

Places of Refuge

In preparation of the discussion of this subject at the Cape Town Colloquium in February 2006 the Chairman of the International Sub-Committee, Mr. Stuart Hetherington, addressed the letter reproduced below to the CMI National Associations. This letter, together with its attachments, was circulated to the National Associations by the President of the CMI with his letter of 1 August 2005, which is also reproduced below.

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To the Presidents of all National Associations

Dear President,

Places of Refuge

I enclose copy of a letter of Mr. Stuart Hetherington together with a document prepared by the International Working Group which will be discussed at the Cape Town Colloquium.

Any suggested amendments to the attached framework document which your Association would like to have debated in Cape Town may be sent to the CMI Secretariat (admini@cmi-imc.org) with a copy to Mr. Stuart Hetherington (swh@withnellheterington.com.au) before the end of January 2006.

Yours sincerely,

JEAN-SERGE ROHART
PRESIDENT

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1st August 2005

Dear President,

Places of Refuge

At the Executive Council Meeting in Paris in April, it was resolved to proceed with the work on Places of Refuge. To that end the International Working Group has prepared a framework document for discussion at the Colloquium to be held in Cape Town from 12-15 February 2006. (The Tuesday morning session will be devoted to this topic.)

It is intended, by the framework document, to encapsulate the essential ingredients of such an instrument, namely:

1) The recognition of the general principle of customary international law that a coastal State has an obligation to offer shelter to a ship in distress. This principle must however be reviewed in the light of the following contemporary developments:

- a) The advent of the helicopter, which makes it possible to rescue the crew of such a vessel quickly and relatively safely;
- b) Increased preoccupation of coastal States with the protection of their marine environment;
- c) The evolving framework of liability conventions on oil, HNS, bunkers and wreck removal.

2) The creation of a presumption that a State which refuses access to a place of refuge must discharge the burden of proving that its action was reasonable.

3) The creation of an immunity from suit by third parties (or indeed from the owner of the ship and its cargo) conferred on a coastal State which admits a ship to a place of refuge in its waters.

4) The recognition of the IMO Guidelines (annexed to Resolution 949(23)) not only for action of coastal states but also for action by masters of distressed ships and salvors:

- a) as the norms for deciding whether conduct was or was not reasonable;
- b) possibly introducing some mandatory force to such guidelines, whilst recognising that this would not be popular with governments or coastal States. In order to overcome such reluctance, the automatic strict liability of the ship under existing liability conventions might need to be extended to, damage caused to fixed and floating objects in the place of refuge, or even to the financial losses caused to the admitting State or Port Authority, for example by the obstruction of a fairway.
- 5) The designation by coastal States of places on their coasts to which a distressed vessel will be directed, and possibly the requirement for such places to be publicised.

Further matters for consideration to be included within the framework document are:

- (i) The legal framework for the issuance of directions by the appropriate authority and the obligation of the Master and ship owner to comply.
- (ii) Whether there should be specific obligations on coastal States to provide facilities for the reception of distressed vessels, analogous to the duty to provide slop reception facilities.
- (iii) Whether the scope of paragraph 9 needs to be enlarged to identify how any funds recovered pursuant to any such guarantee or letter of security should be expended

and/or whether this clause can be enlarged to provide some incentive to competent authorities to grant access to a place of refuge.

It should be noted in relation to clause 4 in the attached framework document, that at the Vancouver Conference, Ms van der Velde suggested the following form of words:

“States are obliged to offer ships in need of a place of refuge when this is necessary and proportionate to the damage. A State shall be liable to the damages caused by all unjust refusals to offer a place of refuge.”

The purpose of the **attached** document is to stimulate debate in the National MLA's as to whether they think a Convention (or other instrument) is needed so that their delegation can attend the Cape Town Colloquium with a clear position on that issue and on the issues of principle raised in the attached document and this letter.

Shortly after the CMI Executive Council met in Paris in April, the IMO Legal Committee also met, and in its report, the following is recorded:

“The Committee noted that the subject of Places of Refuge was a very important one and needed to be kept under review. The Committee agreed that at this point in time, there was no need to draft a convention dedicated to Places of Refuge. It noted that the more urgent priority would be to implement the existing liability and compensation conventions. A more informed decision as to whether a convention was necessary might best be taken in the light of the experience acquired through their implementation. The Committee expressed its appreciation to the CMI for its efforts in carrying out this study on Places of Refuge”.

It will be appreciated that if National Associations favour the preparation and finalisation of a document along the lines of the framework document which is attached, they will need to be prepared to work with their own countries' National Maritime Safety Authority, or like organisation, to promote these ideas in the IMO Legal Committee.

Delegates who attended the Vancouver Conference will know that the International Association of Ports and Harbours, the International Salvage Union and the International Union of Marine Insurers are strongly supportive of this initiative and the International Working Group is conscious that it will need to work closely with these organisations.

I would therefore ask those within your National Association who have an interest in this topic and are intending to attend the Cape Town Colloquium, to come well prepared to debate these issues and express a point of view on behalf of your Association.

