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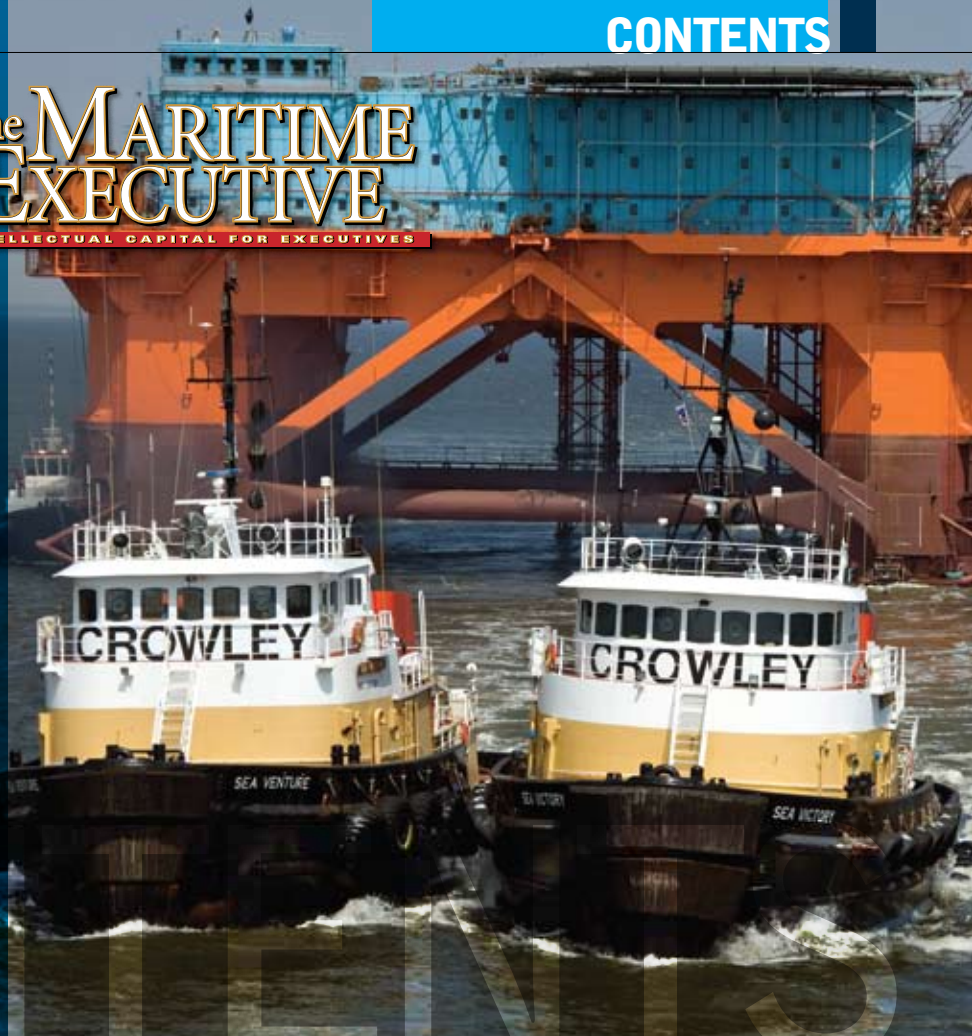
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Requests for “Ports of Refuge” by Vessels in Distress – Considerations for U.S. Ports

“Ports of refuge” captured the media’s attention in November 2002 with the sinking of the tanker *Prestige* off the coast of Spain. The spill was over 20 million gallons of fuel oil, which occurred after Spanish authorities decided to tow the vessel out to sea rather than bring it into port. The disaster highlighted the tension between the economic, environmental, and political interests of coastal states versus the consequences of a ship deteriorating and breaking apart at sea. It also showed there was a legal and regulatory vacuum regarding the responsibilities of coastal states to mitigate environmental catastrophes.

Scenario

Consider this: The oil tanker *Outrageous* steams down the U.S. West Coast after loading oil in Alaska, on its way to Chile. The vessel is owned by a Malaysian company, time-chartered to a South African company, and “insured” with a Protection & Indemnity Club in England. There are complicated contractual arrangements between several other parties.

