COMPULSORY PILOTAGE UNDER LAW OF SEA

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Abstract:

Compulsory pilotage refers to the norm under which it is compulsory for a vessel to be operated and controlled by a licensed pilot unless the vessel itself falls under the category of exempted ones. Almost all the states have created an exemption for boats that are licensed to the United States and operating in coastwise trade and for small vessels.

Pilotage is required beyond internal waters in the territorial sea of a coastal state including an international strait the LOSC imposes constraints on the coastal state regulation of foreign shipping within those waters. Those rights of the coastal state are not unilateral and must be understood in the context of not only the LOSC but also related mechanisms and frameworks, especially those dealing with ship safety and the regulation of navigation overseen by the International Maritime Organisation (IMO).

As per various statutes prescribed by various states, the owners of the ship are supposed to have a licensed pilot upon its entering a harbor. Collisions between vessels caused solely by the negligence of such "compulsory pilots" are governed by separate and distinct rules of liability under admiralty and the common law.

Personal liability is a prerequisite to the liability of a vessel. However this view has been considered as substantively non determinative because the courts have clearly abandoned the personification theory. This gave rise to a uniform application of the common law rule.

With the recent cases, it is certainly clear that the apex court is in itself stuck in this riddle. In fact the Supreme Court has long recognized the existence of an "abiding riddle" in imposing liability on the vessel but not its owner, but has failed to resolve it.

The researcher will look at these issues in the context of a compulsory pilotage regime that has been adopted by the international community and established through various case laws.

Keywords: *compulsory pilots, International Maritime Organization, liability under admiralty, personification theory.*

Pilotage has a long maritime history, and is closely connected with efforts to secure the safety of shipping and the safety of a port from wayward ships. Rose has defined a 'pilot' as "a person other than the master or one of the crew of a vessel who is taken on board especially for the purpose of conducting it through a river, road or channel, or from or into a port, particularly with regard to his knowledge of local conditions."[1] Compulsory pilotage therefore arises when there is a legal or statutory obligation upon the master of a vessel to take on board a pilot while navigating through

[1] **Francis Rose, The Modern Law of Pilotage (Sweet & Maxwell, London: 1984) 1.**

certain waters.[2] This practice is longstanding, and has been identified as having occurred in the twelfth century. Compulsory pilotage refers to the norm under which it is compulsory for a vessel to be operated and controlled by a licensed pilot unless the vessel itself falls under the category of exempted ones. Almost all the states have created an exemption for boats that are licensed to the United States and operating in coastwise trade and for small vessels.[3]

It has been advocated, by Ivamy,[4] that, if at any part of the voyage, a pilot is required, the vessel will be considered unseaworthy unless she obtains one. When the case law and the wording of the MIA 1906 are examined, it can be seen that the situation is not as straightforward as suggested by Ivamy. Whether the lack of a pilot renders the vessel unseaworthy will be examined by considering various possibilities.

If a vessel sails from a port where a pilot may be procured and the nature of the navigation requires one, she will probably be unseaworthy without one unless the master himself has competent knowledge of the navigation.[5] Similarly, if a vessel sails from a port where pilot has been made compulsory by a statute,[6] she will be considered unseaworthy without one. One might consider whether, sailing in violation of a statutory provision like this, would render the voyage illegal and, thus, constitute a breach of the implied warranty of legality, instead of breach of seaworthiness. This can be extremely important as, unlike the breach of implied warranty of seaworthiness, the breach of implied warranty of legality cannot be waived by the insurer. The general rule established by the case law is that a breach of a safety regulation does not render the voyage illegal, but instead renders it unseaworthy.[7]

Expanded seaside State control of route in adjoining waters is turning out to be more basic as concern becomes both for the assurance and safeguarding of the marine environment and for the developing number of marine mischance prompting to genuine contamination of that environment. The most famous occurrence showing these patterns was the Exxon Valdez establishing in Alaskan waters in 1989. This prompted to the presentation by the United States of the Oil Pollution Act 1990 (OPA90), which built up a far reaching administration for managing ship-sourced marine contamination in the neighboring waters of the United States.

The Exxon Valdez episode was trailed by a few genuine contamination occurrences in European waters, including the tanker Braer destroyed off the southwest bank of Shetland in 1993, and the foundering of the tanker Erika off France in 1999 and of the tanker Prestige off Spain in 2002. These episodes have all served to increase the sensibility of coastal front States to the dangers of ship-sourced marine contamination in their adjoining waters, and have prompted to moves towards more prominent control of transportation in these waters. Human blunder was a key consider these episodes, especially those including the establishing of a ship.

