

Places of Refuge and CMI Developments

Stuart Hetherington

Partner, Withnell Hetherington

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Stuart Hetherington is a Partner of the Sydney Transport Law Firm of Withnell Hetherington. He is a past President of the Maritime Law Association of Australia and New Zealand and an Executive Councillor of the Comité Maritime International (CMI).

He is the author of Annotated Admiralty Legislation and a co-author of the Admiralty Section in Laws of Australia.

PLACES OF REFUGE

AND

CMI DEVELOPMENTS

1. **Report on Places of Refuge Submitted by CMI to IMO Legal Committee. August 2004.**
2. **Report of the International Subcommittee on Places of Refuge. 4 June 2004.**

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REPORT ON PLACES OF REFUGE
SUBMITTED BY COMITE MARITIME INTERNATIONAL (CMI) TO THE IMO
LEGAL COMMITTEE

EXECUTIVE SUMMARY

In accordance with a request made by the Legal Committee at its 87th Session in October 2003 the CMI has carried out a further study of this topic and submits this Report.

ACTION TO BE TAKEN

This Report concludes (under the heading “Solutions”) that either an International Convention, or amendments to existing Conventions, or Guidelines need to be prepared, covering the topics described in the Report, in order to remedy the deficiencies in the present regime identified in this Report. CMI invites delegates to discuss these alternatives and decide which is preferred.

HISTORY OF PROJECT

At the 87th Session the Legal Committee received a report (LEG 87/7/2) from CMI, which summarised the responses received from National Associations to the second Questionnaire which had been sent to them enquiring as to whether their States would accept liability where pollution damage ensued in circumstances in which the vessel had either been permitted a Place of Refuge, or in circumstances in which a vessel had been denied or refused a Place of Refuge.

At the 23rd Regular Session of the Assembly of the IMO a Resolution requested that the Legal Committee "consider the provision of financial security to cover coastal States' expenses and/or compensation issues and to take action as it may deem appropriate".

At its 38th Conference in Vancouver, BC, Canada in June 2004 CMI devoted a day to discussing 8 topics relevant to Places of Refuge issues. Those topics included “The Obligation to offer a Place of Refuge”, “Penal Liability”, “Reception Facilities”, “Civil Liability and Monetary Incentives”, and “Designation of Places of Refuge and Mechanisms for Decision Making.” Papers were prepared on each of the topics which were discussed; which can be found on the CMI website (www.comitemaritime.org).

A Report of the International Subcommittee is contained in an Appendix to this Report which has been deposited in the IMO library and copies will be made available in the English,

Spanish and French languages by the CMI observer delegation to the Legal Committee Meeting.

In addition to delegations representing National Associations the International Association of Ports and Harbours (IAPH), the International Salvage Union (ISU), the International Group of P and I Clubs, the International Chamber of Shipping (ICS) and the International Union of Marine Insurers (IUMI) were represented and participated in the debates. IAPH, ISU and IUMI are strong advocates for an International Convention to be developed in this area.

ISSUES IDENTIFIED

A large number of delegations supported the views that:-

- The right, according to customary international law, for a vessel in distress to be granted a place of refuge no longer appears to be recognised by many States as an absolute right and has become clouded.
- Either an International Convention, (or Guidelines or amendments to other Conventions) supplementing and consistent with the current liability regimes needs to be prepared in order to address the deficiencies in the present system, and would cover such topics as:
 - (a) the rights and obligations of States when faced with a request for access to a place of refuge, but which recognises the customary international law position pursuant to which there was an absolute right to be granted a place of refuge and a State's sovereignty and right to protect the marine and land based environments,
 - (b) civil and criminal liability/immunity of States and others involved in place of refuge situations,
 - (c) compulsory insurance, direct action, financial compensation and security for States who grant access to places of refuge,
 - (d) the impartiality and objectivity of decision makers,
 - (e) the application of consistent international approaches in relation to the predesignation and publicity of identified places of refuge,
 - (f) availability of funds to meet gaps in present liability regimes.

It was noted that steps are being taken to deal with some of these issues on a unilateral basis by some countries and on a regional basis, which will lead to a lack of uniformity in

maritime law. (See for example the EEC Vessel Traffic Monitoring and Information System Directive 2002 Articles 20 and 26.3, the latter of which requires the Commission to “examine the need for measures to facilitate the recovery of or compensation for costs and damage incurred for the accommodation of ships in distress, including appropriate requirements for insurance or other financial security”).

