MARINE PILOTAGE

THE REASON WHY

EXCEPTIONS AND EXEMPTIONS

IMPLEMENTATION

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MARINE PILOTAGE – THE REASON WHY

1. In a Report published on 7th March 2013, the House of Commons Select Committee on Transport recorded accurately that marine pilotage is vital but little known. On the basis that anything vital should be well known, unless it is a state secret, it becomes clear that something is amiss and is in serious need of clarification. There is nothing secret about marine pilotage. Where any little known matter is being considered by any Parliamentary Select Committee the need for clarification becomes so much the greater.

2. The purpose of the explanation which follows is to try to inform the general reader of the scheme of marine pilotage as it operates in the United Kingdom and which has been adopted with minor variations in other seafaring nations. There are of course many general readers who have no familiarity at all with the sea or ships; and it is to those worthy people to whom this account is addressed.

3. Before any attempt is made to explain how the scheme might operate, it might be helpful to address the question of why any such scheme might exist at all, what its origins might be and what its purpose might be. Underlying those three fundamental questions is the fact that the United Kingdom is comprised of a group islands of which one island is by far the largest but the remainder of the inhabited islands are no less worthy of consideration in terms of humanity. It is probably right to say that there is not a single island in the British Isles (i.e. the United Kingdom plus the Republic of Ireland) which is self-sufficient. It is certainly true to say that far more than ninety percent of our imported goods are imported by sea. It thus becomes clear instantly that our sea-borne trade is vital to our well being. Without it, we would literally starve. The carriage of goods by sea is at least as important to our survival today as it ever was in the past; and probably more important even than in the days long past when a good many communities within our islands realistically could claim to be self-sufficient. Any such times are long in the past and are unlikely to recur; the more so as immigration continues with little effective restriction.

4. Having once established the fundamental point that our sea-borne trade is vital to our survival, the next important step in survival is the need to protect, promote and nurture the trade in order to conserve cost and to strengthen the economy. Anybody who understands the meaning of the word “shipwreck” will understand that sea-borne trade is beset by hazard of the most fundamental kind. To illustrate the point even further there cannot be many readers who have never heard of the ship

Titanic and the disaster which led to her total loss, together with large loss of life. The expression "perils of the sea", so beloved of insurers and lawyers, has the same meaning today as ever it did have. At the time when Titanic struck an iceberg in mid-Atlantic in 1912 there was a widely held belief that transport by sea had developed to the point that it was almost entirely safe. The aftermath of that event created a reminder for the world that the belief was unfounded; and that the sea remained as perilous a place as ever.

5. Icebergs, of course, are not commonly seen around the coastline of the British Isles, but other perils of the sea most certainly are. The occurrence of fog and strong wind is frequent. Rainfall and snowfall have a severe effect on visibility. Unseen tidal currents are rarely still and create a constant trap for the unwary. The tidal currents themselves have the power to move sandbanks; and do so at various different places and at various different rates of movement. All of these hazards have created insurmountable perils for all too many ships around our coast throughout history. It is unlikely that that there will be any abatement in any of the hazards.

6. Measures have been taken to address the hazards. Hydrographic survey has been undertaken throughout history to determine the depth of water in particular places together with identification of the nature of the sea floor. Depending upon whether the sea bed is soft mud or hard rock, contact with it may be either simply unfortunate or otherwise fatal. Predictions of tidal flow have been undertaken since ancient times; and whilst tidal prediction has long been reasonably accurate, the ability to construe and understand the predictions with any required degree of accuracy is a skill which needs to be learned and cannot simply be understood on first sight. The advent of electronic aids to navigation has been helpful but remains far from overcoming any of the hazards mentioned so far. Reliance upon electronic aids to navigation is in itself a hazard when consideration is given to the matter of failure in electronics which can occur instantaneously and without warning.

7. Save only for the modern hazard of electronic failure, all the modern perils of the sea have been recognised since ancient times. Records exist of specialist expertise recruited in attempts to overcome the dangers of sea transport amongst the ancient Egyptians and Phoenicians. The expertise came to be known in the modern world as marine pilotage. In Northern Europe the earliest record of any organised pilotage (as considered by the Select Committee in its Report of 7th March 2013) is to be found in the French Code of Oleron as adopted in the British Isles during the 12th Century and subsequently. The significance of the Code is that, through the combined jurisdiction of England and France at Oleron (an island adjacent to La Rochelle) it came to be adopted as part of

the law of England at the time and, in due course, the United Kingdom. With many modifications, the Code remains as the basis for much modern maritime law. It refers specifically to pilots and pilotage as things distinctly different from all other marine operations. It makes it clear that a pilot is a servant of the ship which he is engaged to navigate around or through the known hazards while at the same time not being a member of the crew of the ship. He is a wholly independent man whose sole function is to navigate safely.

