

STUART WILLIAM HETHERINGTON

Educational Qualifications:

Educated at Wellington College, Crowthorne, Berks. Head of School 1969, awarded Queens Gold Medal 1969.

Read Law at Pembroke College, Cambridge. Awarded Exhibition 1971. M.A. (Cantab)

Diploma in Management 1997 (University of New England)

LEADR (Mediators Certificate) 1992

Professional Qualifications:

Barrister in England and Wales (1974)

Solicitor in New South Wales. (1978)

Barrister and Solicitor in Victoria (1978)

Solicitor of the High Court of Australia (1978)

Professional Memberships:

Maritime Law Association of Australia and New Zealand

- Honorary Secretary, NSW Branch 1976-1979
- Federal Secretary 1980 – 1984
- Vice President 1988 – 1991
- President 1991 – 1994
- Immediate Past President 1994 – 1997

Professional Background:

- Called to the Bar of England and Wales by Grays Inn.
- 1973 – 1974 – pupilled to Alan Ward (now Sir. Alan Ward L.J.) at 2 Dr Johnson's Building, Temple.
- 1974 – 1976 – Allen Allen & Hemsley (Employee).
- 1976 – 1981 – Ebsworth & Ebsworth (Employed Solicitor).
- 1981 – 1997 – Ebsworth & Ebsworth (Partner).

- 1998 – Withnell Hetherington (Partner).
- Author of *Annotated Admiralty Legislation* (Law Book Company 1989).
- Co-author with Professor James Crawford, of Admiralty Law Section of Transport Section in Law Book Company's "*Laws of Australia*".
- Co-author Australian section Professor Tetley's work "*Conflicts of Laws*".
- Australian correspondent for the Lloyds Maritime and Commercial Law Quarterly.

**Board
Appointments:**

- 1987 – 1992 Neuchatel Swiss Management Ltd.
- 1992 – 1994 – Marine and Aviation Management Services Ltd.
- 1989 – 1995 – Maritime Services Board – Sydney Ports Authority.
- 1995 – Sydney Ports Corporation.
- 2000 – Executive Councillor Comite Maritime International.

PLACES OF REFUGE

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COMITE MARITIME INTERNATIONAL ("CMI")

PLACES OF REFUGE

1. This paper reports on the responses received from National Associations to a questionnaire which sought information on the following matters : Article 11 of the *Salvage Convention*; Articles 17, 18, 21, 192 to 199 and 221 of the *United Nations Convention on the Law of the Sea 1982* ("UNCLOS"); and Articles 3, 4, 5 and 6 of the *International Convention on Oil Pollution Preparedness, Response and Co-Operation 1990* ("OPRC").

2. CMI has, in addition to canvassing its member Associations in relation to those three Conventions, sought to ascertain the extent of experience which member countries have had of casualties needing salvage assistance or a Place of Refuge and has also sought information as to any other legislation which member States have adopted dealing with the admission of a distressed vessel to a Place of Refuge.

Attached to this paper are:-

1. A summary of the responses to the CMI questionnaire in tabulated form.
2. A Schedule of Casualty Experience
3. Guidelines published by the State of Queensland, Australia.
4. Extract from US Coast Guard's Marine Safety Manual.

[A] **The Salvage Convention 1989**

Article 11 of the Salvage Convention provides:-

3. "A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."

Commentary

4. Slightly less than 50% of the National Associations who responded to the questionnaire have **not** ratified the Salvage Convention but even amongst those countries who have ratified the Salvage Convention none have introduced any legislation which specifically gives effect to Article 11 and only three countries **Germany, Norway and UK** have designated any particular Places of Refuge.

Germany has by Regulation, identified Places of Refuge along the German coast. (Access to such places is not guaranteed, and is at the discretion of the Authorities). The National Coast Guard and the Port Authorities in **Norway** provide several Ports of Refuge along the Norwegian coast (none are designated for environmental hazards). In the **UK** places of refuge have been designated but they are not made known to the public. In **Hong Kong** there are no designated places but by reason of repeated use such places are well known to local salvors and others in the maritime community. (Anchorages south of Lanna Island are normally used.)

[B] Law of the Sea Convention

5. **Articles 17 and 18 of UNCLOS** provide that ships of all States have a right of innocent passage through the territorial sea, and passage is defined as meaning “navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility.” Article 18 requires such passage to be “continuous and expeditious” but it does include stopping and anchoring if incidental to ordinary navigation or “are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress”.

6. **Article 21 of UNCLOS** expressly allows the coastal State to adopt laws and regulations relating to innocent passage through the territorial sea in respect of various matters which are enumerated such as “the preservation of the environment” and the “prevention, reduction and control of pollution”.

7. **Article 39(1)(c) of UNCLOS** provides that ships and aircraft while exercising the right of transit passage shall “refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress.”

Commentary

8. Whilst the great majority of respondents to CMI’s questionnaire have ratified the Law of the Sea Convention very few have given effect to any legislation with respect to ships which are the victims of force majeure or distress and their rights to seek shelter in a Place of Refuge. **China** and **Norway** have however enacted such legislation. For example:-

1. **China:** has enacted the following:-

Articles 11 and 19 of the Law on Maritime Traffic Safety 1983:-

Article 11 “A non-military vessel of foreign nationality shall not enter into the internal waters and harbours of the People’s Republic of China without obtaining the approval from the competent authority. Nevertheless, under unexpected circumstance, such as acute diseases of personnel on board, malfunction of machine, maritime disasters or

seeking shelter from the weather, the above vessel, when do not have the time to obtain such approval, may enter into the above area with reporting immediately to the competent authority and obey orders”.