The weather becomes treacherous, approaching gale-force proportions. By the time the *Outrageous* is off the coast of San Diego, the Beaufort scale is a solid 12, i.e., hurricane strength, with wave heights of 50 feet or more. The vessel is difficult to maneuver. The Master is concerned since he knows the vessel is old and in danger of breaking up. So he calls the owners and requests urgent assistance – he wants to put in to a U.S. port and ride out the storm before the vessel breaks apart and causes a major oil spill.

By now, the South African charterers are in the loop and do not want to pay for time in a non-scheduled port. The Chilean buyers do not want the vessel to deviate from its scheduled voyage as the cargo is set for immediate discharge

The vessel owner does not want to be responsible for an oil spill. And the P&I Club has already contacted lawyers to liaise with the U.S. Coast Guard and activate oil spill response teams.

The Coast Guard contacts the closest port and demands that the *Outrageous* be allowed to enter the harbor and wait out the storm. By now, the vessel is leaking oil.

to a petroleum company, which in turn must immediately deliver to a government entity. The vessel owner does not want to be responsible for an oil spill. And the P&I Club has already contacted lawyers to liaise with the U.S. Coast Guard and activate oil spill response teams.

The Coast Guard contacts the closest port and demands that the *Outrageous* be allowed to enter the harbor and wait out the storm. By now, the vessel is leaking oil.

Time is of the essence. How should the port respond to the Coast Guard request and calls from the vessel owner, charterer, cargo owner, P&I Club, immigration authorities (there may be stowaways on board) and a battery of lawyers?

No Absolute Precedent

Oil spill catastrophes highlight the need for a decision-making framework to evaluate requests by a vessel for a port of refuge. Unfortunately, there is a notable absence of U.S. law on the subject of a port's rights and obligations regarding a vessel in peril.

On the one hand, relevant statutes, case law, and secondary materials do not disclose an absolute legal duty on a U.S. port to grant refuge to a vessel in peril. On the other hand, since port operations impact a multitude of federal, state, and local interests in the economy, environment, commerce, health, and safety of the community, a port cannot really argue it has an absolute right to deny a request for refuge.

Instead, a "confluence of interests" requires the port to balance various factors on a case-by-case basis to determine if granting the request is the best course of action.

Ultimate Decision-Maker

The ultimate decision-maker is the U.S. Coast Guard, acting as "Captain of the Port" (COTP). It has federal authority to order ships within U.S. territorial waters in and out of ports, harbors and bays to protect the public, the environment, and maritime commerce. Further, it can enlist the "aid and cooperation" of federal, state, county, and municipal agencies. A port can therefore play an advisory role in the decision on whether to grant or deny refuge to a vessel.

There does not appear to be legal precedent on whether a port can legally refuse the Coast Guard's determination that a vessel should be granted refuge in a port.

The closest example involved the 2004 *Athos I* oil spill

in the Delaware River's main channel outside the Port of Delaware. The vessel remained anchored for 14 days due to a stalemate between the vessel and a shipyard over potential liability from repairs. The Coast Guard considered several options, including whether to order the facility to accept the vessel. Ultimately, the stalemate was resolved before any option was elected, but it is believed that any Coast Guard order to the facility to accept the vessel would have been challenged in court.

If the Coast Guard decides to order a vessel into port, but the port is strongly opposed with factual evidence to support a refusal, the port would probably have to file an urgent application in court to challenge the order.

Guidelines

Organizations have begun the arduous task of compiling "guidelines" for use by coastal states in evaluating requests for refuge.

Following the *Prestige* disaster, in 2003 the International Maritime Organization (IMO) adopted Resolution A.949, Guidelines on Places of Refuge for Ships in Need of Assistance (IMO Refuge Guidelines). Then, in 2004, the Pacific States/British Columbia Oil Spill Task Force developed its Plan Annex for Places of Refuge.

Although they lack the force of law, these guidelines have been used by maritime organizations and government entities to create a framework for decision-making in port-of-refuge scenarios. For example, specific guidelines have been incorporated into the U.S. government's "Regional Contingency Plan." The guidelines below are equally relevant to a port's evaluation of a request for refuge.

