

Report submitted by the CMI to the IMO Legal Committee in April 2009

Summary

Executive Summary: The CMI has developed a draft instrument on Places of Refuge, which was approved at the Plenary session of the CMI Conference in Athens in October 2008. The approved text is annexed as Annex I to this document, which sets out the principal policy issues addressed by the draft. Annex 2 is a copy of a report on a survey conducted by the CMI's member National Maritime Law Associations on the current status of the ratification of the principal liability conventions

Planned output: International Convention or other instrument

Action to be taken: Delegations are invited to note the contents of the Annex 1 in light of the comments in this paper and the contents of Annex 2

Related documents: LEG 90/8, LEG 90/15 (paragraphs 384-395), LEG 91/6, LEG 90/8, LEG 89/7, LEG 8511013

Comments

At the 90th session of the Legal Committee in May 2005 CMI submitted a report: LEG/9018. LEG90115 reported, in paragraphs 384 to 395, on what took place at the 90th session in relation to the topic of "Places of Refuge". In paragraph 394 it was noted:

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 all 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 CMI submitted a further report to the 91st session of IMO Legal Committee in March 2006 (LEG 91/6). The purpose of that report was to inform the IMO Legal Committee that the CMI had decided to complete the work upon which it had embarked and to produce a Draft Instrument dealing with the topic of Places of Refuge.

The Draft Instrument which was attached to LEG 91/6 was the subject of discussion at the CMI Colloquium held in Cape Town in February 2006, at a further Symposium held in Dubrovnik in May 2007 and at the recent CMI Conference held in Athens in October 2008.

At the Plenary Session of the Athens Conference the text of the Draft Instrument was approved by a majority of delegates and the following resolution was passed at the Conference:

CMI approves the text of the Draft Instrument on Places of Refuge for submission to the IMO Legal Committee, noting that it contains options in two Articles for alternative provisions to be adopted in any text which the IMO Legal Committee may consider appropriate at some future occasion.

Attached to this report as Annex I is the Draft Instrument as approved at the CMI Conference in Athens in 2008.

The objectives which the CMI set out to achieve in producing the Instrument were largely in accordance with those that were identified in LEG 9116, ie:

- to emphasise the position under customary International law of a presumption of a right of access to a place of refuge for a vessel in distress
- to make the presumption rebuttable by the coastal State if it can show that it was reasonable to refuse access (Article 3).
- to give immunity from suit to a State which grants access to a place of refuge to a vessel in distress (Article 4).
- to give more force to the IMO Guidelines (Article 8), which CMI recognises as playing a significant role in assisting to define the ambit of "reasonableness", when considering the behaviour of both ship owners (and their masters) and States (and port authorities).
- to clarify the position regarding the issue of letters of guarantee to secure claims of a port or coastal State, which grants access to a ship in distress (Article 7).
- to require coastal States to designate places of refuge in advance, although not necessarily to publicise them (Article 8).

Concurrently with the preparation of the attached Instrument, the International Working Group sought information from National Maritime Law Associations in late 2006 as to the status of particular conventions and the attitudes, so far as they could be ascertained, of their governments in relation to the likely ratification of those conventions. The conventions concerned were the 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 (Funds 1992; Protocol of 2003 to the 1992 Fund Convention (Supplementary Fund Protocol); the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS 1996) and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001. The feedback which the CMI obtained from National Maritime Law Associations has been summarised in a report which the CMI sent to the CMI Executive Council Meeting in November 2006 and a copy of that report together with its annexures is also attached to this Report as Annex 2.

