

**PRACTICAL ASPECTS OF SHIPOWNERS
SAVING MIGRANTS AT SEA
GIANNICOLA FORTE**

LEGAL FRAMEWORK

Montego Bay Convention - UNCLOS

Under Article 98(1) Masters are required to render assistance to any person found at sea in danger of being lost and must proceed at speed to the rescue of persons in distress. In addition, Article 98(2) imposes an obligation on Coastal States to promote the establishment, operation and maintenance of search and rescue services and to co-operate with neighbouring States where required.

SOLAS

Regulation V/33.1 obliges the Master of a ship which is in a position to be able to provide assistance to proceed with all speed to assist persons in distress at sea and, if possible, inform the relevant search and rescue service that the ship is doing so. State Parties are required by Regulation V/7 to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around their coast. Again, the regulation requires Coastal States to establish and operate search and rescue facilities.

Search and Rescue Convention

Chapter 2.1.10 obliges State Parties to provide assistance to persons in distress at sea, regardless of nationality, status or circumstances. Chapter 1.3.2 requires States to provide for initial medical or other needs and deliver persons to a place of safety.

Salvage Convention

Article 10 places a duty on every Master to render assistance to any person in danger of being lost at sea, so far as he can do so without serious danger to his vessel and persons thereon.

1951 Convention Relating to the Status of Refugees

The Refugee Convention provides a definition of refugees and prohibits their expulsion or return to a territory where their life or freedom may be at risk on account of race, religion, nationality or membership of a particular social group or political opinion.

MASTER OBLIGATIONS

The current legal framework imposes to Masters and crewmembers the obligations to assist and rescue migrants and refugees in distress at sea. Furthermore, the relevant Rescue Coordination Centre (“RCC”) usually orders to the vessels to take appropriate action to save those in peril at sea take.

Criminal sanctions can be imposed to the masters which fail to take part to SAR operations.

Masters are requested to stay in contact with the RCC and are obliged to comply with the requirements of the Authorities, but SAR operations are subject to the safety of the ship and crew.

Basic care in furnishing food, water, sanitary facilities and makeshift cover to rescued people is expected.

The ship’s care period for rescued people is limited to the time necessary to disembark them at a safe (or ordered) port, but this also depends upon circumstances and RCC orders. The RCC should relieve the ship of the refugees as soon as possible.

The masters are not obliged to undertake tasks over and the above requirements nor they are required to allow the ship to be used as floating accommodation for the refugees.

There are no obligations on Masters and crews Under the Refugee Convention, no responsibility to determine the status of rescued persons or hear any application for asylum.

MASTER AND CREWMEMBERS DUTIES

The masters should provide the Rescue Coordination Centre (RCC):

- d**etails about the vessel undertaking the rescue operation (name, flag, port of registry, IMO number, details of owners and managers);

- v**essel's exact position, next scheduled port of destination;

- v**essel's security conditions/technical specifications, additional number of passenger;

- a**s much information as possible regarding the number and details of rescued persons (name, age, gender, health condition, special medical needs;

- w**here these persons have been located and how the vessel found them;

- i**nformation about any assistance needed by the vessel undertaking SAR operations;

- v**essel's primary destination and any other information (weather conditions, sensitivity of cargo, etc.).

Special advice for the control of the spread of infectious diseases:

- i**mmEDIATE contact be made with either the authority that ordered the rescue or the nearest state (likely to be Italy) where rescued persons may be disembarked;

- c**rew assist the boarding of persons in full protective clothing;

- c**rew limit interaction with the persons rescued;
- a**ny interaction be conducted only by way of full protective clothing;

- t**he accommodation block is to be guarded and all access is to be prevented

- a**ll materials, clothing, blankets, cooking utensils, toilets and other items provided to the rescued persons may need to be incinerated or otherwise safely disposed of after disembarkation;

- v**essel areas which the rescued persons used will need to be disinfected after disembarkation.