LEGAL DEFICIENCIES IN THE PRESENT SYSTEM

1. There is currently **no single International Convention** which identifies the rights and obligations of a State when it is faced with a request for a place of refuge. There are many Conventions which touch on the subject and some contain conflicting rights and obligations. Such Conventions include the Salvage Convention 1989 (especially Article 11); the Solas Convention, (Regulation 15 of Chapter V); the OPRC Convention 1990 (especially Articles 5, 6, 7 and 10); and UNCLOS 1982 (especially Articles 17, 18, 21, 24, 39, 56, 98, 192, 194, 195, 198, 199, 211, 221, and 235.) The IMO Guidelines on places of refuge for ships in need of assistance (Adopted 5 December 2003) provide a most useful framework from an operational perspective and also, perhaps, set benchmarks against which the conduct of shipowners, masters, salvors and States can be judged in a place of refuge situation but does not clarify the sometimes contradictory or inconsistent legal obligations that some of those parties may currently be under.
2. Although there are principally four International Conventions dealing with the liabilities arising from pollution damage: Civil Liability Convention 1969 (CLC), and its Protocols; The Fund Convention 1971, and its Protocols; the Hazardous and Noxious Substances by Sea Convention 1996 (HNS); the Bunker Convention 2001; and the proposed Wreck Removal Convention will have a role to play, not all are in force and even those which have wide support in the international community may not necessarily be in force in a country from whom access to a place of refuge is sought.
3. Even in circumstances in which one or more of the four principal Conventions apply in a place of refuge situation they have within them **exclusions** from liability for pollution damage which benefit shipowners (and their insurers), and which could operate to the detriment of a State in such a situation. They are not identical but generally apply in circumstances in which pollution damage results from: an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character or was wholly caused by an act or omission done with intent to cause damage

by a third party or was wholly caused by the negligent wrongful act of any government or local authority responsible for the maintenance of lights or navigational aids. (See for example: CLC-Article 3; Fund Convention Article 4 para 2; HNS Convention Article 7 para 2 ; Bunker Convention Article 3.)

4. There are further significant **exclusions** under those Conventions, which could be relevant in a Place of Refuge situation. They apply where the owner proves that the pollution damage resulted wholly or partially, either from an act or omission done with intent to cause damage by the person who suffered the damage, *or from the negligence of that person*. (See for example CLC Article 3(iii); Fund Convention Article 4 para 3; HNS Convention Article 7 para 3; Bunker Convention Article 3 para 4.)
5. In addition all the regimes have built into them **limitation provisions**, which cap the ship owner's liability and could leave a State or its citizens uncompensated in a Place of Refuge situation (See for example CLC Article 5 of the 1969 Convention, as amended by the 1992 Protocol; Fund Convention Article 4, as amended by the 1992 Protocol; HNS Convention Article 9; Bunker Convention Article 6.)
6. Where a State fails adequately to assess a request for access to a ship in distress and refuses such access and the ship then founders as a result it is arguable that the State has acted negligently and the ship owner may not be liable to compensate that State for any ensuing damage which is occasioned. Furthermore the State may have a liability to its own citizens or another State for acting negligently and failing to grant access to a place of refuge, especially where a liability Convention does not apply or the fund available from the shipowner is inadequate to meet all claims.

CONCERNS IDENTIFIED IN THE PRESENT SYSTEM

1. States who are unwilling to take a risk with a vessel seeking a place of refuge insist on financial securities well in excess of the amounts pursuant to which the ship owner would be entitled to limit its liability for any ensuing damage under either the applicable limitation provisions contained in the relevant Convention or under the applicable Limitation Convention. Such demands may well be in breach of the treaty obligations of a coastal State.
2. Some decisions to refuse a place of refuge have often been taken by States without the benefit of objective technical examination of all the facts and circumstances.