IMO

The IMO attempted to balance the interests of a vessel in peril against those of a coastal state (and thereby a port) in the protection of its coastline. The IMO Guidelines are voluntary: A coastal state is not obligated to grant refuge, but should weigh all relevant factors in a balanced manner and grant refuge whenever reasonably possible. Specifically, it should:

- » Enact vessel procedures to mitigate danger and establish a "Maritime Assistance Service."
- » Assess and take preparatory measures, i.e., (i) enact procedures for requests for refuge; (ii) with port authori-

ties, identify advantages and disadvantages of granting refuge, taking into account environmental and social factors, natural conditions, contingency planning, and potential consequences; and (iii) implement a communications system.

- » Conduct an "event-specific" assessment of objective factors, including a vessel's seaworthiness; cargo and bunkers on board; distance to place of refuge; whether the vessel is insured; cooperation by vessel and its owner with a coastal state's requirements for refuge; financial security, and the advantages and disadvantages of granting refuge.
- » Designate experts to board the vessel and evaluate the emergency and risks posed by leaving the vessel in place or bringing it into a coastal shelter, breakwater or port, taking into account safety, community, and environment at place of refuge, environmental threat, and disruption of port operations.
- » Weigh all factors/risks in balanced manner and give shelter where reasonably possible.
- » Where refuge is granted in a port, obtain security to cover costs for the port's operations.

Note: The IMO Guidelines are silent on the issue of liability and compensation for damage flowing from a decision to grant or decline refuge.

Pacific States/British Columbia Oil Spill Task Force

The Task Force completed its Plan Annex in 2004, which was largely adopted in 2005 and incorporated by the U.S. Coast Guard into the Federal Region 9 Regional Contingency Plan.

The Plan Annex defines a "place of refuge" as where a vessel can stabilize its condition and reduce the hazards of navigation (including a port). It emphasizes that decisions are case-specific, as they "encompass a wide range of environmental, social, economic, and operational issues that vary according to each situation," and the initial decision should be based on "assessment of the risk factors involved and the exercise of sound judgment and discretion."

The Plan Annex also identifies the parties (stakeholders) with jurisdiction:

- » The U.S. Coast Guard & COTP, which has authority to protect federal government interests in U.S. navigable waters and (as COTP) may order ships in and out of ports, harbors or embayments to protect the public, the environment and maritime commerce.
- » The State, which has authority to protect its interests along state-owned shorelines and in waters to the three-mile limit; the state designates a "State On-Scene Coordinator."

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- » Local & Port Authorities, with authority over near-shore waters in ports & harbors; a local government or port authority representative acts as “Local On-Scene Coordinator.”
- » The Master, with control of the vessel and responsibility for requesting a place of refuge from the COTP.
- » Government Resource Agencies & Tribal Leaders.

The COTP has final decision-making authority regarding a request for refuge; if time permits, it will implement a “Unified Command” to evaluate the request and consult with federal, state and local stakeholders (e.g., a port). If there is not enough time, the COTP is directed to make the decision without input from other stakeholders.

Note: The Plan Annex is silent regarding any dispute between COTP and a port to grant refuge.

Recommendations

First, to evaluate a request for refuge, a port should:

- » Obtain information on the status of vessel and crew, assistance sought, anticipated needs at refuge, and mitigation by the vessel.
- » If time permits, activate a Unified Command and consult with stakeholders.
- » Evaluate risks to human health, safety, and the environment.


- » Determine response and salvage/repair resources.
- » If the risks weigh in favor of granting refuge, point out the best location for refuge (port, anchorage, or break-water area), and prepare for firefighting and repairs.

Second, the port should appoint a “communications director” to interact with federal and state agencies, media, COTP, immigration, customs, and security. The need for good public relations and damage control due to political impact cannot be overestimated.


Third, due to multiple and competing interests, and the consequences of an oil spill, the port should create and have in place a “contingency response plan” to deal with an urgent port-of-refuge request. Having a plan in place will facilitate “lines of communication” and provide a framework to deal with the Coast Guard, P&I Clubs, federal and state agencies, as well as with local resources and clean-up companies. And it will allow a reasoned response to the parties and their lawyers.

John McKasson and Neil Klein formed McKasson & Klein in 1998 after working together as co-counsel on a case against a foreign government. The firm is based in Costa Mesa, California and focuses on maritime law, general business litigation and business transactions, intellectual property, employment, real property, and insurance. Marcella Chambers, an associate lawyer at the firm, contributed to the article.

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