Delegates to the Cape Town Colloquium are asked to send me any suggested amendments to the attached framework document which they would like to have debated in Cape Town at least two weeks before the Colloquium.

If I can be of any assistance in providing copies of materials which have already been produced on this topic over the last three years by the International Working Group, please do not hesitate to contact me.

STUART HETHERINGTON,
CHAIRMAN INTERNATIONAL WORKING GROUP: PLACES OF REFUGE

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INSTRUMENT ON PLACES OF REFUGE

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1. General
 - (a) Introduction

Existing Conventions, which are listed in Appendix 1, do not establish a sufficiently clear framework for legal liability arising out of circumstances in which a ship in need of assistance seeks a place of refuge and is refused, or is accepted, and damage ensues.

(b) Customary International law

The principle of customary international law pursuant to which there was considered to be an absolute entitlement of a ship seeking a place of refuge to be granted a safe haven, has in recent times been eroded.

(c) IMO Resolution A949(23)

This instrument is intended to be complementary to IMO Resolution A949(23) adopted in December 2003 and seeks to establish an international code [or proper framework] of responsibilities and obligations concerning the granting or refusing of access to a place of refuge to a ship in need of assistance. It is intended that this code shall govern the actions of States, port authorities, shipowners, ship operators, salvors and others involved, where a ship seeks assistance, and recognises the importance of adhering to international Conventions relating to [the preservation of life;] the preservation of property and the environment, and seeks to balance those interests in a fair and reasonable way.

2. Definitions

For the purposes of this Instrument:

- (a) “ship in need of assistance” means a ship in circumstances [apart from one requiring rescue of persons on board,] that could give rise to loss of the ship or its cargo or to its becoming an environmental or navigational hazard.
- (b) “place of refuge” means a place where a ship in need of assistance can stabilise its condition and reduce the hazards to navigation, [and to protect human life] and the environment.
- (c) “competent authority” means an organisation, whether owned by the State, privately owned or in public ownership which has the right to permit or refuse the entry of ships, which are in need of assistance, to a place of refuge.
- (d) “relevant Convention” means those Conventions listed in Appendix 1.
- (e) “limitation sum” means the amount pursuant to which a shipowner is able to limit liability under one of the International Conventions listed in Appendix 1.
- (f) “ship owner” includes bareboat charterer.

3. It is intended that this Instrument shall provide guidance whenever judicial or arbitral proceedings relating to matters dealt with in this Instrument are brought.

4. States and competent authorities have a duty to permit access to a place of refuge by a ship in need of assistance, unless it can be demonstrated, objectively, on reasonable grounds, that the condition of the ship is such that it and/or its cargo is likely to cause greater damage if permission to enter a place of refuge is granted than if such a request is refused.

5. In circumstances in which a State or competent authority grants access to a place of refuge to a ship in need of assistance and damage is caused to the ship, its cargo or other third parties or their property the State or competent authority shall have no liability to such claimants unless:

- (a) it is established that the State or competent authority has acted unreasonably in granting access to a place of refuge to the ship and
- (b) the damage was caused by the decision to grant access to the ship.

6. In circumstances in which a State or competent authority refuses to grant access to a place of refuge to a ship in need of assistance and damage is caused to another State or a third party or their property by reason of such refusal and the State or competent authority which refused access is unable to establish that it acted reasonably in refusing such access and it is demonstrated by the other State or third party that the damage caused would have been unlikely to have been occasioned had access been granted the State or competent authority which refused access shall be liable to compensate the other State or third party for its loss and damage.

7. In circumstances in which a State or competent authority refuses to grant access to a place of refuge to a ship in need of assistance and that ship sustains further damage by reason of such refusal and the State or competent authority which refused access is unable to establish that it acted reasonably in refusing such access and it is demonstrated by the ship owner that the damage caused would have been unlikely to have been occasioned had access been granted the State or competent authority which refused access shall be liable to compensate the ship owner for its loss and damage occasioned thereby.

8. For the purposes of ascertaining under paragraphs 5, 6 and 7 of this Instrument whether a State or competent authority has acted reasonably courts or tribunals should have regard to all the circumstances which were known (or ought to have been known) to the State or competent authority at the relevant time, having regard in particular to the enquiries which ought to have been conducted in accordance with IMO Resolution A949(23) in assessing requests made on behalf of ships for access to a place of refuge.

9. Where a State or competent authority grants access to a place of refuge to a ship in need of assistance it shall be reasonable for the State or competent authority to make such access conditional on the provision of a guarantee or letter of security by a member of the International Group of P&I Clubs or other recognised Insurer or Bank or Financial Institution, in the form of Appendix 2 to this Instrument, in an amount up to the limit of liability calculated in accordance with the relevant Convention [applicable to that ship].