3. A divergence of views amongst States as to whether it is appropriate to publicise predetermined places which are regarded as suitable for a Place of Refuge.
4. The absence of a clarifying framework which sets out the rights and obligations of States leads to bad decision making, wasted effort and time potentially leading to bad outcomes.
5. Both salvors and States need to be given greater incentives to assist ships in distress and the availability of a fund on an International or regional basis to meet expenditure which is not otherwise likely to be recovered. This would greatly enhance the present system. (A disaster contingency fund being one suggestion.)
6. Any new Convention should contain a rebuttable right of entry, in other words that a State has a duty to permit access to a vessel in distress but not if it can demonstrate that the condition of the ship is more likely than not to worsen and cause greater harm than might otherwise be caused if the request was refused.
7. The IMO Guidelines on Places of Refuge for ships in need of assistance, to which reference has been made earlier, could be incorporated in a new process oriented Convention.
8. The view has also been expressed that , as with reception facilities for oil residues, the creation of reception facilities for ships in distress (special permanent or floating docks located in strategic geographical locations) would facilitate the determination of the rights and obligations of States in receipt of a request for a place of refuge, as well as the decision making and determination of liability issues. Relevant provisions could be included in a new Convention on Places of Refuge or in an amendment to MARPOL 73/78 or the OPRC Convention. Concerns were expressed in connection with this idea as to its practicability and funding.

SOLUTIONS

1. **Either** preparation of an international Convention which, if thought appropriate, could include provisions covering the following topics:
 - (a) the rights and obligations of States when they are in receipt of a request for a place of refuge,
 - (b) the granting of immunity for States from any claims, including recourse actions, when they provide a place of refuge,

- (c) the consequences for States who unjustifiably fail to grant a place of refuge,
 - (d) the circumstances in which States can require financial securities from shipowners, their form, limits and terms,
 - (e) the liability compensation regime(s) which are to apply when pollution ensues in circumstances when a right of access to a place of refuge is granted or refused,
 - (f) the requirement for objectivity and technical expertise to be applied when decisions are made to grant or refuse a place of refuge,
 - (g) the requirement for detailed reasons for refusal to be set out,
 - (h) the requirements for places of refuge to be designated in advance by the coastal State and whether this should be publicised,
 - (i) what, if any, criminal penalties are applicable when places of refuge are requested and granted or refused,
 - (j) whether compulsory liability insurance should be carried by all vessels seeking a place of refuge,
 - (k) whether direct action against the insurer should be permitted in a place of refuge situation,
 - (l) whether a shipowner requesting a place of refuge should be required to waive any applicable limitation of liability,
 - (m) the establishment of a fund (or funds) on either an International or regional basis to meet any excess liabilities not covered by current regimes faced by a State granting a place of refuge.
2. **Or** drafting amendments to International Conventions already in existence to cover the matters listed in 1 (a) to (m), such as CLC, Intervention Convention 1973, Salvage Convention 1989, UNCLOS 1982, MARPOL 1973, SOLAS, OPRC 1990, HNS 1996, Bunker 2001.
3. **Or** drafting Guidelines dealing with the matters listed in 1 (a) to (m).

Stuart Hetherington.

Chairman CMI International Working Group on Places of Refuge.

August 2004

REPORT OF THE INTERNATIONAL SUBCOMMITTEE

ON PLACES OF REFUGE

The Subcommittee met on 3 June 2004 under the Chairmanship of Stuart Hetherington. The meeting considered the following eight issues, all of which were the subject of written papers and presentations:

got papers?

1. The obligation to offer a place of refuge – Eric van Hooydonk
2. Penal liability – Frank Wiswall
3. Reception facilities – Gregory Timagenis
4. Civil liability and monetary incentives – Stuart Hetherington
5. Designation of places of refuge, mechanism for decision making – Richard Shaw

In addition to the papers published in the Vancouver papers there were papers on the website and an agenda paper identifying some 28 questions directed to issues raised by the papers.

The meeting was reminded that the genesis of CMI's involvement on this topic was the assistance rendered to IMO (as a result of the "Castor" incident in 2001) by responses to two questionnaires submitted to National Associations which considered what States had done in their national legislation to give effect to certain International Conventions: Salvage, UNCLOS and OPRC, and what the civil liabilities of States might be in circumstances in which oil pollution ensued from a failure to grant a place of refuge or to accept a place of refuge.

In addition there had been the following International developments since 2001:-

- (i) The IMO Resolution giving effect to Guidelines for a master in need of a place of refuge and for actions expected of coastal States;

- (ii) EEC Vessel traffic Monitoring Directive of 2002;
- (iii) CMI Bordeaux Colloquium, June 2003;
- (iv) CMI International Subcommittee, November 2003.