[2] See Alex L. Parks and Edward V, Cattell Jr, The Law of Tug, Tow and Pilotage 3rd (Cornell Maritime Press, Centrevillle, Ma: 1994) 1018-1021 discussing the distinction between voluntary and compulsory pilotage.

[3] http://definitions.uslegal.com/c/compulsory-pilotage/ last visited on 31st January, 2016.

[4] Ivamy, 1988, p 376

[5] Dixon v. Sadler (1839) 5 M & W 405; and The Framlington Court 69 Fed Rep 300 (1934)

[6] Article II of the Convention on the Regime of Maritime Port 1923 recognises the right of each state to organize and administer pilotage services as it thinks fit. In the UK , pilotage was originally the responsibility of independent individuals. Later, it was administered by the corporation of Trinity House, in certain districts, and by local authorities, elsewhere. Since the Pilotage Act (PA) 1987, it has been provided by competent harbor authoritities.

[7] St John Shipping Corp v. Joseph Rank Ltd [1957] 1 QB 267

Environmental Norms

The 1982 UN Convention on the Law of the Sea (UNCLOS)1 provides the framework for coastal State regulation of activities in adjacent waters. However, UNCLOS was formulated in a period when there was less concern for the health of the marine environment than there is at present and modern international environmental law was underdeveloped. Norms and principles for the preservation and protection of the marine environment have multiplied exponentially over the last two decades.

All State parties to UNCLOS have a general obligation to protect and preserve the marine environment,[8] and UNCLOS Part XII sets out comprehensive rights and obligations for the preservation and protection of the marine environment. However, the navigational regimes in UNCLOS provide an example of the relatively lower level of concern for the marine environment that was current in the 1970s when UNCLOS was being negotiated. The regimes of straits‟ transit passage and archipelagic sea lanes (ASL) passage apply to "all ships and aircraft",[9] and there is no clear right of the coastal or archipelagic State to prevent the passage of a vessel that might be perceived to be a serious threat to the marine environment.

Aldo Chircop had addressed the issue in the context of a ship in distress seeking a place of refuge in a strait used for international navigation concluding that:

While respecting the intention of the UNCLOS III negotiators to protect freedom of navigation through straits, one should be wary of applying too restrictive an interpretation that might not permit the coastal state to intervene to prevent a casualty from harming vital interests. It is possible to argue that international straits are not exempted from the right of protection of the coastal state under general international law and the precautionary principle under international law apply.[10]

Many international conventions, as well as the desire of coastal States around the world to increase their controls over navigation in their adjacent waters, reflect the precautionary approach to preserving and protecting the marine environment. The second generation of environment conventions followed after UNCLOS. These reflect increased awareness of threats to the marine environment and incorporate concepts developed after UNCLOS, such as sustainable development and the conservation of biological diversity, as well as the precautionary principle.[11]

The precautionary principle has its origins in the Rio Declaration,[12] one of the outcomes of the 1992 UN Conference on Environment and Development (UNCED) held in 1992 and now constituting a customary norm of international law.[13] The precautionary approach reflects the notion that it is not necessary to await conclusive, scientific or technical evidence of the risks of damage to the marine environment before taking preventive action. 8 The precautionary approach post-dates UNCLOS by over a decade and its acceptance is a clear demonstration that the world has changed with regard to the balance between freedoms

[8] UNCLOS, Article 192.
[9] In accordance with UNCLOS Articles 38(1) and 53(2) respectively.

[10] A. Chircop, "Law of the Sea and International Environmental Law Considerations for Places of Refuge for Ships in Need of Assistance," in A. Chircop and O. Linden, eds., *Places of Refuge for Ships – Emerging Environmental Concerns of a Maritime Custom* , Leiden: Martinus Nijhoff Publishers, 2006, p. 246.
[11] R.R.Churchill and A.V. Lowe, *The law of the sea*, 3rd edition, Manchester: Manchester University Press, 1999, p. 336
[12] (1992) 31 *International Legal Materials* 818.
[13] R. Rayfuse, "International Environmental Law", Chapter 14 in S. Blay, R. Piotrowicz and M. Tsamenyi, eds, *Public International Law- An Australian Perspective*, Oxford: Oxford University Press, 1997, pp. 360 – 1.

of navigation and marine environmental protection.[14]