The CMI commends the Instrument to the IMO Legal Committee and remains of the view that there is still a long way to go before existing liability conventions have worldwide acceptance, that even if all the liability conventions (which now include the Wreck Removal Convention 2007) achieve wide international acceptance there is no international convention which expressly requires States, (or those charged with the responsibility of making decisions concerning requests for admission to a place of refuge), to act reasonably

in carrying out assessments of the condition of vessels which are in need of assistance and seek that assistance. Whilst the guidelines annexed to IMO Resolution A949(23) make it clear that maritime authorities should, for each place of refuge, make an objective analysis of the advantages and disadvantages of allowing a ship to proceed to a place of refuge in waters under their jurisdiction, there is no compulsion on them to carry out such an assessment. The CMI fears that a repeat of the events which took place in 2001 and 2002, in relation to the vessels "Castor" and "Prestige", may take place again in the future.

CMI is also conscious of legislation being contemplated within the European Union and believes that the IMO is a more appropriate body to be introducing legislation which requires States to act responsibly in these situations.

Annexure 1 Draft Instrument on Places of Refuge

Preamble

1. Definitions
2. Object and purpose
3. Legal obligation to grant access to a place of refuge
4. Immunity from liability where access is granted reasonably
5. Liability to another State, a third party, the ship owner or salvor where refusal of access is unreasonable
6. Reasonable conduct
7. Guarantees
8. Plans to accommodate ships seeking assistance
9. Identification of competent authority

Preamble

THE STATES PARTIES TO THE PRESENT INSTRUMENT

CONSIDERING that the availability of places of refuge to ships in need of assistance significantly contributes to the minimization of hazards to navigation, human life, ships, cargoes and the marine environment and to the efficiency of salvage operations,

RECOGNISING that the legal framework for the efficient management of situations involving ships in need of assistance and requiring a place of refuge should take into account the interests of all concerned parties,

CONSCIOUS of the fact that existing international conventions do not establish a comprehensive 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,

NOTING that the principle of customary international law that there is an absolute entitlement of a ship in need of assistance to a place of refuge has in recent times been questioned,

BEARING IN MIND the Guidelines on Places of Refuge for ships in need of assistance, adopted by IMO Resolution A949(23) and the IMO Guidelines on the control of ships in an emergency (adopted as IMO Circular MSC.1/Circ.1251),

MINDFUL OF THE NEED for an Instrument which seeks to establish a framework of legal obligations concerning the granting or refusing of access to a place of refuge to a ship in need of assistance,

INTENDING that this Instrument shall govern the actions of States, competent authorities, shipowners, salvors and others involved, where a ship seeks assistance; encourage adherence to international Conventions relating to the preservation of human life, property and the environment, and balance those interests in a fair and reasonable way; and shall be construed accordingly,

HAVE AGREED as follows:

1. Definitions

For the purposes of this Instrument:

(a) "**ship**" means a vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms.

(b) "**ship in need of assistance**" means a ship in circumstances that could give rise to loss of the ship or its cargo or to an environmental or navigational hazard.

(c) "**place of refuge**" means a place where action can be taken in order to stabilise the condition of a ship in need of assistance, to minimize the hazards to navigation, or to protect human life, ships, cargoes or the environment.

(d) "**competent authority**" means a State and any organisations or persons which have the power to permit or refuse entry of a ship in need of assistance to a place of refuge.

(e) "**assessment**" means an objective analysis in relation to a ship in need of assistance requiring a place of refuge carried out in accordance with any applicable IMO guidelines or any other applicable regional agreements or standards.

(f) "**ship owner**" includes the registered owner or any other organization or person such as the manager or the bareboat charterer who has assumed the responsibility for operation of the ship from the owner of the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended.

(g) "**registered owner**" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship; however, in the case of a ship owned by a State and operated by a company, which in that State is registered as the operator of the ship, "registered owner" shall mean such company,

2. Object and purpose

The object and purpose of this Instrument is to establish:

- (a) a legal framework for the efficient management of situations involving ships in need of assistance requiring a place of refuge and
- (b) the responsibilities and obligations concerning the granting or refusing of access to a place of refuge.

3. Legal obligation to grant access to a place of refuge

- (a) Except as provided in Article 3 (b) any competent authority shall permit access to a place of refuge by a ship in need of assistance when requested.