8. The law thus recognises pilots and pilotage as a service to sea-borne transport. Commerce continued to develop and pilotage was recognised as such an asset to the safety and protection of the growing nation that it was determined at law that pilotage should be compulsory at certain places, for the greater protection of all. "At law" at that time included the simple word of the Monarch. It is well recorded that King Henry VIII when visiting Kingston-upon-Hull in 1541 was an eye-witness to an incident in which a ship navigating the Humber estuary found herself in difficulty, There and then, the King ordered that pilotage should be compulsory for all foreign-flag vessels when navigating the Humber. In order to implement the decree of the King it was arranged that licences should be granted by Trinity House to duly qualified mariners to serve as local pilots. It is of interest to note that the foreign flag on this particular occasion was the flag of Scotland; thus serving to remind that the laws of pilotage pre-date even the formation of the modern United Kingdom, which did not occur until the Act of Union in 1707. Although compulsory pilotage is a clear violation of the principle of freedom of the seas, by similar application of the law through Crown approval (otherwise known as the Royal Assent), compulsory pilotage came to be imposed at many places and in various circumstances. It never has been possible to impose compulsory pilotage without the approval of the Crown.

9. In modern law by the application of the Pilotage Act of 1913, the Pilotage Authorities which then existed at local level would make recommendations to the Secretary of State as to which parts (if any) of the geographical areas within their jurisdictions should be made subject to compulsory pilotage and the Secretary of State would then make an appropriate Order in Council in confirmation of the arrangement. Under the Pilotage Act of 1987, which repealed the Act of 1913, the local Pilotage Authorities were abolished and in their place were created Competent Harbour Authorities (CHAs) with governing power over pilotage at local level. Significantly today, a CHA has the power to impose compulsory pilotage within its jurisdiction without reference even to the Secretary of State for an Order in Council. A CHA is given the power to make a Pilotage Direction under the Act of 1987 to precisely the same extent. Crown authority remains, however, insofar as a Competent Harbour

Authority cannot exist at all without the application of the Royal Assent and the express approval of the Secretary of State in accordance with Act of 1987, to which the Royal Assent continues to apply.

10. There is therefore today more power at local level in the regulation of pilotage than there has ever been before. The counterbalances in terms of ensuring that a CHA conducts pilotage affairs properly are twofold. In an extreme case the Secretary of State retains the power to de-authorise a CHA. More usually, a CHA as a public body remains subject to Judicial Review of any decision which it might make. The historic significance of organised pilotage today, however, remains as virile as ever it was in the days of King Henry VIII or even King Hal's ancestors in the application of the Code of Oleron in the 12th Century. On 27th January 2012 a pilot of the Port of Belfast had occasion to apply for Judicial Review of a decision made by Belfast Harbour Commissioners who, as a body, comprise the Competent Harbour Authority for the port. It was the pilot's case in the High Court at Belfast, in a disciplinary matter, that the CHA had acted improperly in arriving at the decision which it had made against him. On the pilot's behalf James Dingemans QC rose to his feet and addressed the Court saying, "My Lord, we are an island nation and we need a proper pilot service……."; thus making the point very neatly that in pilotage, propriety is all. Within ten minutes after Mr Dingemans spoke those words, Mr Justice McCoskey ordered that there should be a further enquiry, whereupon Belfast Harbour Commissioners agreed immediately to withdraw their order against the pilot, without the necessity of any further enquiry.

COMPULSORY PILOTAGE – EXCEPTIONS, EXEMPTIONS and OTHER TERMINOLOGY

11. As a matter of global principle, the human race enjoys free access to the sea. That being so, it is entirely natural that any imposition of compulsory pilotage might not be universally welcome or even appropriate; particularly when the ship which is obliged to take a pilot on board is also obliged to pay a fee for the service provided. The burden upon the shipowner is not a light one. Accordingly, wherever compulsory pilotage has been imposed, exceptions have applied by one means or another. During the 18th century, one means of easing the burden of compulsory pilotage was that certain vessels, particularly those trading coastwise and therefore constantly visiting and re-visiting the compulsory pilotage areas, might be charged merely a fraction of the full fee for the service.

12. By the time the Pilotage Act of 1913 was introduced, certain ships were excepted from the compulsory pilotage scheme altogether. These included ships belonging to the Crown (i.e. the Royal Navy etc), pleasure yachts, fishing vessels, ships of less than fifty tons gross tonnage and tugs, barges, ferry-boats, dredgers, sludge vessels and similar craft plying solely within harbour limits. In those cases it is significant to point out that the exception applied to the specific vessel.