10. Where a ship in need of assistance, which seeks access to a place of refuge is not otherwise required to have compulsory insurance or provide evidence of other financial security it will be reasonable for a State or competent authority to refuse access to a place of refuge by that ship where there is a reasonable prospect that damage could be sustained to property or the environment or that the ship may become a navigational hazard, if the ship does not have insurance [coverage]:

- (a) that gives coverage up to any applicable limitation amount which applies to that ship in respect of:
 - (i) pollution damage arising out of a spillage of oil.
 - (ii) pollution damage arising out of a spillage of bunkers.
 - (iii) pollution damage caused by a spillage of hazardous and noxious substances.
 - (iv) wreck removal expenses.
 - (v) damage by impact or explosion.
- (b) that gives a direct right of action against the insurer, with no intervening “pay to be paid” condition.

11. States shall draw up plans to accommodate in the waters under their jurisdiction ships seeking assistance and such plans shall contain the necessary arrangements and procedures to take into account operational and environmental constraints to ensure that ships in distress may immediately go to a place of refuge, subject to authorisation by the State, or competent authority. Such plans shall also contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response.

12. States shall identify appropriate places around their coasts as places of refuge.

APPENDIX 1**APPLICABLE INTERNATIONAL CONVENTIONS**

The following Conventions and Protocols are considered relevant.

- United Nations Convention on the Law of the Sea (UNCLOS), in particular articles 195, 211 and 221 thereof;
- International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (the Intervention Convention), 1969, as amended;
- Protocol relating to Intervention on the High Seas in Cases of Pollution by substances other than Oil, 1973;
- International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974), as amended, in particular chapter V thereof;
- International Convention on Salvage, 1989 (the Salvage Convention);
- International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (the OPRC Convention);
- International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78);
- International Convention on Maritime Search and Rescue, 1979 (SAR 1979), as amended.
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972.
- Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971.
- Convention on Limitation of Liability for Maritime Claims (LLMC), 1976.
- International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969.
- International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992.
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992.
- Hazardous and Noxious Substances Convention 1996.

- Bunker Convention 2001.
- Facilitation of International Maritime Traffic 1965.
- International Regime of Maritime Ports 1923
- Convention and Statute on Freedom of Transit 1921.
- Convention on Regime of Navigable Waters of International Concern 1921.

APPENDIX 2

**STANDARD LETTER OF GUARANTEE TO BE GIVEN TO PORT OR
PROPER AUTHORITY IN RELATION TO A SHIP SEEKING ENTRY TO
A PLACE OF REFUGE**

Dear Sirs

Heading – Details of Ship, Casualty and Place of Refuge

In consideration of:

1. Your agreeing to the entry into port or other place of refuge, of the (name of ship) and;
2. Your agreeing not to arrest or detain the (name of ship) or any other ship or property in the same or associated ownership, management, possession or control;

and upon condition that:

1. Such refuge is given and;
2. The (name of ship) or any other ship or property in the same or associated ownership, management, possession or control is not arrested or detained by you:

We (name of Club/Bank/Financial Institution/Insurer) hereby undertake to pay you, within 14 days of receipt by us of your written demand, such sum or sums as may be found by the final unappealable judgment of a Court of competent jurisdiction (or name of specific Court having jurisdiction) or agreed in writing between us to be due to you from (name of Owners) the Owners {(name of Bareboat Charterers) the Bareboat Charterers] of the [name of ship] in respect of (I) the removal, destruction or marking of the wreck of the [name of vessel] and/or (ii) any pollution clean-up or pollution prevention expenses (individually and collectively “the Claims”), provided always that our liability hereunder shall be:

1. limited in any event to the total aggregate sum of US\$[], less:
 - (a) Any amounts we (name of Club/Bank/Financial Institution/Insurer) have paid under any Certificate of Financial Security issued by us or on our behalf in respect of or relating to the Claims; and
 - (b) Any amounts paid or payable by (name of Owners) the Owners [(name of bareboat charterers) the bareboat charterers] of the (name of ship) or by us in respect of or relating to the Claims, whether paid under this Guarantee or otherwise; and
 - (c) Any amount equal to any limitation fund(s) constituted by us and/or (name of Owners) the Owners [(name of bareboat charterers) the bareboat charterers] of the

(name of ship) in relation to the Claims in accordance with any applicable law;
and

2. without prejudice to or waiver of:
 - (a) any rights (name of Owners) the Owners [(name of bareboat charterers) the bareboat charterers] of the (name of ship) may have to limit their liability under any applicable law or convention;
 - (b) any rights (including the right to limit liability) or defences which we (name of Club/Bank/Financial Institution/Insurer) may have under any applicable law or convention.

We hereby further undertake, when called upon to do so, to instruct solicitors in (name of appropriate city), to accept service of any proceedings issued on your behalf in connection with the above incident and hereby confirm that we have irrevocable instructions and authority from (name of Owners) Owners [(name of bareboat charterers), the bareboat charterers] of the (name of vessel) so to do and further to agree that any claim of each party against the other and any and all disputes between the parties arising from this incident shall be exclusively determined by a competent Court (or name of specific court).

This guarantee shall be governed by and construed in accordance with law.