

## **The Fair Treatment of Seafarers**

**Esther Mallach**

**Dabelstein & Passehl**

Dear Mr. President, Ladies and Gentlemen,

I am honoured that our firm has been so generously invited to contribute to this workshop on the criminalisation of seafarers and the prompt release of crews and vessels.

This speech deals with the treatment of seafarers from their point of view and how best to protect their interests in the aftermath of a pollution accident. It is aimed at providing a summary – and is by no means meant to be exhaustive – it cannot be.

The title “the fair treatment of seafarers” unfortunately, does not describe the current status in many respects which is why organisations such as the IMO, the ILO, the ITF, the CMI, the IFSMA and BIMCO , to name but a few have taken it upon them to keep the fate of seafarers in the public domain and to campaign relentlessly towards an improvement of their situation.

It is not always the law itself which is unfair or, more to the point, in breach of binding international conventions, it is more often than not the

way it is administered or that it is simply ignored, which constitutes unfair treatment; regardless of whether a seafarer is guilty or innocent under the law applicable, due process of law, and the principles of human rights must be observed at all times.

## **1.) What is the legal framework applicable to marine investigations and the protection of seafarer's rights?**

### The MARPOL Convention

The Convention contains rules against the discharge of pollutants. It also contains an important Rule 11 b) in Annex I whereby an owner or master can be exempted from liability for pollution caused as a result of damage to the ship or her equipment or for the safety of life or limb, provided all reasonable precautions were taken after the occurrence of the damage *unless* the damage was caused with intent or recklessly with knowledge that damage would probably result.

### UNCLOS United Nations Convention on the Law of the Sea

providing, inter alia, that arrested vessels and their crews shall be promptly released upon posting of reasonable bond or other security,

Setting the parameters for the level of sanctions against foreign vessels in territorial seas and the EEZ (Art. 230) providing that, ultimately, a dispute involving the refusal of a detaining state to release a vessel flying the flag of another state party upon posting reasonable bond or other security may be submitted to the International Tribunal for the Law of the Sea.

## The European Declaration of Human Rights

## The universal Declaration of Human Rights 1948

On a European level the controversial European Directive on Ship Source Pollution, Directive 2005/35 about which we hear more later on from the next speaker. I understand that on 03.06.2008 the European Court of Justice ruled that the Directive stands and is not invalid despite obvious contradictions to MARPOL and it will be a grave concern to seafarers of non –EU countries if and how the Directive and its new standard of liability and the extended jurisdiction will be applied

## **2.) The unfair treatments**

Professor Proshanto Mukherjee and Professor Edgar Gold summarized the frequently encountered unfair treatments in their respective speeches at the CMI International Working Group on the Fair Treatment of Seafarers in February 2006 and the CMI update on Guidelines on fair treatment of seafarers in September 2006 as follows:

- breaches of UNCLOSS Art. 230 by imposing custodial penalties against foreign seafarers in territorial waters without there being an indication of the required wilful and serious act of pollution
- failure to investigate the MARPOL rule 11 a/b Annex 1 exemption,

- infringements of human rights, i.e. the presumption of being innocent until proven guilty, by incarceration without charge
- Criminal action is taken against seafarers involved in Maritime accidents that have been *beyond their control*; due to the fact that in many maritime accidents some form of human error or omission is likely to have occurred which does not necessarily involve those actually working on the ship, namely the master, officers and crew. In some cases the ship may have been improperly constructed or repaired. In other cases adverse weather conditions beyond the control of the seafarer may have caused the accident.
- even in cases where the relevant seafarers have not been found at fault, they are, nevertheless, *held on the respective criminal law provisions as “material witnesses”*
- .access to legal assistance which is being curtailed;
- The seafarer is charged but not given the opportunity to a proper defence;
- Bail is set at inordinately high amounts without any evidence of the seafarer’s fault (breach of Art. 292 UNCLOS)
- The denial of interpreter services and the ensuing breakdown of communication adding to the seafarer’s isolation
- A further important mitigating circumstance is the seafarer’s dependency as employee on the ship-owner as his employer and the individual working conditions on board. There will be no problem with a “good Owner”. However, there are scenarios where employed seafarers are given to understand to act against the law or face instant dismissal and immediate

loss of their income which frequently serves to maintain a family.