In his extremely well researched (and argued) paper Eric van Hooydonk pointed out that the right according to customary international law to be granted a place of refuge has become clouded and can no longer be regarded as an absolute right.

There was a view expressed at the meeting by some delegates and two significant stakeholders (IUMI and IAPH) that CMI should, with the support of IMO, seek to develop an International Convention or amendments to existing Conventions or Protocols to clarify the framework needed to balance the interests of shipowners and others interested in the safety of the ship and the potential dangers to the environment and others from a damaged vessel.

Others, however, questioned whether States would ratify a new Convention (or permit amendments to Conventions) if they impacted on their sovereignty.

Some National Associations considered that the work had ventured beyond the tasks requested of CMI by IMO.

There was a strong view that if any new Instrument (or amendments to existing Instruments) is to be developed questions of financial compensation and security would need to be included to make it a feasible proposition. There was no dispute that there are uncertainties in the current situation in which some of the framework Conventions await ratification (HNS and Bunker) and one is still in the gestation period (Wreck Removal). It is thought that these circumstances do not encourage States to assist vessels in distress. There was a general view that if there is a risk that States face liabilities they should be removed and any gaps in the present regimes need to be covered, so as to encourage States that they will, so far as possible, not suffer if damage ensues after a place of refuge has been granted.

There was also support for the view that the preferable approach concerning security for any potential claims is that all ships should be required to carry compulsory liability insurance and there should be direct action to avoid the problems associated with delay when negotiations take place over the amount and wording of a guarantee or letter of comfort.

Great concern was expressed by a number of delegates in relation to the treatment of masters and others which Frank Wiswall highlighted in his paper on criminalisation. Concern was expressed as to the adverse effect it has on the willingness of a ship's master and/or an owner to seek a place of refuge. There would seem to be a possibility that CMI could assist IMO and ILO in seeking to resolve this issue. As our Rapporteur pointed out, it is not only ship's masters who are at risk but also salvors and lawyers who may be on board in a salvage situation where States, in breach of their obligations under the United Nations Law of the Sea Convention, take action to detain and charge masters, salvors and others arising from a marine casualty or incident.

Frank Wiswall quoted from a presentation to the European Parliament of the IMO Secretary General which is reproduced below:-

"My concern is threefold:-

1. I am concerned about the impact the prolonged detention may have on the morale of the seafarers under detention;
2. I am concerned about the seafarers of the world as a whole who may justifiably fear for their future livelihoods following an accident involving the ships on which they serve; and
3. I am concerned about the impact an act of detention may have on the global campaign to attract youngsters to the maritime profession, particularly at a time when there is a shortage of quality officers and there is a strong possibility of a shortage of ratings as well in the not too distant future

The IMO Conventions have not been drafted with the prospect of non-compliance giving rise to criminal prosecution and, therefore, any move to criminalise polluters will constitute a significant departure from the established philosophy in the formulation of IMO Conventions”.

Whilst there appeared to be general agreement that the SOSREP model was an ideal, so that decision making is done by independent people (not amenable to political pressure) it was recognised that this may not suit all cultures. Similarly, it was accepted that some countries take the position that there is no problem with predesignating and publicising places of refuge whilst others prefer not to publicise in advance and treat each situation on an ad hoc basis.

Whilst considerable interest was expressed in Gregory Timagenis' paper recommending a requirement that reception facilities (such as floating docks) may need to be located, at least near busy seaways, which may be funded on a regional basis, delegates expressed concerns about the practicality of this suggestion and remarked on the problems of docking laden vessels, the unpredictability of where their services might be needed, and the cost of providing such facilities.

The Subcommittee proposes to prepare a report arising from the meeting, especially dealing with the issues of liability and compensation and continue its work in co-operation with the Legal Committee of the IMO and other interested bodies.

The numbers that attended throughout the day (standing room only) and the volume of materials produced on the topic by CMI and others speaks volumes for the interest there is in the topic and the work that needs to be done to bring greater clarity and uniformity to this topic.

Stuart Hetherington
Chairman
International Subcommittee
Vancouver, B.C., Canada
4 June 2004