13. A change was introduced in the Pilotage Act of 1987 to the point that all of those exceptions were swept aside and the newly created CHAs were given a discretion to impose compulsory pilotage on any vessel at any time and in any circumstances; the absurdity of which is patently obvious. Within the strict terms of the 1987 Pilotage Act a CHA is given the discretionary power to impose, by the making of a Pilotage Direction under the Act, compulsory pilotage upon an eight-foot pram dinghy which is being sculled across an enclosed dock. The only instrument which could prevent such an occurrence would be an application to the High Court for Judicial Review of the CHA decision.

14. Upon the removal of the statutory "exceptions" to compulsory pilotage (which, as seen, applied only to certain vessels) "exemptions" (which apply personally to senior officers of vessels) continue to apply. By the Pilotage Act of 1849, provision was made that the Master or Mate (i.e. Captain or Chief Officer) of any vessel may apply for what was then known as a "Pilotage Certificate"; and upon his satisfactory showing by examination he would be granted a Certificate which would excuse his ship from compulsory pilotage by a licensed pilot, provided that at the relevant time the holder of the Certificate was on board the ship and serving as "*bona fide* Master or Mate". A Pilotage Certificate could more accurately have been described as a Pilotage Exemption Certificate, which name was eventually adopted by the Act of 1987. A further accuracy of the 1987 Act is that the 19th century terminology of "*bona fide* Master or Mate" is narrowed to "*bona fide* Master or First Mate", in recognition of the vital factor that the pilotage of any ship should be conducted only by the most senior and responsible personnel, whether exempted Captain or Chief Officer or fully licensed pilot.

15. It has always been the case that the standard of examination required for the grant of an exemption certificate must not exceed the standard required for the grant of a pilot's licence. Pilotage Exemption Certificates (or PECs) are commonly and widely used by cross-channel ferry companies. At the time of writing, a Bill is presently in Parliament which proposes that the restriction on the grant of a PEC should be relaxed to include a grant to even the most junior of deck officer. The obvious danger of this proposition is that the statutory protection which presently exists for fare-paying passengers aboard cross-channel ferries is removed by permitting the pilotage (and thus the safety of their lives) to be conducted by an officer of a lesser standard than is presently required. The proposal contained in the Bill presently before Parliament thus contravenes all other existing aspects of pilotage law; and in particular the principle that wherever compulsory pilotage is imposed, then it is necessary to maintain the highest possible standards of navigation. Pilotage Exemption applies only in compulsory pilotage areas; a point which appears to have been overlooked entirely by the sponsors of the Bill. Where pilotage is not compulsory, there is no pilotage from which exemption can be granted. It remains to be seen whether the Bill will be given the Royal Assent. A Request has been delivered to the Monarch asking that the Royal Assent be withheld in the event that it might be sought.

COMPULSORY PILOTAGE – IMPLEMENTATION

16. Compulsory pilotage emanates from the will of the Crown in Parliament. Responsibility for ensuring that the will of Parliament is carried out rests in the hands of the Ministers of the Crown, namely, the appropriate Secretary of State assisted by the Shipping Minister and the Civil Servants at the Department for Transport. Section 32 (1) of the 1987 Pilotage provides that the Secretary of State may by regulations make such consequential or incidental provision as he considers necessary or expedient for the purpose of giving effect to any provision of the Act. The power of the Secretary of State to make regulation has never been exercised.

17. As to the implementation of the will of Parliament where pilotage is compulsory, however, the judiciary has made a very clear observation that, in those circumstances, the

highest possible standards are called for. In that regard, full reasons are given for the observation in the judgment following the public prosecution of the CHA in the case of the disaster caused by the faulty navigation of the tanker Sea Empress at Milford Haven in 1996. The Court found that because a pilot is expected to take the conduct of a vessel and because a shipmaster has no realistic option other than to trust his pilot; and because the shipmaster is in any event obliged to pay for the services of the pilot; and because also a CHA is relieved of liability in cases of civil negligence by a pilot, all justice and propriety requires that that the highest possible standards are maintained. In April 2002 the Department for Transport, Local Government and the Regions (DTLR) declared in a Report that the obligations identified in the Sea Empress case were "strict and onerous". In a written advice in February 2008, Andrew Edis QC and Nigel Jacobs QC advised jointly that the view of the judiciary on that point was unlikely to be challenged. It was altogether astonishing, therefore, when on 29th June 2009 the (then) Shipping Minister declared in a letter to Julian Brazier MP that the Department "does not accept" the Sea Empress judgment. No reason was given as to why the Department for Transport does not accept the judicial view. The departmental view remains an abrupt and unexplained affront to the will of Parliament as understood and construed by the judiciary. The departmental view is a complete reversal, also, of the advice contained in its own Report of April 2002 that obligations in compulsory pilotage areas are "strict and onerous".

18. The Select Committee Report of 7th March 2013 indicates in clear terms that confidence in the Department for Transport is in major need of improvement. In light of the foregoing it is not difficult to understand the reasons why the Select Committee has reached that decision.

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