Both Indonesia and Singapore backed Malaysia's insistence that Japanese plutonium shipments should not be routed through the Malacca Strait for fear of the environmental risks involved.[15] The concern is also evident in the Revised Guidelines for the Identification and Designation of PSSAs adopted by the International Maritime Organisation (IMO) in 2005.[16] These guidelines acknowledge that with the increase in global trade, shipping activities are also increasing with greater potential for adverse effects and damage to the marine environment. The guidelines are far more detailed and "liberal" in their approach than UNCLOS Article 211(6) reflecting the more sophisticated and comprehensive scientific understanding of the dangers posed by ships to the marine environment than was the case when UNCLOS was negotiated.[17]

Particularly Sensitive Sea Areas (PSSAs) are important measures that may be adopted by a coastal State as a means of regulating navigation in adjacent waters. PSSAs are designated by the IMO, which must be satisfied that the areas concerned require special protection because of their significance for recognised ecological, socio-economic and technical reasons and vulnerable to international maritime activities. The kinds of measure that might be taken by the coastal State include the designation of areas to be avoided, the adoption of vessel traffic systems, speed restrictions and compulsory pilotage. Following the *Braer*, *Prestige* and *Erika* incidents, a proposal was tabled by several European States to have an extensive area of the north-eastern Atlantic declared a PSSA.[18] The initial proposal was significantly watered down but restrictions on single-hull tankers and a mandatory ship reporting system have been implemented. However, differences still remain on the extent and effectiveness of PSSAs and the "PSSA discourse in the IMO is likely to remain contentious".[19]

Compulsory Pilotage: A Reexamination of Personification

As per various statutes prescribed by various states, the owners of the ship are supposed to have a licensed pilot upon its entering a harbor. Collisions between vessels caused solely by the negligence of such "compulsory pilots" are governed by separate and distinct rules of liability under admiralty and the common law.[20]

The common law does not hold the ship owner personally liable. In fact it will be the damaging vessel which will be liable for damages in an in rem admiralty libel.[21] However sometimes certain types of inadequacies and inconsistency determine the adequacy of the remedy provided to an injured party. For example, if the vessel

[14] E. Gold, *Gard Handbook on Protection of the Marine Environment*, 3rd ed., Arendal: Gard AS, 2006, p. 62.
[15] https://www.iho.int/mtg_docs/com_wg/ACLOS/ABLOS_Con6/S1P1-P.pdf, last accessed on 22nd November, 2016.
[16] *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, adopted by IMO Assembly Resolution A.982(24), 1 December 2005 [hereinafter Revised Guidelines].
[17] *West European Particularly Sensitive Sea Area (PSSA) – Comments made by the Division for Ocean Affairs and the Law of the Sea of the United Nations (DOALAS) in connection with issues raised in document LEG 87/16/1*, IMO Doc. LEG 87/16/1, Annex 7 (23 October 2003).
[18] J. Roberts, M. Tsamenyi, T. Workman and L. Johnson, "The Western European proposal: a "political sensitive sea area", *Marine Policy*, Vol., 29, 2005, pp. 431-440.
[19] A. Chircop, "The Designation of Particularly Sensitive Sea Areas; A New Layer in the Regime for Marine Environmental Protection from International Shipping" in A. Chircop and T. McDorman, eds, *The Future of Ocean*
[20] Author(s): Dennis M. Robb , The Compulsory Pilot Defense: A Reexamination of Personification and Agency ; Source: The University of Chicago Law Review, Published by: University of Chicago Law Review Stable ; Vol. 42, No. 1 (Autumn, 1974), pp. 199-215 URL: http://www.jstor.org/stable/1599132 Accessed: 12-02-2016 07:01 UTC
[21] Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U.S. 406 (1901).

steams out of the jurisdiction before it has been served in rem, it may escape service and liability altogether. The injured party's remedy would be more adequate if the common law permitted an in personam action against the ship-owner, who would presumably be easier to serve with process. The enigma of holding a vessel liable in the absence of an underlying personal liability of its owner results from an application of the personification theory of maritime liens.[22]

Around four federal court of appeals have clearly denied the virtual paradox with reference to the context other than collisions caused by compulsory pilots. Personal liability is a prerequisite to the liability of a vessel.[23] However this view has been considered as substantively non determinative because the courts have clearly abandoned the personification theory. This gave rise to a uniform application of the common law rule.