OPTION 1

[(b) The competent authority may deny access to a place of refuge by a ship in need of assistance when requested, following an assessment which on reasonable grounds establishes that the condition of the ship is such that it and/or its cargo is likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is refused.

(c) The competent authority shall not deny access to a place of refuge by a ship in need of assistance when requested on the grounds that the shipowner fails to provide an insurance certificate, letter of guarantee or other financial security.]

OPTION 2

[(b) Notwithstanding Article 3 (a) a competent authority may, on reasonable grounds, deny access to a place of refuge by a ship in need of assistance when requested, following an assessment and having regard to the following factors:

(i) the issue of whether the condition of the ship is such that it and/or its cargo is likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is refused, and

(ii) the existence or availability of an insurance certificate, letter of guarantee or other financial security but the absence of an insurance certificate, letter of guarantee or other financial security, as referred to in Article 7, shall not relieve the competent authority from the obligation to carry out the assessment, and is not itself sufficient reason for a competent authority to refuse to grant access to a place of refuge by a ship in distress, and the requesting of such certificate, or letter of guarantee or other financial security shall not lead to a delay in accommodating a ship in need of assistance.]

OPTION 3

[(b) Notwithstanding Article 3 (a) the competent authority may deny access to a place of refuge by a ship in need of assistance when requested :

(i) following an assessment which on reasonable grounds establishes that the condition of the ship is such that it and/or its cargo is likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is refused

or

(ii) on the grounds that the shipowner fails to provide an insurance certificate, or a letter of guarantee or other financial security in respect of such reasonably anticipated liabilities that it has identified in its assessment, but limited in accordance with Article 7.]

(d) If access is denied the competent authority shall use its best endeavours to identify a practical or lower risk alternative to granting access.

(e) The obligations imposed by this Article shall not prevent the competent authority from making any claim for salvage to which it may be entitled.

4. Immunity from liability where access is granted reasonably

Subject to the terms of this Instrument, if a competent authority reasonably grants access to a place of refuge to a ship in need of assistance and loss or damage is caused to the ship, its cargo or other third parties or their property, the competent authority shall have no liability arising from its decision to grant access.

5. Liability to another State, a third party, the ship owner or salvor where refusal of access is unreasonable

If a competent authority refuses to grant access to a place of refuge to a ship in need of assistance and another State, the ship owner, the salvor, the cargo owner or any other party prove that it or they suffered loss or damage (including, in so far as the salvor is concerned, but not limited to, the salvors inability to complete the salvage operations) by reason of such refusal such competent authority shall be liable to compensate the other State, ship owner, salvor, cargo owner, or any other party, for the loss or damage occasioned to it or them, unless such competent authority is able to establish that it acted reasonably in refusing access pursuant to Article 3(b).

6. Reasonable conduct

For the purposes of ascertaining under Articles 3, 4 and 5 of this Instrument whether a State or competent authority has acted reasonably courts shall take into account all the circumstances which were known (or ought to have been known) to the competent authority at the relevant time, having regard, inter alia, to the assessment by the competent authority.

7. Guarantees

OPTION I

[(a) When agreeing to grant access to a place of refuge to a ship in need of assistance, the competent authority may request the ship owner to provide evidence of an insurance certificate, or a letter of guarantee by a member of the International Group of P&I Clubs, or other financial security from a recognised insurer, bank or financial institution in a reasonable amount in respect of such reasonably anticipated liabilities that it has identified from its assessment. Subject to the following paragraph of this Article, such letter of guarantee or other financial security shall not be required to exceed an amount calculated in accordance with the most recent version of Article 6(1)(b) of the Convention on Limitation of Liability for Maritime Claims, 1976 or the corresponding provision on limitation for claims other than passenger, loss of life or personal injury claims of any other international convention replacing the previously mentioned convention, in force on the date when the insurance certificate, or letter of guarantee or other financial security is first requested, whether or not the State in question is a party to that convention.