Article 19 “A competent authority has the power to forbid it from leaving a harbour or order it to suspend its voyage, change its route or cease its operation, in the case of a vessel or an installation involving in the following circumstances:-

- (ii) be in a condition of unseaworthiness or unfitness for towage, or
- (iii) has not gone through the required formalities after occurrence of a traffic incident, or
- (v) other harmful circumstances recognised by the competent authority that will jeopardise or might jeopardise maritime traffic safety.”

Articles 3, 13 and 19 of the Rules Governing Vessels of Foreign Nationality, 1979.

Article 3. “If in the course of its voyage, a vessel has to enter or return to the port temporarily due to special circumstances such as mishap, malfunction, acute disease contracted by its seamen or passengers, a report should be made to the Harbour Superintendency Administration in advance.”

Article 13. “Vessels that have to enter into a port of the People’s Republic of China, which is open to foreign vessels, for the purpose of taking shelter or temporary berth, shall apply to the Harbour Superintendency Administration for approval. The application shall include: the ship’s name, call sign and nationality, name of the shipping company, ports of departure, port of destination, ship’s position, speed, draft, hull colour(s), funnel colour(s) and mark. The vessel shall take shelter or temporary berth at the place designated to it. Vessels that have to take shelter or temporary berth in a place other than the port open to foreign vessels of the People’s Republic of China shall, in addition to going through the above procedures for the application for approval, abide by the following:-

- (iv) duly report to the Harbour Superintendency Administration in the neighbourhood on the anchorage time, position and the time of departure;
- (v) observe the provisions of the relevant local department, subject itself to inspection and enquiry and obey orders.

- (vi) the personnel on board the vessel shall not come ashore and nor shall the goods on board be loaded or discharged without the approval of the relevant local departments.”

2. **Norway:** Regulation of 23 December 1994 No. 1130 concerning the entry into and passage through Norwegian Territorial Waters in peacetime of foreign, non-military vessels, Sections 10, 14, 16 and 20 provide:-

“Section 10. Innocent passage through the territorial sea is permitted for foreign, non-military vessels. Innocent passage means navigation through the territorial sea, either in transit or for the purpose of proceeding to or from Norwegian internal waters or ports.

Stopping or anchoring while passing through the territorial sea is only permitted when such action is incidental to ordinary navigation or is rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft which are in danger or distress.

Section 14. Foreign, non-military vessels which are obliged to seek a port of refuge for the reasons specified in Section 10, second paragraph, may enter Norwegian internal waters without a prior written application.

Section 16. For foreign, non-military vessels, entry into and passage through Norwegian internal waters is restricted to the following activities:-

- c. Navigation in order to seek a port of refuge.

Stopping or anchoring while passing through internal waters is only permitted when such action is incidental to ordinary navigation or is rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft which are in danger or distress. If the vessel makes a temporary stop or remains stationary, the Norwegian authorities shall be notified without undue delay.

Section 20. Foreign, non-military vessels which are obliged to enter Norwegian internal waters due to force majeure or distress or to provide assistance to persons, ships or aircraft that are in danger are excepted from the above provisions concerning the requirement to report and the use of sea lanes. Such vessels shall nevertheless and by the fastest possible means contact the Norwegian authorities for specific instructions regarding anchoring or continued navigation.”

9. **Articles 192 to 199 and 221 of UNCLOS** touch on the topic of protection of the marine environment from pollution. *Article 195* provides:-

“In taking measures to prevent, reduce or control pollution of the marine environment, States shall so act so as not to transfer, directly or indirectly,

damage or hazards from one area to another or transform one type of pollution into another.”

Commentary

10. Only four countries, **Brazil, China, UK** and the **U.S.** appear to have enshrined this principle in their National legislation, albeit somewhat indirectly in the case of the U.S..

Brazil has ratified the 1989 Basel Convention on the control of transboundary movements of Hazardous wastes. In addition a Regulation issued by the Brazilian Maritime Authority through the Directorate of Ports and Coasts is empowered to cancel a temporary licence where a ship flying the flag of foreign state but diverted for operations in Brazilian waters, causes maritime boundary problems with another State.

China. Article 11 of the Regulations of the PRC on the Prevention of vessel Induced Pollution, 1983, provides as follows:-

“After oil pollution accidents or discharges of oil in violation of the regulations have occurred, the vessels involved may not use oil-elimination chemicals at their own discretion. If oil-elimination chemicals have to be used, applications by telephone or in written form shall be made to the harbour superintendencies in advance, with the brand names, amounts and the areas for the application of the oil-eliminating agents stated, and they may be used only with approval.”

UK Merchant Shipping Act s.130 regulates the transfer of, inter alia, fuel between ships.

U.S. US law bars, indirectly, the transfer of “damages” by requiring containment and clean-up measures.

11. Article 198 of UNCLOS requires a State which becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution to “immediately notify other States it deems likely to be affected by such damage, as well as the competent international organisation.” Article 199 requires States to “jointly develop and promote contingency plans for responding to pollution incidents in the marine environment.”

Commentary

12. Whilst the majority of respondents to the CMI questionnaire have adopted contingency plans there are a number of significant maritime nations who have not, and very few of those which have been adopted contain provisions for the admission into a place of refuge of a vessel in distress which may threaten to cause pollution. Those countries which have adopted such provisions are **Australia, Denmark, Germany and New Zealand.**

Australia:- While no Places of Refuge have been designated in Australia most Australian States have guidelines (or plans) for considering requests for Places of Refuge. They set out criteria which the authorities will take into account when considering any request on a case by case basis. For example they take into account: adequate depth of water, good holding ground, shelter from effects of prevailing wind/swell, relatively unobstructed approach from seaward, environmental classification of adjacent coastline and fisheries activity, access to land/air transport, access to loading/unloading facilities for emergency equipment. (The Guidelines published by the State of Queensland are **attached**).