With the recent cases, it is certainly clear that the apex court is in itself stuck in this riddle. In fact the Supreme Court has long recognized the existence of an "abiding riddle" in imposing liability on the vessel but not its owner, but has failed to resolve it.[24] It avoided it on both occasions by reversing the lower court's holding that no personal liability existed."

In Calero-Toledo v. Pearson Yacht Leasing Co.,[25] the court irrespective of the ship owner being innocent upheld the statutory forfeiture of a ship. Though the majority affirmed the concept of independent liability of vessels in case of forfeiture, it certainly failed to answer the question of independent liability in other circumstances under a general theory of personification.[26]

The undesirability of maintaining the personification fiction compels a reexamination of the bases of the rules of liability for collisions caused by the sole negligence of compulsory pilots. This comment first examines the cases that established those rules, both to expose the issues underlying the cases and to suggest the actual grounds of the decisions. It then considers the legal and policy issues to determine what the rule of liability should be, and concludes that the ship owner should be held liable whether the action is at law or in admiralty. Although this results in a rule like that currently existing in admiralty[27] rather than the contrary common law rule that courts generally have adopted as a natural consequence of rejecting the personification doctrine, it is sup-ported by independent historical, legal and policy analysis instead of a conclusory application of the personification fiction.[28]

Case laws:

The 19th century marked the genesis of the concept of compulsory pilot defense in the

[22] See Toy, Introductiotno theL aw of MaritimeL iens, 47 TUL. L. REV. 559, 563 (1973). The personificationt heory treats the ship as a juridical entitya nd has three distinctc onsequences: "(1) the maritime lien should attach irrespective of any personal obligation of the owner; (2) the limito f liabilityi n an action in remb ased on the existence of a maritime lien must be the value of the ship; and (3) the lien would remain indelible notwithstanding any change in ownership." Hebert, The Origin and Nature of MaritimeL iens, 4 TUL. L. REV. 381, 383 (1930).

[23] See United States v. Bissett-BermanC orp., 481 F.2d 764 (9th Cir. 1973).

[24] Reed v. The Yaka, 373 U.S. 410 (1963); Guzman v. Pichirilo,3 69 U.S. 698 (1962).

[25] 416 U.S. 663 (1974).

[26] Justice Story's language in The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827), and in United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844), is commonly quoted in conjunction with a citation to United States v. The Little Charles, 26 F. Cas. 979 (No. 15,612) (C.C.D. Va. 1818) (Marshall, Circuit Justice), to form "the usual trio of old forfeitur ceases.

[27] A shipowner can limit his liability to the value of the vessel and the freight then pending by petitioning a federal district court, whether the action is originally brought in personam at admiralty or in a common law court.

[28] Author(s): Dennis M. Robb , The Compulsory Pilot Defense: A Reexamination of Personification and Agency ; Source: The University of Chicago Law Review, Published by: University of Chicago Law Review Stable ; Vol. 42, No. 1 (Autumn, 1974), pp. 199-215 URL: http://www.jstor.org/stable/1599132 Accessed: 12-02-2016 07:01 UTC

court of law. Although the findings are no more a part of the legal language yet a short analysis of these cases is a must.

A. The Creole Case (1853)

In the year 1853, one of the first cases of pilotage defense came into being with Smith v. The Creole,[29]an admiralty case. If the vocabulary of the court is to be taken into consideration, earlier the ship owners were deliberately jeopardized irrespective of the pilot not being a voluntarily chosen servant. In their treatises, George Curtis and Joseph Story disapproved that view and accepted in-stead the prevailing British rule of non liability for the negligent acts of a compulsory pilot, finding it "only conformable to a principle of natural justice" to exempt the ship owner when his choice of a pilot was not free.[30]

Justice Grier, while writing his opinion about the case; instead of confining his analysis to the specific legal situation before him, approached the question of liability in harbor collisions from the perspectives of common, civil, and maritime law as applicable to both voluntary and compulsory pilots. First, h e recognized that if a colliding vessel guided by a licensed pilot were itself discharged, leaving only the pilot to respond in damages, the injured party would in most cases be denied a remedy.[31]

The Pennsylvania Supreme Court clearly stated that the pilotage statutes were not intended to obliterate the principle of law holding the owner of a vessel liable for the conduct of the pilot. If Grier is to be believed then the whole concept of statutory compulsion which supposedly eliminates the relation of master and servant between pilot and owner is "more imaginary than real."[32] Hence to conclude, third parties are entitled to treat the vessel as primarily liable for the acts of the owner, and in turn for the acts of his pilot, who would be considered the temporary master of the ship no matter how or why he was appointed.