(b) Nothing in this Article shall prevent a competent authority from requiring the shipowner to provide a certificate or letter of guarantee under any other applicable International Convention other than this Instrument.]

OPTION 2

[(a) When agreeing to grant access to a place of refuge to a ship in need of assistance, the competent authority may request the ship owner to provide evidence of an insurance certificate, or a letter of guarantee by a member of the International Group of P&I Clubs, or other financial security from a recognised insurer, bank or financial institution in a reasonable amount in respect of such reasonably anticipated liabilities that it has identified from its assessment. Subject to paragraph (c) of this Article, such letter of guarantee or other financial security shall not be required to exceed an amount calculated in accordance with the most recent version of Article 6(1)(b) of the Convention on Limitation of Liability for Maritime Claims, 1976 or the corresponding provision on limitation for claims other than passenger, loss of life or personal injury claims of any other international convention replacing the previously mentioned convention, in force on the date when the insurance certificate, or letter of guarantee or other financial security is first requested, whether or not the State in question is a party to that convention.

(b) In cases where claims described in Article 2 paragraphs I (d) or (e) of the Convention on Limitation of Liability for Maritime Claims are not subject to limitation the reasonable amount shall be calculated in accordance with Article 7 (a), with the addition of such amount as is likely in total to compensate the competent authority in respect of such liabilities.

(c) Nothing in this Article shall prevent a competent authority from requiring the shipowner to provide a certificate or letter of guarantee under any other applicable International Convention other than this Instrument.]

OPTION 3

[(a) When agreeing to grant access to a place of refuge to a ship in need of assistance, the competent authority may request the ship owner to provide evidence of an insurance certificate, or a letter of guarantee by a member of the International Group of P&I Clubs, or other financial security from a recognised insurer, bank or financial institution in a reasonable amount in respect of such reasonably anticipated liabilities that it has identified from its assessment.

(b) Nothing in this Article shall prevent a competent authority from requiring the shipowner to provide a certificate or letter of guarantee under any applicable International Convention other than this Instrument.]

8. Plans to accommodate ships in need of assistance

States shall draw up plans to accommodate ships in need of assistance in appropriate places under their jurisdiction around their coasts and such plans shall contain the necessary arrangements and procedures to take into account operational and environmental constraints to ensure that ships in need of assistance may immediately go to a place of refuge, subject to authorisation by the competent authority, granted in accordance with Article 3. Such plans shall also contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response.

9. Identification of competent authority

States shall designate the competent authority to whom a request from a ship in need of assistance for admission to a place of refuge appropriate to the size and condition of the ship in question should be made, and use all practicable means, including the good offices of States and organisations, to inform mariners of the identity and contact details of such competent authority.

A Nexure 2 Report Executive Council Meeting 11-2006

Places of Refuge

Since the last Assembly and Executive Council Meetings a questionnaire, a copy of which is attached, has been sent to National Associations. At the date of this report responses have been received from the following National Associations:

Australia, New Zealand, Netherlands, Argentina, Italy, Japan, Belgium, Brazil, Nigeria, United States, Finland, Croatia, Germany, Denmark, Slovenia and Canada, attached is a summary of the responses to the first question. In relation to what is anticipated by the above countries, the following responses have been received:

In respect of Argentina no decisions have been made to ratify the HNS or Bunker Conventions or the Fund Protocol 2003.

Brazil is likely to ratify CLC and Fund Protocol 1992 in the near future. It will not be ratifying the Supplementary Fund Protocol 2003 and is not inclined at the present time to ratify FINS or Bunker Conventions.

In respect of Belgium no decisions have been made to ratify the HNS or Bunker Conventions.

In respect of Australia it expects to ratify both the Fund Protocol 2003 and the Bunker Convention in the course of next year. No decision has been made in respect of the TINS Convention.

Canada is considering ratification of each of the HNS, Bunkers and Supplementary Fund Protocol.

Croatia expects to ratify the HNS Convention in 2007.