Denmark:- Under the Danish Marine Pollution Act Sections 43 and 43a a vessel in distress which threatens to cause pollution can be forced into a repair yard, or denied access to a Place of Refuge.

Germany:- Pursuant to Chapter 26 Volume 2 of the Bonn Agreement Counter Pollution Manual.

New Zealand:- Annexure 15 to its National Oil Spill Contingency Plan envisages either safe havens being designated by Regional Councils or during an incident by the National on Scene Commander. In determining a safe haven Annexure 15 states: "Priority should be given to the crew of ships, then the environment, then the ship itself. Detection of the safe haven on the day will depend on sea state, weather conditions and the location of the ship and will be made by the National on Scene Commander in Consultation with the Regional on Scene Commander and/or the Local Harbour Master."

[C] The International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 ("OPRC")

13. Article 3 of OPRC requires State parties to pass legislation requiring ships which fly its flag to have on board a Shipboard Oil Pollution Emergency Plan ("SOPEP") complying with Internationally agreed standards.

14. Article 4 of OPRC requires State parties to pass legislation requiring the masters of ships which fly its flag to report any event on their ship involving a discharge or probable discharge of oil to the flag State and the nearest coastal State.

15. Article 5 of OPRC requires the Authorities of the State receiving such a report to assess the nature, extent and possible consequences of such an incident and to inform without delay all States likely to be affected together with details of its assessment and any action it as taken, or intends to take, to deal with the incident. Such action may involve the admission of the ship involved to a Place of Refuge.

Commentary

16. Almost all countries who have responded to the CMI questionnaire have ratified the OPRC Convention. Of those countries almost all have adopted

legislation to give effect to Articles 3, 4 and 5 and have adopted oil pollution response contingency plans, but some of those have not as yet reported them to the IMO. Very few of the oil pollution contingency plans contain provisions dealing with the admission of ships in distress which may prove a threat of pollution. Those countries which do have such contingency plans are **Australia, Germany, New Zealand**. (See comments in relation to UNCLOS above.) None of those plans contain provisions requiring financial or other security as a condition of entry.

[D] Casualty Experience

17. Some countries have had experience of ships in distress being refused entry. A Schedule is attached to this paper which contains specific examples provided by National Associations of the ships concerned and the reasons for the refusal. (4.1)

The justifications for such refusals include:

Local Port Authority Regulations or the Protection of the Sea (Powers of Intervention) Act 1981 (Australia); Marine Traffic Act 1981, and Marine Traffic Regulations 1985 and Marine Pollution (Control and Civil Liability) Act 1981 (South Africa); Spanish Port and Merchant Marine Act 1992 (Spain); Dangerous Vessels Act 1985 and Merchant Shipping and Maritime Safety Act 1997 (UK); Ports and Waterways Safety Act, Port and Tanker Safety Act (United States).

18. Some countries have had experience of vessels needing salvage assistance in a Place of Refuge and have been permitted entry. A Schedule is attached to this paper which contains specific examples provided by National Associations of the ships concerned. (4.3) Some countries have specific requirements as to the information they require, such as:

Germany requires a detailed report about the ship's actual condition,

Greece requires the master of a tanker or vessel carrying dangerous substances in bulk to notify the nearest Coast Guard of the Place of Refuge about the approach, the substances carried, their quantity and the reasons for the approach. The master is required to maintain the ship in the place specified by the coast guard.

In **Hong Kong** the Director of Marine requires a thorough inspection and discussions with any salvors' concerned.

The **Japanese** Coast guard requires the owner of the vessel to fly the necessary international flag, appoint proper agents when necessary and establish a system of telecommunication.

19. It would seem to be rare for time limitations to be imposed on vessels in such situations when permission is granted, although on occasions time limitations are known to have been set by the authority concerned. Similarly

proof of adequate insurance or guarantees, or tugs on standby are sometimes required.

20. The **UK** authorities have not specified any particular requirements in these situations but the entry has often been permitted under the directions of the Secretary of States Representative (SOSREP).

[E] Other Legislation

Australia, both by Federal (Protection of the Sea (Powers of Intervention) Act) 1984 and by State law, there are wide powers given to ministers and local authorities to remove vessels in certain circumstances.

Brazil. The Naval Authorities have a wide discretion in relation to the admission of a ship in distress and may require as preconditions of entry: proof of insurance, appointment of reputable salvors etc. In its Act on Safety of Traffic in Jurisdictional Waters, 1997, in Articles 5, iii and iv authorities are empowered to order a foreign vessel which by reason of "operational conditions representing a threat of damage to the environment, crew, third parties or to water traffic" either not to enter a port, not to leave a port, to leave jurisdictional waters or call at a National port.

Canada. Minister, Pollution Prevention Officers and Port authorities are given wide powers to direct vessels to go to certain places (or not to enter Canadian waters or particular areas) under the *Canada Shipping Act 1985* and the *Canada Marine Act 1998*.

Chile. Article 32 of the Law of Navigation: "In certain qualified cases the Directorate may restrict or forbid the passage or stay of vessels in determined areas or places, or prohibit the passage or stay of vessels in determined areas or places, or prohibit their transit through waters of national jurisdiction if their passage through same is not innocent or is dangerous."

China. Article 18 of the Law of the PRC on Maritime Traffic Safety permits the competent authority, where a ship is believed to be dangerous to the safety of a port, to refuse entry to the ship or order the ship to leave the port so threatened.

France. The Code des Ports give to Harbour Masters a wide discretion to refuse entry of a vessel to a Port, having regard to commercial interests, the interest of the port and the risks to the maritime and coastal environment.

