Law of the Sea (2020)

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As for any other practice area related to the field of disaster law, 2020 was uncharted territory. This year-in-review article is divided into two parts. The first part will examine how COVID-19 (SARS-CoV-2) impacted maritime law. The second part will review the legal responses to the conventional disasters associated with vessel collisions and spills.

1 COVID-19 (SARS-CoV-2)

The maritime transport sector, the cruise line industry, the fishing industry, and the marine environment itself were all impacted by COVID-19. After the World Health Organization identified COVID-19 as a pandemic, shipping and cruising became targets of national regulations focused on different aspects of public health safety. The events of COVID-19 triggered a number of insurance claims.

1.1 *Maritime Shipping*

When States began globally to initiate lockdowns, seafarers working in the cargo industry found themselves trapped at sea because there was no opportunity to participate in a crew change even though the 2006 Maritime Labor Convention requires that a seafarer should not have to serve more than 11-months on a vessel without leave unless there are *force majeure* conditions. Crew changes are essential not just for the workers themselves but also for the safety of the operation of global fleets. Countries attempted to address the Catch-22 situation that seafarers found themselves leading to a patchwork of approaches across the world's ports. For example, the Australian National Cabinet agreed to permit non-cruise maritime crew members with appropriate documentation to transition on and off vessels without being subject to any national quarantine rules.¹ This national permission, however, did not

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1 Mauric Thompson, Ernest van Buuren, and Nic van der Reyden, 'Seafarers' wellbeing in a "Covid-Normal" World', (December 2020) <<https://www.lexology.com/library/detail.aspx?g=445a8467-53b2-4c39-affa-c19f2822a42d>> last accessed (as any subsequent URL) on 15 May 2021.

come into legal effect at the time of its adoption because sub-national entities used their public health authority to mandate locally based quarantine rules. The inability to execute crew changes raised humanitarian concerns particularly for ill crewmembers and safety concerns associated with over-worked crewmembers.

The International Maritime Organization (IMO) eventually became involved with trying to coordinate state responses. Over the course of 2020, the IMO issued a number of documents offering specific recommendations and protocol to address national concerns about ships as vectors of the spread of COVID-19. These documents included:

- Recommended Framework of Protocols for Ensuring Safe Ship Crew Changes and Travel During the Coronavirus (COVID-19) Pandemic;²
- Recommendation for Port and Coastal States on the Prompt Disembarkation of Seafarers for Medical Care Ashore During the COVID-19 Pandemic;³
- COVID-19 Related Guidelines for Ensuring a Safe Shipboard Interface Between Ship and Shore-Based Personnel.⁴

From an international disaster law perspective, these maritime policy documents reflect a notable public and private stakeholder effort with IMO serving a coordinating role between national governments and major maritime transportation associations to ensure safe shipping practices. The letters reflect private governance commitments from shipping companies designed to alleviate concerns by national governments. The Circular Letters reflect an effort to progressively and pragmatically address coordination challenges that had yet to be addressed in detail by any existing international frameworks. It is worth noting that these documents reflected maritime private companies taking a strong leadership role in explicitly regulating its employees with IMO encouraging States to consider taking certain measures that would reduce some of the barriers to maritime trade movements.⁵ The industry-led global responses to interruptions in shipping due to the COVID-19 crisis is a prime example of private governance shaping public governance efforts.

2 IMO Circular Letter No 4204/Add 14 (5 May 2020) revising IMO Circular Letter No 4204/Add 6 (27 March 2020).

3 IMO Circular Letter No. 4204/Add. 23 (1 July 2020).

4 IMO Circular Letter No. 4204/Add 16 (6 May 2020).

5 For example, in the IMO Circular Letter No 4204/Add 14 (5 May 2020), the language under each of the protocols provides for 'Requirements of Shipping Companies' and 'Recommendations to Governments'. Under 'Requirements for Shipping Companies', the language in the protocols provides that 'The company will instruct and require seafarers to ...' In the sections involving 'Recommendations to Governments', the language is more hortatory: 'In liaison with maritime administrations, Governments and relevant national authorities are encouraged to ...'.

International labor rights issues persist with implication for disaster law. As of December 2020, the International Transport Workers' Federation was raising issues with the International Labor Organization that States who had ratified the Maritime Labour Convention (MLC) were using the *force majeure* provisions in the convention 'as a shield for non-compliance'. A Committee of Experts at the ILO expressed deep concern over the failure of States to approach the MLC as 'a comprehensive labour instrument for the maritime industry applicable to all ratifying countries, and not a compilation of labour regulations to be applied selectively, if and to the extent that circumstances so permit'.⁶ At the close of 2020, repatriation of seafarers remained problematic due to the lack of coordination between States.