CHALLENGES / CONCERNS

the unknown status of any persons rescued presents significant security challenges to commercial vessel crews (smuggling, terrorists infiltration, etc.);

masters and crews may face difficulties to comply with checklist approach when embarking hundreds of persons rescued;

the responsibility of a ship first arrived to the scene of an incident and prompt handover of SAR operations with the Rescue Coordination Centres;

there is no available guidance on the length of time acceptable for commercial vessels to stand by when assessing a distress situation. This links to the SOLAS amendment on the Masters' discretion and his or her judgement on whether rescue operations can be undertaken without causing further risk to the safety of life at sea or the marine environment;

particular concerns have been raised by the cruise industry as a result of the potential impacts on passengers during any rescue operation (direct safety impacts, loss of future custom, etc.). The industry still requires clarification on the level to which passenger safety should be considered when assessing the viability of a rescue;

pactical guidance from flag varies from state to state with different legal interpretations of international obligations;

risks for ships' crews for the presence on board of police or State's security personnel while disembarking persons.

INDUSTRY MEASURES AND SUGGESTIONS

NSA Check list - summary of suggested guidelines:

- m**ake sure you company and crew is prepared.
- Discuss scenarios, roles, risks, solutions;
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- a**pproach the refugees with a mob boat;
- p**rovide life vests, water/nutrition if possible;
- e**stablish trust. Assure the refugees that they are safe and will not be returned to shore;
- c**alm down the refugees. Protect their boat from winds, waves, using you own ship;
- k**eep in touch with the RCC. Maintain good internal communication among the crew.

If embarking refugees:

- s**ecure, prepare your ship. Lock the interior. Seal off dangerous areas;
- t**he transfer/embarkation phase is critical. Ensure safety and order to avoid accidents;
- n**ote the number of people. Specify gender, children, and nationality. Document events;

- i**implement hygiene and infectious disease control measures for crew. Use protective gear;
- k**keep refugees on deck in a 24/7 controlled environment. Wear uniforms, display authority;
- c**ontrol what the refugees bring on board. Body search/metal scan? Confiscate knives, etc.;
- s**how cultural and gender sensitivity. Identify and assist the most vulnerable;
- e**nsure safety and supervision of children. Some may travel unaccompanied;
- p**rovide water and food/nutrition/shelter/medical aid as per your capabilities;
- c**onsider destroying the refugee boat –but note that the traffickers may try to interfere;
- a**fter disembarking/ transferring to a safe port;
- s**earch for stowaways. Hand over any remaining ID papers / belongings to the authorities;
- d**isinfect decks / areas. Dispose of used personal protective equipment, properly;
- d**ebrief your crew after operation. Remember: some may need extra follow-up.

P&I Clubs solutions

Deviation for the purpose of saving life at sea, subsequent rescuing of persons and safe disembarking ashore is usually covered but the P&Is rules, as well as the Charterer's potential liability.

The deviation starts when the vessel changes her course for SAR of refugees and it ends when the ship is reasonably back on course to her intended destination.

The costs of deviation are covered by the P&I if justified and reasonably undertaken under the order by RCC to assist and rescue persons in distress at sea.

The costs which will be reimbursed usually include:

- expenses for fuel;
- insurance;
- extra wages;
- stores;
- provisions;
- port charges (pilots, tugs and port dues/fees) for a reasonable deviation;
- costs incurred for care and maintenance of refugees while on board.

All actions and activities performed by Master and crewmembers should be recorded in the deck log book; a log extract is required from the shipowners to obtain expenses compensation.

Basic P&I cover does not address the loss of earnings (hire or freight) arising from deviations connected with the saving of life at sea. Such circumstance should be fall under proper cover of loss of hire / business interruption insurance.

CONTRACTUAL ARRANGEMENTS

The contracts of carriage incorporating the Hague/Hague-Visby rules explicitly provide that such a deviation shall not be an infringement of the contract of carriage and that the carrier shall not be liable for any loss or damage resulting from it.

NYPE 1946

Liberty to deviate for the purpose of saving life and property pursuant to clause 16 together with Off-hire clause (“any other cause preventing the full working of the vessel”) lead to consider that charterers will continue to be responsible for hire and bunkers throughout such an adventure. However, the standard form also provides that charges incurred in putting into port for causes for which owners are responsible should be borne by owners. Therefore, arguably, owners would have to pay for any port-related costs for landing those rescued.