Hong Kong: The Director of Marine has wide power under various legislation to refuse entry, give directions generally and for the prevention of pollution etc MS (Shipping and Port Control) Ordinance; MS (Prevention of Oil Pollution) Ordinance.

Italy: Article 83 of the Code of Navigation provides that the Ministry of Transport may limit or prohibit for reasons of "ordre public", the transit or the stoppage of merchant ships in the territorial sea; Article 59 of the Regulation

empowers the port authorities to regulate the arrival, mooring and departure of ships and Article 256 of the Decree of the President of the Republic (1991) provides that all ships are bound to observe the traffic separation rules issued by the Ministry of Transport.

New Zealand: Under Section 248 of the Maritime Transport Act the Director of Maritime Safety is empowered to issue instructions to a ship and/or salvors if the Director is satisfied the ship is a hazardous ship. (These include directions to relocate the vessel).

Netherlands: Wet Bon (1992) allows Minister of Transport to give directions to the Master, owners and salvors for the purpose of preventing damage to the environment. Such a measure may include the appointment of a place or port of refuge. Under its Rampenplan the admission of vessels in distress is decided by the Government and factors such as reasonableness, fairness and principles of proportionality will be considered. The Government could also require security to be provided.

Norway: Regulation 2 of May 1007, No. 396 concerning the access of Foreign Military Vessels and Aircraft to Norwegian Territory in Peacetime:-

“When subject to force majeure or to sea peril or rendering assistance to persons, ships or aircraft which are in danger or distress such ships have access to innocent passage, without having obtained permission by diplomatic means.”

South Africa: Wreck & Salvage Act places obligations on Masters of South African ships to assist ships or persons in distress; the South African Marine Safety Authority may direct the master or owner of a ship that is wrecked, stranded or in distress to move to a specified place, or to raise, remove or destroy such a ship itself if it is unable to contact the master or owner. South Africa is drafting a Disaster Management Act which may impact on the topic of Places of Refuge.

Spain: Spanish Port and Merchant Marine Act 1992. Section 107 The Port Authority, after report by the Marine Captain and in case a vessel is in danger of sinking inside the Harbour Waters may, if neither the owner nor the ship agent remove nor repair the vessel at request of the Authorities remove the vessel out of the port or destroy and sink her in place where port activity sailing and fishing are not prejudiced, at the expense of the owner.” (The same powers apply to outside the port but within Spanish Maritime Waters.)

Sweden: Pollution from Ship's Act (980-424). Swedish Maritime Administration is entitled to order a ship to take measures necessary for preventing pollution, to order a ship to a place of refuge, to use only certain routes etc.

UK: Merchant Shipping and Maritime Security Act (MSA) 1995 enables the Secretary of State or an authorised representative to declare a temporary exclusion zone for the purpose of promoting maritime safety or protecting the

maritime environment (s.100A). MSA 1995 also contains power to detain dangerously unsafe ships (s.95). MSA 1995 enables orders in Council to be passed "specifying areas of sea above any of the areas for the time being designated under s.1(7) of the *Continental Shelf Act* (1964) as waters within which the jurisdiction and rights of the UK are exercisable in accordance with Part XII of UNCLOS for the protection and preservation of the marine environment" (s.129(2)(b))

Guide to Good Practice on Port Operations and Contingency Planning for Marine Pollution Preparedness and Response: Guidelines for Ports (March 2002) reinforces the UK obligations under SOLAS to provide shelter for maritime casualties (paragraph 2.5 provides: "Beyond providing shelter for a casualty a harbour authority may be called upon to take a casualty into port.")

Dangerous Vessels Act 1985 ss 1 and 3 empowers Harbour Masters to give directions to prohibit vessels from entering areas within their jurisdiction, and to remove vessels, where they present a grave and imminent danger to the safety of any person or property or risk of obstruction to navigation. However the Secretary of State (through SOSREP) has the power under s.137 of MSA to override the power of a Harbour Master, and direct a casualty to a place of refuge.

Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 give effect to Articles 3 and 4 of OPRC Convention and Article 5 in the National Contingency Plan, the Port Marine Safety Code; Guide to Good Practice in Marine Operations and Port and Guidelines for Ports.

United States: The States' Coast Guard has promulgated regulations which bear on the above topics. A vessel in a hazardous condition is required to comply with various conditions prior to entry into US waters. The Coast Guard Captain of the Port (COTP) may waive any such conditions upon finding that circumstances are such that their application is "unnecessary or impractical for purposes of safety, environmental protection, or national security." Furthermore whilst foreign merchant vessels are prohibited from entering US waters unless they comply with the ISM Code an exception is allowed for vessels under force majeure. A district commander or COTP may also prohibit a vessel from operating in the navigable waters of the US if it is determined that the vessel's serious repair problems create reason to believe that the vessel may be unsafe or pose a threat to the marine environment. Provisional entry may be allowed if the owner/operator proves to the satisfaction of the District Commander or COTP that the vessel is not unsafe or does not pose a threat to the marine environment and that such entry is necessary for the safety of the vessel or the persons on board. (See appendix for extract from US Coast Guard's Marine Safety Manual). On Scene Coordinators are empowered to remove, and if necessary destroy a vessel discharging or threatening to discharge – where there are spills or the threat of spills which pose a threat to the public health or welfare of the U.S.

Article 17 of the EU Draft Directive will require States in the EEC to create Places of Refuge and plans for handling vessels in distress. ("Member

States, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and procedures taking 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 competent authority. Plans for accommodating ships in distress shall be made available upon demand. Member States shall inform, within 12 months of the date of application of this Directive, the Commission of the measures taken in application of the preceding paragraph.”

Pursuant to the decision of the EU Court in ECR 1994 page 1-6019 - EU Fishery provisions do not necessarily apply to vessels in Ports of Refuge.