1.2 *Cruise Industry*

The cruise line industry became a focal point of disaster management as crew members and passengers became infected and States refused land entry. For example, the Diamond Princess cruise ship with 712 of its 3,700 passengers and crew members having contracted COVID-19, was dock-quarantined in Yokohama, Japan for almost one month. Under the Law of the Sea, Port States have the right to restrict or condition entry into ports as national internal waters. Coastal States can restrict innocent passage through the territorial sea (twelve nautical miles/22.2 kilometers from designated basepoints) when there are reasonable security threats and impose quarantine measures within the contiguous zone (twenty-four nautical miles/44.4 kilometers from designated basepoints). As part of disaster practice, a number of States exercised Port State quarantine powers to prohibit international vessels from docking.⁷ This created what the International Maritime Organization identified as a "humanitarian crisis" particularly for crew members.⁸

In the case of the cruise ship industry, this was unfamiliar legal terrain. For example, was there a right of rescue for the parties on board the boats that could not find a reasonable port of disembarkation? Who would be responsible for this rescue? Would passengers need to rely on their states of nationality? Could a potential Port State assert a right of refusal to entry based

6 International Labour Organization, 'Information Note on Maritime Labour issues and Coronavirus', Revised Version 3.0, <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_741024.pdf>.

7 See e.g. United States, Centers for Disease Control and Prevention, No Sail Order (13 March 2020) <<https://www.cdc.gov/quarantine/cruise/index.html>>.

8 International Maritime Organization, 'Crew Changes: A Humanitarian, Safety and Economic Crisis', <<https://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx>>.

on inadequate resources to deliver needed assistance even if passengers and crew members are in distress? Is the only really responsible State required to provide a port of call the Flag State? The only real guidance for States was the World Health Organization's International Health Regulations where under Article 28, ships generally 'shall not be prevented for public health reasons from calling at any point of entry' unless there are national health measures in place which achieve the same or greater level of health protection that WHO recommendations based on scientific principles and available scientific evidence of risk to human health.⁹ For an affected ship where there are national health measures in place, the captain of a vessel is expected to communicate with authorities, including about how to apply necessary health measures. States have the authority 'unless required for emergency purposes' to prohibit travelers from leaving the ship's 'vicinity'. The International Health Regulations provide that after 'all health measures required by the competent authority have been completed' that the ship can 'so far as such health measures are concerned, proceed ... to the ... port at which it was due'. How to interpret these rules in the early months of COVID-19 management proved challenging.

While the cruise industry is not an essential industry in the same way as the cargo industry, it became clear that the cruise industry would not be able to operate as it had pre-COVID when the industry could resume operations. In 2020, governments extended mandatory guidelines to the industry. For example, in the United States, the Center for Disease Control developed 'Technical Instructions for Mitigation of Covid-19 Among Crew Members' requiring cruise companies to implement COVID-19 testing and other measures before a ship would be permitted to operate again in U.S. waters.¹⁰ Any deviations from the instructions must be reported to both the CDC and the US Coast Guard.

In large part triggered by the outbreaks on cruise ships containing thousands of potential virus spreaders, the United States extended its mask mandate to 'all persons traveling on commercial maritime conveyances into, within, or out of the United States and to all persons at U.S. seaports'.¹¹ Notably in the Law of the Sea context, the United States extended this order to include all 'international, interstate, or intrastate waterways, subject to the jurisdiction of the

9 World Health Organisation, International Health Regulations, WHA58.3 (2005) <<https://www.who.int/csr/ihr/WHA58-en.pdf>>.

10 United States, Centers for Disease Control and Prevention, Technical Instructions for Mitigation of COVID-19 Among Cruise Ship Crew, <<https://www.cdc.gov/quarantine/cruise/management/technical-instructions-for-cruise-ships.html>>.

11 United States, Centers for Disease Control and Prevention, Mask Order (January 29, 2021) <<https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html#Maritime>>.

United States' which as written appears to encompass not just territorial sea and contiguous zones but also all Exclusive Economic Zone waters and possibly even high seas and other States jurisdictional waters. In a far-reaching order, the United States indicated that they would condition port entry into the United States on conveyance operators requiring "all persons to wear masks on board conveyances departing from the United States and for the duration of their travel until the conveyance arrives at the foreign destination if at any time any of the persons on the conveyance (passengers, crew, or conveyance operators) will return to the United States while the Order remains in effect".¹²

Leaving aside any practical challenge of enforcing this order across the duration of a cruise, 'conveyance operators' are only expected to 'use best efforts' to ensure compliance with the order including potentially disembarking passengers 'at the earliest opportunity'. This introduces novel and interesting legal questions about what responsibility the Flag state of a vessel or what liability the conveyance operator might have related to disembarking a potential COVID-19 spreader in a third-party State?

