a marine hull and machinery (H&M) and war risks insurance perspective. The topic has been on our agenda at recent meetings, due to, initially, the inclusion of CL380 (the Institute Cyber Attack Exclusion Clause) in London market H&M and War insurance policies, and, latterly, the increasing focus of insurers on cyber risks in a more broad sense (including, for example, risks from automation of ships).

With regard to CL380, it will be recalled that we undertook a detailed consideration of the effect of this clause (which excludes wilful or malicious cyber-attack intended to cause harm). At the last meeting it was reported that the Joint Hull Committee (JHC) and Joint War Committee (JWC) agreed that the risk of a cyber-attack on a ship which led to systemic loss was low but that one of the purposes of the clause was to drive the excluded risk to the war policy, which would then provide underwriters the opportunity to cancel the policy more quickly and to reinstate on more appropriate terms when necessary. It was accepted by the JWC and JHC that CL380 was sometimes also inserted into the war risk policy but they believed that it was possible for the risk to be "bought back" at an agreed price. The Committee concluded that this was a commercial issue for owners and encouraged them, through members, to resist the inclusion of CL380 in their war risk contracts (not least because of the low risk identified by the insurers themselves).

Somewhat surprisingly therefore against this background, I was recently invited to a meeting with the Chairman and Deputy Chairman of the JHC and the Lloyd's Market Association (LMA) in which it transpired that the JHC / JWC / LMA are considering various alternatives, one of which would be the idea of all types of cyber risks (i.e. a malfunction or a hostile attack), being insured together on one policy, in much the same way as piracy has been moved from the Marine H&M to the War policy. In addition, a review of the Institute Time Clauses (Hulls) 1.10.83 and the International Hull Clauses of 1995 and 2003 (neither of which are widely used) is also being considered, primarily due to concerns about the market's potential exposure to cyber risks.

Following the meeting, I held an informal exchange of views with some London based shipping company risk managers and a London based broker, at the ICS office with the support of the ICS Secretariat (Insurance and Marine). The purpose was to gauge the initial reaction to the underwriters' proposals swiftly before seeking the views of the wider Insurance Committee.

Briefly, all participants were of the view that a standalone insurance product for physical damage to a vessel arising from cyber risks was not wanted or needed and that cover should remain as is. There was some support for cyber risks to be included under an owner's war risk policy as was now the case for piracy risks.

With regard to the proposal from the JHC to undertake a review of the various versions of the London market H&M Policies, there was some scepticism as to whether this would be a worthwhile exercise. Whilst the previous reviews had resulted in new clauses/terms, these had not been widely used. Insurers and assureds continued to prefer to use the well-known and well-understood Institute Time Clauses (Hulls) 1.10.83, with appropriate amendments. It was noted also that any review should be undertaken with active participation by shipowners' representatives in order to ensure that they were balanced and therefore more likely to be better used.