Some Countries have bilateral contingency arrangements (eg: Japan and Korea; Japan and Russia, UK and France, Norway and UK). Reference has been made to the Copenhagen Agreement; the Lisbon Agreement and the Bonn Agreement (1983) which contains the following:

“When permission of access to a port or sheltered area is requested, there is no obligation on the part of a Contracting Party to grant itgranting access to a port or sheltered area (so called “safe haven”) could involve a political decision which can only be taken on a case- by-case basis with consideration of the balance between the advantage for the damaged ship and the environment from that ship being near the coast.”

The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969) and London Protocol (1973) (to which at least 77 Countries are parties) is also relevant to this topic.

Conclusion

21. Whilst the principles dealing with the obligations and responsibilities of States when dealing with stricken vessels are mostly identified in the International Conventions some countries have clearly not become parties to those Conventions and of those which are parties very few have followed through on the Conventions and developed National laws to give detailed effect to those principles in their local jurisdictions. Most significantly there is a paucity of National legislation which relates to the provisions of Article 11 of the Salvage Convention or Articles 17, 18 21 or 39 (1)(c) of UNCLOS.
22. Similarly it appears that National Plans do not, for the most part, give guidance to those who might be in distress as to what they should do in such situations or to those with the power and responsibility to administer National laws as to what criteria will be adopted in considering requests for assistance.

23. It may be that Governments (particularly in those countries where there are Federal/State/Regional issues to be taken into account) are unaware of the various responsibilities, duties and powers which they may have both under International law and their own domestic law where casualties occur in or near their Territorial waters, and seek a Place of Refuge. Governments, it is suggested, need to have consistent (but not inflexible) processes for dealing with requests for Places of Refuge. Such places may need to be identified in advance and published and Governments may need to identify the controls, or conditions, that they may want to apply before permitting entry into a Place of Refuge, (such as security, guarantees undertakings, length of stay involvement of salvors, the survey of the vessel etc). Related to such issues which Governments may need to consider are questions concerning the availability of equipment and the power to requisition/commandeer equipment which might be necessary in an emergency.

September 2002

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**CMI PLACES OF REFUGE QUESTIONNAIRE:
SUMMARY OF RESPONSES RECEIVED IN TABULATED FORM**

1.1 Has your country ratified the Salvage Convention?

Argentina	No	Denmark	Yes	Japan	No	South Africa	No*
Australia	Yes	France	Yes	DPR Korea	No	Sweden	Yes
Belgium	No	Germany	Yes	Mauritania	No	UK	Yes
Brazil	No	Greece	Yes	Netherlands	Yes	US	Yes
Canada	Yes	Hong Kong	Yes	New Zealand	No		
Chile	No	Ireland	Yes	Norway	Yes		
China	Yes	Italy	Yes	Spain	No		

* But given the force of law in South Africa.

1.2 & 1.3 No countries who have ratified Salvage Convention have adopted legislation to give effect to Article 11.

1.4 & 1.5 Only **Germany, Norway and the UK** have designated any particular Places of Refuge and these places are known to the public or to the shipping community in the case of Germany and Norway, but not the UK.

2.1 Has your country ratified the Law of the Sea Convention 1982?

Argentina	Yes	China	Yes	Ireland	Yes	New Zealand	Yes
Australia	Yes	Denmark	Yes	Italy	Yes	Norway	Yes
Belgium	Yes	France	Yes	Japan	Yes	Spain	Yes
Brazil	Yes	Germany	Yes	DPR Korea	Yes	Sweden	Yes
Canada	No	Greece	Yes	Mauritania	Yes	UK	Yes
Chile	Yes	Hong Kong	Yes	Netherlands	Yes	US	No

2.2/2.3 Countries who have adopted any legislation or regulation to give effect to Articles 17, 18, 21 and 39(1)(c).

China, Korea, Norway and South Africa.

2.4 The only countries which have provisions applicable to ships which are the victims of force majeure or distress and their rights to seek shelter in a place of refuge are:-

China and Norway

2.5 The only countries which have implemented the principle enshrined in Article 195 of the Convention are **Brazil, Denmark Greece and Hong Kong.**

2.6 Has your country developed any contingency plan as referred to in Article 199?:-

Argentina	Yes	Denmark	Yes	Japan	Yes	South Africa	No
Australia	Yes	France	Yes	DPR Korea	No	Sweden	Yes
Belgium	Yes	Germany	Yes	Mauritania	Yes	UK	Yes
Brazil	No	Greece	Yes	Netherlands	Yes	US	Yes
Canada	Yes	Hong Kong	Yes	New Zealand	Yes		
Chile	No	Ireland	No	Norway	Yes		
China	Yes	Italy	Yes	Spain	No		

2.7 and 2.8 The only countries who have developed a contingency plan which contains provisions for the admission into a Place of Refuge of a vessel in distress which may threaten to cause pollution are:-

Australia, Denmark Germany, Netherlands, New Zealand and UK

3.1 Has your country ratified the **OPRC Convention**?

Argentina Yes	Denmark Yes	Japan Yes	South Africa No
Australia Yes	France Yes	DPR Korea Yes	Sweden Yes
Belgium No	Germany Yes	Mauritanie Yes	UK Yes
Brazil Yes	Greece Yes	Netherlands Yes	US Yes
Canada Yes	Hong Kong Yes	New Zealand Yes	
Chile Yes	Ireland Yes	Norway Yes	
China Yes	Italy Yes	Spain Yes	

3.2 The countries which have adopted legislation to give effect to Article 3, 4 and 5 are:-

Argentina, Australia, Brazil, Chile, China, Denmark, France, Greece, Hong Kong, Japan, Korea, Netherlands, New Zealand, Sweden, UK and US.