1.3 *Fishing Industry*

With the lockdowns, the fishing industry which depends on transporting often globally either highly spoilable fresh fish or processed fish was heavily impacted. In a number of cases, governments responded with various forms of disaster assistance. In some countries such as China, the Government set up a fund to provide an incentive to companies with cold storage facilities to pre-purchase fish in bulk to offset losses to fishermen.¹³ The Chinese Aquatic Products Processing and Marketing Alliance created opportunities for small-scale fishing enterprises to connect with leading food and processing companies.¹⁴ Korea followed a similar approach of connecting small-scale fishers with seafood companies.¹⁵ Notably, a FAO project focused on improving fisheries and aquaculture-dependent livelihoods in Myanmar highlighted that fishing communities were eager to develop training and skills in disaster risk management.¹⁶ Thailand provided monthly supplemental payments to registered aquaculture farmers and small-scale fishers.¹⁷

12 United States, Centers for Disease Control and Prevention, Order 361, (January 29, 2021) <https://www.cdc.gov/quarantine/pdf/Mask-Order-CDC_GMTF_01-29-21-p.pdf>.

13 Food and Agriculture Organization, The Impact of COVID-19 on fisheries and aquaculture food systems, possible responses: Information Paper (November 2020) <<http://www.fao.org/3/cb2537en/CB2537EN.pdf>>.

14 *Ibid.*, 22.

15 *Ibid.*

16 *Ibid.*, 24.

17 *Ibid.*, 25.

In Europe, the Directorate-General for Maritime Affairs and Fisheries in the European Commission (MARE) intervened to support the fisheries sector by providing support to fishing operations including 100% financing for storage of fisheries products in hopes of stabilizing the market and avoiding massive waste.¹⁸ Similar types of measures have been taken globally with most of the measures focused on protecting workers, avoiding food waste, and restoring markets.

1.4 *Maritime Environment*

The COVID-19 crisis created both opportunity and threat for the marine environment. In the earliest days of the lockdown, scientists reported measurable benefits for the marine environment in the form of reduced ocean noise and pollution.¹⁹ With the lockdown also came, however, less enforcement of illegal harvesting of living marine resources. Before the pandemic, illegal, unreported, and unregulated harvesting was already contributing to disastrous conditions for certain communities dependent on fisheries for livelihoods. For example, in Brazil, without sufficient human capacity to actively monitor illegal fishing and enforce laws such as a ban on commercial trawlers in certain areas, industrial fishing vessels harvested in protected coastal areas and recreational fishers compounded the overfishing problems.²⁰ Further afield, COVID-19 interrupted at-sea observer programmes that may have reduced the compliance with regional fishing conservation measures by some regulated parties.²¹

2 *Vessel Collisions and Spills*

Due to COVID-19, there was less maritime traffic than in previous years. Even so, there continued to be marine collisions leading to lost lives and property including in September 2020 a collision between two fishing vessels and an oil tanker in the Japan Sea leading to the loss of 13 lives, and in October 2020 a supply ship sinking in Malaysia leading to the rescue of 185 individuals.²²

18 *Ibid.*, 26.

19 Sharon Bernstein, 'Noise Pollution is Harming Sea Life, Needs to Be Prioritized, Scientists Say' (February 4, 2021) <<https://www.reuters.com/article/global-oceans-noise/noise-pollution-is-harming-sea-life-needs-to-be-prioritized-scientists-say-idUKL1N2K93OF>>.

20 Eduardo Campos Lina, 'In COVID's Shadow, Illegal Fishing Flourishes', Hakai Magazine (July 8, 2020) <<https://www.hakaimagazine.com/news/in-covids-shadow-illegal-fishing-flourishes/>>.

21 Food and Agriculture Organization, 'The impact of COVID-19 on fisheries and aquaculture – A global assessment from the perspective of regional fishery bodies: Initial Assessment', May 2020. No. 1. Rome. <<http://www.fao.org/3/ca9279en/CA9279EN.pdf>>.

22 See generally 2020 Accidents <<https://safety4sea.com>>.

Numerous investigations during 2020 raised concerns including a lack of effective communication during passing, insufficient training in collision regulations, failure to follow international collision regulations, and a need for more management training for those operating vessels on the bridge.