NYPE 1993

The off-hire clause would itself have the effect of putting the ship off-hire for a deviation to save life at sea. Because the express reference to the liberty to deviate to save life (lines 256 to 258), the ship should remain on-hire.

Baltimex

No provisions relating to deviation to save life. However, it is likely that in the absence of an express liberty to divert to save life, a court or tribunal would imply such a liberty into the charterparty. Under clause 4 of the Baltimex form, the charterer is to provide and pay for all fuel, port costs, pilotage and other expenses. It does not specify (in contrast to clause 7 of the NYPE 1946 form) the causes for which owners are responsible. As such, pursuant to the unamended Baltimex form, the charterer is likely to have to pay hire, bunkers and the majority of the costs of the rescue.

Shelltime

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

BP Time 3

The ship remains on-hire during any deviation to save life. Furthermore, the charterer is obliged to pay for all bunkers whilst the ship is on-hire as well as all port, pilotage and similar expenses. Although the owner will be required to pay for full provisions, deck and other necessary stores, the charterer would have to continue to pay for bunkers and the port costs during the rescue and in particular the disembarkation. In terms of voyage charterparties, the time and cost of performing the voyage is borne by the owner and as such owners will bear the time and cost of deviating to save life and disembark the individuals saved.

CONTRACTUAL REFUGEES CLAUSE

The above charterparties clauses generally provide for apportionment of the costs of deviation to save life at sea between the owner and the charterer, and often there are also further clauses (particularly in oil major charterparties) pursuant to which all the time and costs of such a deviation will be for the owner's account.

Many law firms and P&I are proposing a “refugee clause” with intention to achieve at least the splitting of 50% of all S&R operation costs (including costs for additional equipment, food, water, etc.).

“In the event of the ship deviating for the purpose of saving human life (other than crew members / the owners' personnel), or for the purpose of participating in search & rescue operations (as instructed by the ship's flag administration or coastal state authorities), all costs, liabilities and expenses excluding the payment of hire and bunkers

consumed shall be split 50/50 between the owners and the charterers [in the event that they are irrecoverable from the relevant authorities]. The phrase ‘all costs, liabilities and expenses’ shall, for the purpose of this clause, include: a) All telecommunication costs, crew bonuses and overtime and port costs including anchorage, pilot, tug and other costs incurred; b) All water, food, stores, fuel and equipment consumed or used to rescue, care for and disembark the refugees; c) All stores and equipment consumed or used and related costs (such as garbage disposal or third party cleaning costs) or any repairs to the ship to return the ship to the same condition she was in before the deviation; and d) All liabilities to third parties, including liabilities for injuries suffered by the ship's Master, crew or third parties, except where the liability is caused by the negligence of the Master or crew or a failure to exercise due diligence to maintain or make the ship seaworthy.”

CONCLUSIONS

In summary, although deviation for the purpose of saving lives will not constitute a repudiatory breach of the charterparty or contract of carriage, owners are likely to suffer some financial consequence due to their master's humanity and compliance with the law.

Owners are suggested to arrange proper training for masters and crews for SAR and to maintain their vessels equipped and supplied. Furthermore, it appears necessary to arrange procedures and plans granting masters and crews the instruments to face the emergency situations that potentially threaten the safety of crew and vessels.

In any case, it is necessary to comply with the documentation requirements to establish the owners' due diligence in relation to training of the crew, if problems arise during SAR operations.

BRIDGE OVER TROUBLED WATER

When you're weary, feeling small
When tears are in your eyes, I'll dry them all (all)
I'm on your side, oh, when times get rough
And friends just can't be found
Like a bridge over troubled water
I will lay me down
Like a bridge over troubled water
I will lay me down
When you're down and out
When you're on the street
When evening falls so hard
I will comfort you
I'll take your part, oh, when darkness comes
And pain is all around
Like a bridge over troubled water
I will lay me down
Like a bridge over troubled water
I will lay me down
Sail on silver girl
Sail on by
Your time has come to shine
All your dreams are on their way
See how they shine
Oh, if you need a friend
I'm sailing right behind
Like a bridge over troubled water
I will ease your mind
Like a bridge over troubled water
I will ease your mind



Many thanks for your kind attention

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Paul Simon & Art Garfunkel