3.3 Countries who have adopted any Oil Pollution Response Contingency Plan:-

Argentina, Australia, Canada, Chile, China, Denmark, France, Germany, Greece, Hong Kong, Japan, Korea, Netherlands, New Zealand, Norway, Spain, Sweden, UK and US.

3.4 Countries who have **not** reported such contingency plans to the IMO:-

Brazil, Chile, China, Hong Kong, Korea and Netherlands.

3.5 The only countries who have contingency plans which contain provisions dealing with the admission of a ship in distress which may prove a threat of pollution:-

Australia, Germany, Hong Kong, Netherlands, New Zealand, Sweden and UK.

3.6 The plans of the countries referred to in 3.5 (other than Hong Kong and the Netherlands) do not contain provisions requiring financial or other security as a condition of entry.

4.1/4.2 Countries which have had experience of ships in distress being refused entry:-

Australia, Belgium, Brazil, Ireland, South Africa, Spain, UK, US.

4.3/4.4 Countries in which a vessel needing salvage assistance in a place of refuge has been permitted entry:-

Australia, Belgium, France, Germany, Greece, Hong Kong, Ireland, Japan, South Africa, Sweden, UK, US

SCHEDULE OF CASUALTY EXPERIENCE

- 4.1 *Have you had experience of a casualty in your country's territorial waters, EEZ or indeed internal waters in which a vessel needing salvage assistance in a place of refuge has been refused entry by your administration? If so please give details.*

Countries which **have** had such experience:

Australia: "Iron Baron" (1995). Bulk carrier refused entry to discharge cargo at Launceston (after grounding on reef) and by Tasmanian Government to enter place of refuge on east coast of Flinders Island.

Belgium – "Attican Unity" (1977); MS "Long Lin" (1992), both vessels were refused entry after respectively suffering fire and collision damage.

Brazil: "Aida". Vessel ordered by Brazilian naval authorities to leave territorial waters in view of her unsafe condition.

Canada: There are examples of ships being refused entry, initially, but subsequently permitted entry: "Trave Ore" (1987); "Kitano" (2001); "Eastern Power" (2001)

Ireland: MV "Toledo" (1990). Salvors were ordered by Minister of Marine not to enter Irish Territorial waters.

South Africa: "Belofin". Passenger ship on route to scrap in India, severe list, too dangerous to board. Sank 7 hours after aerial inspection on 21 October 2000. "Sea". Passenger ship on route to scrap in India. Sought permission to enter. Told to stabilise her for SAMSA surveyors to board the ship to inspect her. The stabilising and inspection never materialised and the ship sank five days later on 12 July 2001. "Sun". Passenger

ship en route to scrap. Took on a severe list and owners requested permission to enter Algoa Bay. Salvors and a SAMSA surveyor boarded the vessel. She sank within 18 hours of the inspection on 25 July 2001. "Bismihita'la." A bulk carrier which developed a severe port list off Cape Town on 30 August 2001. SAMSA refused her and her tow entry into internal waters. Ship was finally scuttled more than 200 miles off the coast of Namibia on 16 September 2001. "Ikan Tanda". Grounded on 3 September 2001 discharging whatever fuel oil was left on board and lightening by discharging 12,000 tonnes of cargo, was pulled off the beach on 17 October 2001. SAMSA refused permission for the vessel to enter False Bay or Table Bay for damage assessment. The vessel was finally scuttled 200 miles west of Cape Town.

Spain: Castor (2001).

UK: M/T "Andros Patria" and M.V. "Aeolian Sky"

M/T "Andros Patria (1978) developed a 50ft crack in her hull in heavy seas off Cape Finisterre. An explosion occurred. About 50,000 tons of oil were lost but the tanker remained afloat. The Spanish, Portuguese, French and British Governments all refused permission for the stricken tanker to enter their territorial waters for fear of pollution. The salvors towed the tanker 250 miles south of the Azores where an STS was commenced. The vessel was then allowed entry into Portuguese waters.

M.V. "Aeolian Sky" (1979) collided with M.V. "Anna Knuppel" 12 miles South-East of Portland Bill. The vessel was forbidden entry to both Southampton and Portsmouth and a request to be allowed to beach the vessel was refused. It sank on 4 November 1979, 10 hours after the collision.

US: "Prinsendam" (Oct. 1980). Passenger ship under tow by salvor refused permission to enter sheltered waters of Inside Passage, Gulf of Alaska.

Countries which **have not** had such experience: **Argentina, Chile, Denmark, France, Germany, Greece, Hong Kong, Sweden.**

- 4.3** *Have you had experience of a casualty in your country's territorial waters, EEZ or indeed internal waters in which a vessel needing salvage assistance in a place of refuge has been permitted entry by your administration? If so please give details.*

Countries which **have had** such experience:

Australia: "Princess Anne Marie" (1975). Tanker suffered structural damage in Indian Ocean and directed to a place of refuge of the Dampier Archipelago and the cargo was transferred without further incident. "Fared Fares" (1982). Livestock carrier caught fire whilst on route past the coast of South Australia. Vessel sank whilst a request for a place of refuge was being considered before posing a threat to the coastal environment. "Nella Dan" (1987), aground at Macquarie Island. After the vessel was refloated, consideration was given to towing the vessel to a safe location on the Australian mainland for repairs, but would have been a danger to navigation or a threat to the marine environment and the vessel subsequently sank after being towed to sea. "Kirki" (1981). Tanker suffered structural failure off the coast of Western Australia. The State Government's decision to relocate the vessel to the Pilbara area for transfer of remaining cargo was opposed by environmental authorities as well as the local community. The cargo was successfully transferred to another vessel. "Daishowa Maru" (1992). Woodchip carrier grounded near Eden, New South Wales, and sought refuge for towage repairs. The Royal Australian Navy agreed to permit the vessel

to anchor in Jervis Bay. However, local conservationist opposition resulted in an alternative location being sought. Port Kembla was offered but the port was considered too confined and the tow ultimately obtained refuge in the Barrier Reef off Gladstone prior to continuing to Japan.