In July 2020, an ecological disaster unfolded over the course of several weeks. The Panama flagged bulk carrier *MV Wakashio* owned by Nagashiki Shipping and chartered by Mitsui OSK ran aground just offshore from Mauritius spilling about 1,000 tonnes of fuel oil over the course of several weeks into the Indian Ocean. The oil seeping from one of the largest vessels ever built destroyed coral reefs and coastal mangrove forests. Mauritius has a National Oil Spill Contingency Plan but only had equipment capable of handling an oil spill of less than 10 tonnes. On August 7, the Mauritius government declared a state environmental emergency after oil began leaking from the boat's tanks.²³ Mauritius appealed to France for assistance hoping to receive support from the French island of Reunion. The French deployed pollution control equipment.

The oil spill disaster morphed into a second disaster when a tugboat responding to the oil spill sank, leading to the loss of four lives. Notably, Panama's Maritime Authority, investigating the disaster as the Flag State, attributed the grounding to safety violations when the bulk carrier changed course in order to be close enough to the Mauritius coast to get cell phone coverage for a birthday celebration and the bridge crew failed to use the correct chart. There are some questions as to whether the COVID-19 crisis may have contributed to the breach of safety regulations due to a lack of opportunities for crew changes.²⁴

Arguments over compensation emerged after the disaster. While Mauritius is a State Party to the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, the *Wakashio* was not an oil tanker but a bulk-carrier. Under the 2001 International Convention on Civil Liability for Bunker Oil Pollution damage, owners of vessels are strictly liable for damage caused by oil leaks from their vessels. Mauritius, Japan and Panama are members to the treaty. Under Section 6 of the treaty owners of a vessel can limit liability in accordance with Convention for Limitation of Liability for Maritime Claims. Mauritius ratified the 1976 Liability

23 Cara Anna, 'Mauritius Declares Emergency as Stranded Ship Spills Fuel' (August 8, 2020) AP News, <<https://apnews.com/article/virus-outbreak-africa-ap-top-news-international-news-oceans-c2622cd090a3ffb7d868825bc2a646df>>.

24 Mongabay, Birthday party on ship may have led to oil spill in Mauritius, Panama regulator says (16 September 2020).

Convention limiting individual claims to about \$18 million for the gross tonnage of the *Wakashio*, while Japan ratified the 1996 amended Convention on Limitation for Liability for Maritime Claims with an upper limit of \$43 million.

The Bunker Convention required the payment of economic losses and losses for profit from environmental damage. Natural resource damages are not covered unless restoration measures are undertaken. The boat operator contributed \$9.5 million to the Mauritius Natural Environment Recovery Fund for environmental restoration efforts and to pay for fishing losses for the local fisheries. Nagashiki Shipping accepted responsibility and changed its company policy to include enhanced monitoring, prohibitions on private use of cell phones on the bridge during working hours and installation of high-speed communications on all ships in the fleet. Japan, as the state of nationality for the owner and charterer, also contributed funding for cleanup efforts.

The disaster raised many Law of the Sea questions with implications for disaster law that continue to be debated.²⁵ Does a State have to allow for the innocent passage of a vessel through its territorial sea when it may not be equipped to handle a potential disaster? Should owners be allowed to continue to use flags of convenience for vessels that pose a potential physical threat to other states?²⁶ Should the applicable limits under the Bunker Convention be increased to reflect impacts of worst-case scenario oil spills like the *Wakashio*?

3 Conclusion

As in so many sectors of what has come to be considered “normal” 21st-century lifestyles, the maritime sector was severely impacted by global public health measures. The maritime industry, from the cargo industry to the fishing industry to the cruise line industry, were unprepared for the worst-case scenario of a global pandemic. As international public and private actors take preliminary steps to plan for future contingencies, it is abundantly clear that some industries will need to contemplate global disaster risk management and global disaster responses. This will require proactive and not just reactive cooperation

25 On these issues see, generally, Simon Whitbourn, ‘I Must Go Down to the Seas Again’: the Evolution of International Maritime Disaster Law and Its Lessons for the Development of a General Disaster Law Framework’, (2019) 2 YIDL, 204–232.

26 The *Wakashio* is alleged to have not made any port calls in Panama since 2013 giving presumably the Panamanian authorities no opportunities to inspect the ship.

among maritime decision-makers. In stark contrast, the tragic situation of the Wakashio spill in Mauritius suggests that more vulnerable States may need the power in certain situations to refuse cooperation with long-standing customary law when situations outside of the control of the coastal State unduly elevate risk for a particular State.