"It cannot be maintained that the circumstance of having a pilot on board, and acting in conformity with his directions, can operate as a discharge of the responsibility of the owners."[33]

B. The China (1858)

It took a collision between the steamship of China and the brig Kentucky to bring the concept of compulsory pilotage in the limelight and before the hon'ble supreme court. Here the major question of dispute was whether to follow the English rule or the rule of the American circuit and state courts.

While the Chinese relied upon various English precedents thereby pointing out the injustice of holding men responsible for the consequences of acts that the law compelled them to perform there only the libellant countered with policy arguments emphasizing that the British doctrine had never been adopted in the United States. A close reading of the opinion in The China reveals that the Supreme Court not only made a clear policy choice but also did so without turning to the old forfeiture cases as a way of personifying the offending vessel. [34]

It was finally observed that the relation of master and servant does not change or gets

[29] 22 F. Cas. 497 (No. 13,033) (C.C.E.D. Pa. 1853).
[30] G. CURTIS, A TREATISE ON THE RIGHTS AND DUTIES OF MERCHANT SEAMEN 197 (1841); J. STORY, COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE ? 456a (3d ed. 1846).
[31] Author(s): Dennis M. Robb , The Compulsory Pilot Defense: A Reexamination of Personification and Agency ; Source: The University of Chicago Law Review, Published by: University of Chicago Law Review Stable ; Vol. 42, No. 1 (Autumn, 1974), pp. 199-215 URL: http://www.jstor.org/stable/1599132 Accessed: 12-02-2016 07:01 UTC
[32] 22 F. Cas. at 506.
[33] Id. at 507-08, quotingT he Neptune the Second, 165 Eng. Rep. 1380, 1381 (Adm. 1814). Storyh ad cited The Neptunea s counteringt he prevailingB ritishr ule that he incor-porated into the main texto f his treatise. J. STORY, supra note 20, at 595 n.1.
[34] Id. at 54-58 (summaries of the parties' arguments

altered because a ship owner must employ a licensed pilot. If the common law is to be believed, the owners are responsible for the damages committed by their vessel and not the particular agent by whose negligence the injury was committed.[35]

The court explained that the pilot temporarily took the master's place in guiding the ship and the principle of respondeat superior established the liability of the ship owner for damages negligently caused by either master or pilot. Thus, in its historical context, the rule of The China was grounded in the American common law and was applied by lower courts in suits at law and in admiralty.

C. Homer Ramsdell Co. v. Ia Compag,nie GMnrale Trainsatlantique, 182 U. S. 406.

In this case the defendant's vessel, while under the command of a New York licensed pilot and wholly because of his fault collided with a pier owned by the plaintiff, the court held that the defendant was not liable in an action at common law, upon the ground that he was not personally at fault, as the employment of the pilot was compelled by the New York statute, the defendant could not be made responsible as principal.

This result in an action at law seems obviously correct. Yet the injured party may also have alternative remedies in admiralty, and since his rights are then governed by the principles of maritime law, it is by no means necessary that the same result should be reached. A libel in rem is based upon the distinct conception that the right to redress is against

the ship itself; in other words that the ship is the offending person regardless of the fact under whose control it was at the time of the collision. As culpability may thus be fixed upon the ship it has consequently been held in the United States that a libel in rem will be sustained under such circumstances.[36]

Conclusion:

The level and the amount of irregularity in the course while exempting a ship owner from the liability as well as the damages caused by the negligence of a compulsory pilot while holding the ship he owns liable should be eliminated, and the fiction that produces these inconsistencies should be obliterated where it serves no rational purpose. A close analysis of the original compulsory pilot cases reveals the use of the personification fiction in Homer Ramsdell in place of explicit consideration of a policy choice that underlay a rejection of the China rule. A preliminary consideration of the relevant policy issues indicates that a rule of ship-owner liability would be in consonance with the law of other maritime nations, with commercial needs and realities, and with modern principles of agency law. Reversal of the Homer Ramsdell rule, then, would establish a consistent rule of liability without resort to the doctrine of personification as a conclusory rationale.[37]

[35] Sherlock v. Alling [93 U.S. 99 (1876)].

[36] Compulsory Pilotage; Source: Harvard Law Review, Vol. 15, No. 5 (Jan., 1902), pp. 405-406; Published by: Harvard Law Review Association; Stable URL: http://www.jstor.org/stable/1323542 ; Accessed: 12-02-2016 06:58 UTC