These findings are based on and corroborated by a BIMCO study of cases involving the international practice of using criminal sanction towards seafarers adopted by the BIMCO board of directors in Singapore 02.03.2006. It gives a good overview of cases including circumstances and the treatment of seafarers in countries like Egypt, Singapore, France, China, Spain, Pakistan, Greece and the United States to name but few.

The BIMCO study concludes that most laws that are applied *are* fair and that negligent behaviour resulting in pollution deserves punishment but that here is a unfortunate pattern of laws being *applied* unfairly with seafarers being detained after an incident either on the presumption of criminal negligence or as a so called financial security for whatever claims the authorities may put together. The practised unfair approach is to treat the seafarer guilty until proven innocent

The BIMCO survey is complemented by the CMI International Working Group on the Fair Treatment of Seafarers which broadened the approach by circulating a questionnaire to 52 member states covering the administrative and criminal actions that may be taken in the aftermaths of a maritime accident.

### **3.) Responses and actions against seafarer's unfair treatment**

Implementing measures against the unfair treatment of seafarers also means to consider the reasons for authorities and governments to treat seafarers unfairly. The jurisdictions affected by pollution may make the experience of insufficient co-operation by the ship-owner or the flag state. If the ship-owner is difficult or impossible to locate (the key word here being one-ship companies) it is all the more tempting for the prosecuting authorities in the affected coastal states to literally hang on to the crew in order to put pressure on the owner or the club or any other party involved in the incident. There is a fear on the part of the coastal state that foreign seafarers may disappear and information disappears with them. There may be different opinions between the coastal state and the flag state on technical matters which may have caused the incident. Or, indeed, the authorities of coastal state itself may have contributed to the incident and may have an interest in deflecting the blame to the vessel and the crew.

What is important before this backdrop is a consolidated action by all the parties involved, including the Flag State, the Owner, the Club, the Agent at the relevant port; the consulate and other pertinent organisations representing seafarers and Owners.

A good example in this respect is the case of the MV ELIXIR whose Greek master was detained by Russian authorities on smuggling charges in March 2006. A coalition of Owners, the Club, the Greek Consulate, the US and International Chamber of Shipping, Intercargo, the ITF, the IFSA and other intervened on behalf of the Master who was

released from detention as a result and his fine reduced to half of what was allowed under the local law.

The responses and suggestions tabled by the pertinent organisations are:

**3.1.)** IMO draft code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident.

Under Chapter 12, paragraph 2, a seafarer being questioned must be informed of the nature and basis of the investigation, be informed of or allowed access to legal counsel regarding possible incrimination with regard to subsequent legal action, rights regarding self-incrimination or the right to silence, and any protection given to prevent evidence being used against them.

The US for example takes issue with several provisions in Chapter 12 of the code, under which seafarers must be returned to their ship or repatriated at the earliest opportunity and their human rights must be upheld. Chapter 12 runs up against present US anti-terrorism legislation under which non-Americans may be arrested without trial, may be questioned without a legal counsel present, have no rights to legal counsel and may be 'renditioned' to other countries.

This has been last experienced by some of the crew of the COSCO BUSAN. They were held without charge as so called material witnesses in proceedings against the ship's pilot – the COSCO BUSAN spilled some 58,000 gallons of oil into San Francisco Bay in November last year after colliding with a Bay Bridge pier. Their lawyers are apparently

seeking an order to allow them to return home before their salaries are being stopped.

**3.2.)** The IMO/ILO guidelines on fair treatment on seafarers in the event of a maritime accident, complementing the aforementioned IMO draft:

These guidelines were prepared in accordance with a resolution a 987 (24) on Guidelines on Fair Treatment of Seafarers in the event of a Maritime Accident adopted on 01.09.2005 by the IMO. They contain instructive advice for the port or coastal state, flag state, seafarer state, the shipowner and the seafarer himself.

I will only highlight a handful of points brought up in the guidelines in respect of the aforementioned entities and individuals:

### Guidelines for the port or coastal state

- provide interpretation services
- advise the seafarer of his right to remain silent;
- advise the seafarer of his right to independent legal advice and facilitate such access;
- Inform the seafarer on what basis the investigation is being conducted, e.g. IMO Code for the investigation of Marine Casualties and Incidents or pursuant to other national legal procedures;;

- to conduct interviews promptly and allow repatriation and to proceed with the investigation swiftly and charge the seafarer if justified on the evidence and ensure due process thereafter;
- allow the posting of reasonable bond or other security;
- to consider non custodial alternatives to pre-trial detention, including detention as so called material witnesses.