Belgium: “Ever Decent” allowed entry after collision. (There are other examples)

Canada: The three vessels referred to in 4.1 were ultimately permitted entry.

France: Tanio

Germany: Yes

Greece: Yes (numerous instances)

Hong Kong: Yes. In late 2001 a vessel en route from Singapore to China was holed due to cargo shifting in the South China Sea and put into Hong Kong for repairs.

Ireland: “Tribulus” (1990) permitted entry to Bantry Bay. MV “Kowloon Bridge” (1986) also took refuge in Bantry Bay.

Hong Kong: Yes.

Japan: No specific instances but in cases where there is imminent danger due to serious damage, emergency entrance to Japanese territorial waters or internal waters invariably permitted.

South Africa: Yes (approximately 30 vessels)

Sweden: “Scandinavian Star”: Fire on board and taken to a place of refuge in Sweden.

UK: "Darya Tara" (1993) met heavy weather on passage and the cargo shifted. She put into Brixham and the cargo had to be restowed. "Mimosa" (1995) was seriously damaged 10 metres below the waterline through contact with an underwater object 80 miles west of the Hebrides. Permission was given to her to divert to Lyme Bay in the south of England under escort of the naval corvette "Eithne" and Coastguard tug/supply boat "Brodospas Sun". "Sea Empress" (1996) was sailing into Milford Haven under the supervision of a professional pilot when she ran aground on the Mid-Channel rocks. It was not almost a week later that she could be brought alongside a jetty. "Multitank Ascania" (1996) had an engine room fire off the north coast of Scotland. The vessel drifted without power through the Pentland Firth, one of the UK's most dangerous stretches of water, before drifting to a sheltered anchorage at Dunnet Head. The UK Government's Emergency Towing Vessel "Anglian Prince" stood by during the salvage operation and acted as a passive escort during the final tow. "Norwegian Dream" (1999) collided with "Ever Decent" in the English Channel. The "Ever Decent" suffered serious damage and had approximately 18 containers on fire. The fire was eventually extinguished and a formal Passage Plan to Zeebrugge which was also agreed by the French and Belgian authorities was approved. The "Norwegian Dream" managed to sail to Dover on its own power despite a gaping metal gash in her bow. "Dole America" (1999) collided with the Nab Tower in the Solent approaches. The vessel was driven aground outside the main channel to prevent her from capsizing. A Salvage Control Unit was established at Solent MRSC, intervention powers were exercised and an exclusion zone was established around the vessel. She was later refloated and towed to Southampton for repairs. On the casualty's arrival at Southampton, access to dry dock facilities was refused by private owners. "Coastal Bay" (2000) grounded

in Church Bay on the west coast of Anglesey. Grounding caused a crack between the forepeak bulkhead and number 3 fuel tank. MV "Coastal Bay" was refloated. After an underwater survey a passage plan was approved by the SOSREP and she departed under tow for Glandstone's dock, Liverpool, for repairs. A collision took place in the South West traffic lane of the Dover Straits between the tanker "Gudermes" and the fishing vessel "St Jacques II" in 2001. Dover Coastguards spoke with the "Gudermes" after the collision to ascertain the status of the vessel, make an offer of assistance and ask the Master what his intentions were. The Master initially thought he could continue his voyage but powers of persuasion were brought to bear and he agreed to come into an anchorage off Dover whilst the damage was assessed. MV "Lysfoss" (2001) hit rocks and grounded in the Sound of Mull. It was eased off the rocks after a joint salvage operation involving the SOSREP, the vessel's owners, the MCA Counter Pollution branch and the salvors. It was then moved towards Salen Bay in the south of the Isle where it was checked and repaired. "Ab Bilbao" (2001) suffered an explosion which damaged a cargo hold off Margate. The crew made temporary repairs and she sought shelter. The vessel was moved to a safe haven under directions issued by the SOSREP. MT "Willy" (2002) stranded at Cawsands in the outer Plymouth Sound. Unfortunately, much of the vessel's bottom had been ripped and holed and she had to be pressed up on air for refloatation and passage to the port of Falmouth for dry-docking and inspection. "Kodima" (2002) hit a sandy beach at Tregantle Range in Whitsand Bay, Cornwall. The contingency plans in place to counter pollution were not needed during the refloatation and the vessel was able to make its way under tow to Falmouth.

US: No specific instances documented but generally believe small freighters and fishing vessels have been permitted entry.

Countries which have **not** had such experience: **Argentina, Chile, Denmark**, (German MLA referred to a vessel refused entry into Denmark and eventually stranded on German coast).

PROVISION OF SAFE HAVEN FOR DISABLED OR DAMAGED VESSELS AT SEA

**Queensland State Coastal Waters and Waters of the Great Barrier Reef
World Heritage Region**

Guidelines for Responsible Authorities

QUEENSLAND PORT AUTHORITIES

QUEENSLAND DEPARTMENT OF ENVIRONMENT AND HERITAGE

AUSTRALIAN MARITIME SAFETY AUTHORITY

GREAT BARRIER REEF MARINE PARK AUTHORITY.