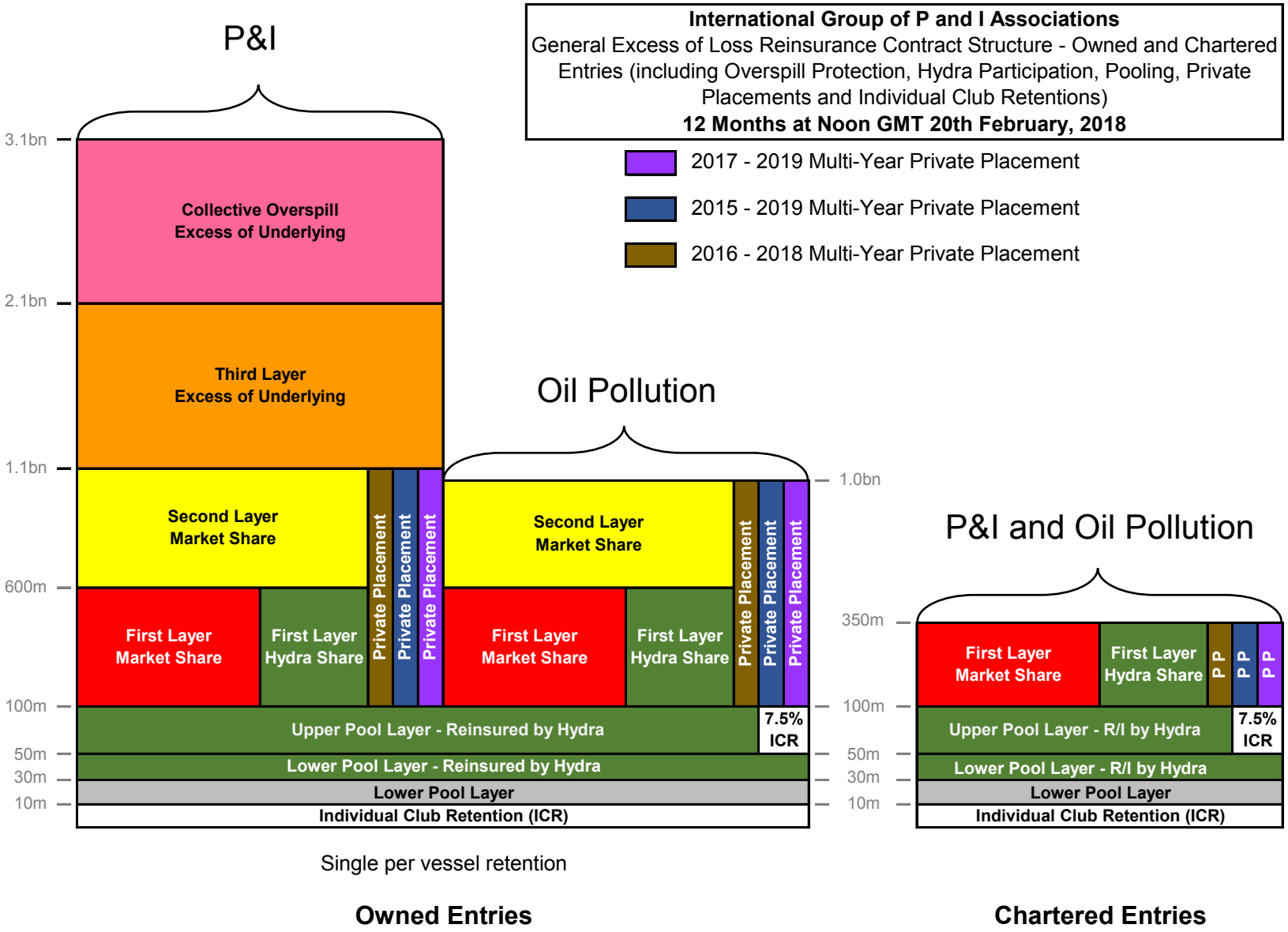
With this preliminary information, and notwithstanding a large number of your associations' members will not be insured on Institute Time Clauses, I would be grateful for your views on the London market underwriters' proposals regarding the insurance of cyber risks, and review of H&M Policies, by **Monday 16 April** to assist in informing the JHC and LMA of the initial ICS reaction. At this stage I am not proposing to convene a meeting of the Insurance Committee to discuss this matter. It will be included on the agenda for our next meeting, which, you may recall, is tentatively scheduled for late November (date to be advised) subject to there being sufficient items for discussion.

I look forward to the thoughts and comments of Committee colleagues regarding the above.

Yours sincerely

Andreas G Bisbas
Chairman: Insurance Committee

# Annex 7


International Group of P and I Associations
General Excess of Loss Reinsurance Contract Structure - Owned and Chartered Entries (including Overspill Protection, Hydra Participation, Pooling, Private Placements and Individual Club Retentions)
12 Months at Noon GMT 20th February, 2018
2017 - 2019 Multi-Year Private Placement
2015 - 2019 Multi-Year Private Placement
2016 - 2018 Multi-Year Private Placement
P&I
3.1bn
2.1bn
1.1bn
600m
100m
50m
30m
10m
Collective Overspill Excess of Underlying
Third Layer Excess of Underlying
Second Layer Market Share
First Layer Market Share
First Layer Hydra Share
Private Placement
Private Placement
Private Placement
Upper Pool Layer - Reinsured by Hydra
Lower Pool Layer - Reinsured by Hydra
Lower Pool Layer
Individual Club Retention (ICR)
Oil Pollution
1.0bn
Second Layer Market Share
First Layer Market Share
First Layer Hydra Share
Private Placement
Private Placement
Private Placement
7.5% ICR
100m
50m
30m
10m
P&I and Oil Pollution
350m
First Layer Market Share
First Layer Hydra Share
P P
P P
P P
Upper Pool Layer - R/I by Hydra
7.5% ICR
Lower Pool Layer - R/I by Hydra
Lower Pool Layer
Individual Club Retention (ICR)
Single per vessel retention
Owned Entries
Chartered Entries