## Guidelines for the flag state

- fund the repatriation of the seafarer if the shipowner fails to fulfil their responsibility to repatriate;
- apply to the ITLOS for the release of vessel and crew;
- ensure and cooperate in any investigation to determine the cause of the maritime accident;
- ensure that ship-owners cooperate in any flag, port or coastal state investigation.

## Guidelines for the seafarer's state

- Ensure that its consular officers have access to the seafarer;
- fund the repatriation where ship-owners or flag state fail their respective responsibility.

## Guidelines for the ship-owners

Ship-owners have an overriding duty to protect the rights of the seafarers employed, including the right to avoid self-incrimination. This is a particularly sensitive area, as, in the wake of a pollution incident, the Owners is under an obligation under the terms of his P&I insurance, to render a report to the Club which will consist of the Master's statement. The Master may incriminate himself in this statement and if it is in the hands of the Club, it is available to the investigating authorities.

Owners should cooperate with the investigating authorities and provide the seafarers representative organisations with access to the seafarer and they should always be aware that the seafarer in their employ enjoys certain rights as an employee under the respective employment law applicable – i.e. they should not add insult to injury by dismissing the seafarer without notice and, thus, believe they can wash their hands of him. They should promote a *no fear, no blame culture* on board. I would add that, above all, ship-owners should ensure that their officers and crew *are being made aware* of their right to access to legal assistance and the entitlement to due process of law. They should be told to insist on a witness and, where required, also an interpreter present when interviewed by officials, and to cooperate to the extent possible having regard to their right to avoid self incrimination. This also corresponds to the Guidelines drafted for the seafarers themselves.

## **4.) Employers and unions unite to back fair treatment for seafarers following maritime accidents**

The International Transport Workers' Federation (ITF), the International Shipping Federation (ISF) and the International Chamber of Shipping (ICS) have joined forces in a new initiative to help protect seafarers involved in maritime accidents. The three organisations, which represent maritime employers and trade unions worldwide, announced in London in February 2008 that they have united to support and promote the IMO and ILO *Guidelines on the Fair Treatment of Seafarers In The Event Of a Maritime Accident*.

As part of the campaign the three organisations are distributing posters (supported by websites and leaflets) worldwide to show seafarers how the Guidelines can help protect them. They are also encouraging their members - national ship-owners' associations belonging to the ISF and ICS, and seafarers' unions affiliated to the ITF - to approach their governments in order to promote the Guidelines and to monitor how effectively they are being implemented.

ISF(International Shipping Federation/ICS (International Chamber of Shipping) Secretary General, Tony Mason explained: "As responsible employers, we believe it is very important that the IMO/ILO Guidelines, which represent the internationally accepted minimum standard for the fair treatment of seafarers by investigating authorities, are indeed implemented in practice by governments. Seafarers must be treated with dignity and respect, and given access to independent legal representation in situations where they may be interviewed or held following an accident at sea."

## 5.) Costs

Costs are a particular issue. All guidelines and all well meaning organisations and institutions are of little immediate help if not funded. Access to legal assistance, medical care, payment of interpreters etc. cost money.

Most Clubs will indemnify their members in respect of certain costs and expenses in this respect - meaning the member will have to pay first - however mostly subject to the proviso that no costs shall be recoverable unless they were incurred with the written approval of the managers or the committee of directors in its absolute discretion decides that they should be recoverable from the Club.

Also, Owners need to be aware that Clubs may not cover incidents like Oily Water Separator transgressions unless purely accidental – so the American Club newsletter of 2006. Considering the strictness applied to these transgressions in the USA involving arrests and detentions as “material witnesses” funding for defending the seafarers rights is essential.

In 2005 at IFSMA Capt. Thomas Brown suggested separate commercial insurance solutions for legal costs insurance and also abandonment insurance. Clearly, the Seafarer himself will be quickly out of pocket, especially, if his fixed term employment contract expires during the investigation and he obtains no further salary.

The seafarer is the most vulnerable link in the chain forming the shipping industry which is why he deserves that his rights are protected. Neither the environment nor the reputation of the industry is helped by treating seafarers unfairly.

Thank you.