Denmark and Finland both expect to ratify the HNS and Bunker Conventions in the near future.

Italy expects to ratify the Supplementary Fund and Bunker Convention soon but has not made any decision in relation to the HNS Convention.

Germany expects to ratify the HNS Convention in the near future.

No decisions have been made by the Japanese Government concerning the HNS or Bunker Conventions.

The Netherlands expects to ratify the HNS Convention in the next couple of years.

New Zealand is likely to introduce legislation to give effect to HNS and Bunkers Convention in 2007 or 2008.

Nigeria is unlikely to ratify the Supplementary Fund Protocol of 2003 or the HNS Convention and the United States is unlikely to be ratifying any of the Conventions.

The only other development in this area has been an initiative by the Bahamas flag and the Maritime Safety Committee of the IMO to produce by next year "generic guidance clarifying

the chain of command". A recent letter to the editor of Lloyd's List by K Sehimizu, the Director of the MSC confirmed that "at its 815" Session in May 2006 it considered a proposal to develop guidelines covering the responsibilities of all parties in a maritime emergency, which would not create a change of command but implemented by member States as part of their emergency action plans, would clarify what the chain should be"

He continued in his letter by saying:

"The Committee, having recognised the importance of the issue, decided to include it in the work programs of the NAV and COMSAR sub-committee's. During the 52` Session of the sub-committee on safety and navigation in July 2006 there was considerable support for the development of these guidelines and sub-committee was also of the opinion that the ISU should be involved, since the proposed guidelines would include a section on guidelines for salvors. It is expected that this work would be completed during 2007 and any input from the ISU that will assist in achieving the objectives would be welcomed".

I have been contacted by Mike Lacey the Secretary - General of the I.S.U. (thanks to Patrick Griggs having been in touch with him) who has enquired whether CMI would be interested in becoming involved in this project. I have responded affirmatively.

Dear President

Places of Refitae: Third Questionnaire

As you may know the International Working Group on Places of Refuge has prepared a draft instrument on this topic and will be continuing, in the lead up to the conference in Greece in 2008, to refine the document for discussion at that conference. The International Working Group is conscious that there is some opposition, both amongst National Associations and some stakeholders (such as the International Group of P&I Clubs) to such an instrument. One reason which has been expressed for that opposition is understood to be that it is thought that discussions surrounding such an instrument might detract from the implementation of the principal liability Conventions in this area (CLC, Fund, FINS & Bunkers).

To assist the International Working Group I would be grateful if you would respond to the following questionnaire by 30 September 2006. The CNII Year Book does, of course, contain information on accession/ratification in relation to the first 6 Conventions or Protocols listed below (A-F) and your task will be somewhat easier if you consult the Year Book, at least in so far as those instruments are concerned.

1. Please advise whether your country has ratified or acceded to any of the following Conventions or Protocols-

(A) International Convention on Civil Liability for OR Pollution Damage (CLC 1969);

CLC Protocol 1976;

CLC Protocol 1992;

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund 1971);

(1) Fund Protocol 1976;

(F) Fund Protocol 1992;

*(G) Protocol of 2003 to the 1992 Fund Convention (Supplementary Fund Protocol);
International Convention on Liability and Compensation for Damage in connection with the
Carriage of Hazardous and Noxious Substances by Sea (HNS 1996);*

(I) International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

*2. If your country has not ratified or acceded to any of the above Conventions or Protocols,
could you please ascertain from an appropriate government official whether any decision to
ratify/accede to or not to ratify/accede to any such Convention or Protocol has been made by
your government.*

*3. If your country has made a decision not to ratify/accede to any such Convention or
Protocol*

please ascertain the reason(s) for that decision.

*4. If your government has made a decision in favour of ratifying or acceding to any such
Convention or Protocol, but has not implemented that decision, could you please ascertain
when such ratification or accession is likely to take place.*

Yours sincerely,

*Stuart Hetherington,
Chairman, International Working Group*