QUEENSLAND DEPARTMENT OF TRANSPORT

*Compiled by:
Marine and Ports Division
Queensland Department of Transport*

OPERATIONAL AND ENVIRONMENTAL CRITERIA FOR ASSESSMENT OF REQUESTS FOR SAFE HAVEN

Initial Notification

Information obtained initially from the vessel requesting safe haven should contain:

- °
- Name, Nationality and Flag State of vessel
- Owner of vessel
- Size, length, beam and draft of vessel
- Local or Australian agent
- Position of vessel
- Course and speed (steaming, adrift or at anchor)
- Weather and sea conditions
- Type of vessel and cargo classification, (access automated manifest systems such as "Sea Cargo")
- Nature and quantity of hazardous or harmful substances carried
- Nature and extent of damage
- Cause of damage
- Casualties
- Immediate assistance required
- Actual pollution or potential for pollution
- Response action taken by vessel
- Details of safe haven request
- Person on ship making request
- preferred language for communications
- Date/time of request

The responsible authority receiving a request for safe haven shall immediately inform the other responsible authorities.

Criteria for Classification of Casualties

The following criteria must be addressed when assessing a vessel requesting safe haven:

- Current and forecast weather and sea conditions at vessel position
 - Vessel size
 - Current and forecast structural condition of vessel
 - Operational and mechanical status
 - Type and integrity of cargo (declaration of pollutants/noxious, hazardous substances aboard)
 - Pollution risk
 - Risk of fire explosion or toxic hazard
 - Repairs being undertaken aboard
-

-
- Limitation of crew capabilities and resources
- Compliance with insurance requirements
- Requirement for human casualty assistance/evacuation
- Requirement for inspection by surveyors/Harbour Master
- Requirement for tugs
- Requirement for salvage crew
- Requirement to undertake lightening operations

Operational Requirement for Selection of Safe Haven

The following operational criteria must be considered in selecting a safe haven:

- Adequate sea room and depth of water with relatively unobstructed approach from seaward
 - Presence of good holding ground for immediate anchoring during approach
 - Availability and positioning of suitable tugs or other support vessels during approach
 - Availability of helicopters or fixed wing aircraft for rescue or surveillance
 - Provision of marine pilot during approach
 - Prevailing weather conditions during approach
 - Shelter from prevailing weather and swell at safe haven
 - Suitability of holding ground at safe haven
 - Access to safe haven by land and air transport modes
 - Availability of berthing and maintenance facilities if required and consideration of the actual and potential physical and economic effect of the requesting vessel on such facilities and port operations
 - Availability of firefighting and oil pollution response equipment and operating personnel
 - Compliance with instructed preventative measures (navigational directions, marine surveyor/salvor aboard to ensure compliance with preventative instructions, tugs in attendance as directed, compulsory pilotage)
 - Any requirement under Administration legislation to post an adequate bond to cover any risk (pollution, grounding, damage to port facilities)
 - Overall risk posed to coastal waters, coastline or proposed safe haven
 - Restricting or prohibiting unauthorised vessels/vehicles and personnel as required during operation
 - Through Civil Aviation Authority, restriction on use of air space over vessel route or haven, if required
 - Notification of Quarantine and Customs as required
 - Alternatives to granting safe haven (facilitating on board repairs)
 - When practical, and particularly where serious impact to coastal resources may occur, consultation with the community should be undertaken as soon as possible.
-

Environmental and Socioeconomic Requirements for Selection of a Safe Haven

The requirements listed under must be considered in conjunction with operational factors:

- Assessment of environmental risk to ecological and socioeconomic resources, both along the approach to and at the proposed safe haven
 - Ecological and socioeconomic resources include reefs, islands coastline, significant species, habitats, fisheries, commercial activity and amenities
 - Analysis of "worst case" scenario and the effects on environmental resources
 - Liaison with environmental groups within the community
-



APPENDIX

US. COAST GUARD MARINE SAFETY MANUAL Volume VI - Ports and Waterways Activities Chapter 1 - Ports and Waterways Safety

F. Force Majeure

1. General. Force Majeure is a doctrine of international law which confers limited legal immunity upon vessels which are forced to seek refuge or repairs within the jurisdiction of another nation due to uncontrollable external forces or conditions. This limited immunity prohibits coastal state enforcement of its laws which were breached due to the vessel's entry under force majeure.

2. Definition. Emergency entry, or force majeure, is defined as an overwhelming force or condition of such severity that it threatens loss of the vessel, cargo or crew unless immediate corrective action is taken. Force majeure is based upon the historical premise in international law that, if a vessel is compelled to move into the waters of a foreign state by some uncontrollable external force, then the vessel should be excused from compliance with domestic laws which prohibit such entry.

3. Burden of Proof. The burden of proof that a vessel has a valid claim of force

majeure rests with the vessel, its master and owner. A claim of force majeure is supported only by the existence of overwhelming conditions or forces of such magnitude (e.g., severe storm, fire, disablement, mutiny) that they threaten the loss of the vessel, crew, or cargo unless immediate action is taken. Conversely, an invalid claim of force majeure has no effect on the authority of the coastal state to take all appropriate law enforcement action against an entering vessel.

4. COTP Authority. Each Coast Guard COTP, and the District Commander, has the authority to verify and then accept or reject claims of force majeure for the purposes of enforcing applicable laws. Even if a vessel exhibits a valid force majeure claim, the COTP may nevertheless take action to remove a hazard to life or property under the authority of the Ports and Waterways Safety Act (33 USC 122 1, et seq.). For example, in the event of fire, flooding, or collision damage which may affect the safety of a vessel or its cargo the COTP would ascertain the condition of the vessel, determine the existence of any hazard to the port, and make any COTP order consistent with the right of entry under force majeure and the protection of the port. The COTP may direct the vessel to a specific location and not to the port of their choice. However, once a force majeure claim has been validated, the Coast Guard alone is the Federal agency responsible for granting or denying vessel entry.

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