

# **CMI Report**

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## INSTRUMENT ON PLACES OF REFUGE

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1. General

(a) Introduction

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

(b) Customary International law

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

(c) IMO Resolution A949(23)

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

2. Definitions

For the purposes of this Instrument:

- (a) “ship in need of assistance” means a ship in circumstances [apart from one requiring rescue of persons on board,] that could give rise

to loss of the ship or its cargo or to its becoming an environmental or navigational hazard.

- (b) “place of refuge” means a place where a ship in need of assistance can stabilise its condition and reduce the hazards to navigation, [and to protect human life] and the environment.
  - (c) “competent authority” means an organisation, whether owned by the State, privately owned or in public ownership which has the right to permit or refuse the entry of ships, which are in need of assistance, to a place of refuge.
  - (d) “relevant Convention” means those Conventions listed in Appendix 1.
  - (e) “limitation sum” means the amount pursuant to which a shipowner is able to limit liability under one of the International Conventions listed in Appendix 1.
  - (f) “ship owner” includes bareboat charterer.
3. It is intended that this Instrument shall provide guidance whenever judicial or arbitral proceedings relating to matters dealt with in this Instrument are brought.
  4. States and competent authorities have a duty to permit access to a place of refuge by a ship in need of assistance, unless it can be demonstrated, objectively, on reasonable grounds, that the condition of the ship is such that it and/or its cargo is likely to cause greater damage if permission to enter a place of refuge is granted than if such a request is refused.
  5. In circumstances in which a State or competent authority grants access to a place of refuge to a ship in need of assistance and damage is caused to the ship, its cargo or other third parties or their property the State or competent authority shall have no liability to such claimants unless:

- (a) it is established that the State or competent authority has acted unreasonably in granting access to a place of refuge to the ship and
  - (b) the damage was caused by the decision to grant access to the ship.
6. In circumstances in which a State or competent authority refuses to grant access to a place of refuge to a ship in need of assistance and damage is caused to another State or a third party or their property by reason of such refusal and the State or competent authority which refused access is unable to establish that it acted reasonably in refusing such access and it is demonstrated by the other State or third party that the damage caused would have been unlikely to have been occasioned had access been granted the State or competent authority which refused access shall be liable to compensate the other State or third party for its loss and damage.
7. In circumstances in which a State or competent authority refuses to grant access to a place of refuge to a ship in need of assistance and that ship sustains further damage by reason of such refusal and the State or competent authority which refused access is unable to establish that it acted reasonably in refusing such access and it is demonstrated by the ship owner that the damage caused would have been unlikely to have been occasioned had access been granted the State or competent authority which refused access shall be liable to compensate the ship owner for its loss and damage occasioned thereby.
8. For the purposes of ascertaining under paragraphs 5, 6 and 7 of this Instrument whether a State or competent authority has acted reasonably courts or tribunals should have regard to all the circumstances which were known (or ought to have been known) to the State or competent authority at the relevant time, having regard in particular to the enquiries which ought to have been conducted in accordance with IMO Resolution A949(23) in assessing requests made on behalf of ships for access to a place of refuge.

9. Where a State or competent authority grants access to a place of refuge to a ship in need of assistance it shall be reasonable for the State or competent authority to make such access conditional on the provision of a guarantee or letter of security by a member of the International Group of P&I Clubs or other recognised Insurer or Bank or Financial Institution, in the form of Appendix 2 to this Instrument, in an amount up to the limit of liability calculated in accordance with the relevant Convention [applicable to that ship].
10. Where a ship in need of assistance, which seeks access to a place of refuge is not otherwise required to have compulsory insurance or provide evidence of other financial security it will be reasonable for a State or competent authority to refuse access to a place of refuge by that ship where there is a reasonable prospect that damage could be sustained to property or the environment or that the ship may become a navigational hazard, if the ship does not have insurance [coverage]:
  - (a) that gives coverage up to any applicable limitation amount which applies to that ship in respect of:
    - (i) pollution damage arising out of a spillage of oil.
    - (ii) pollution damage arising out of a spillage of bunkers.
    - (iii) pollution damage caused by a spillage of hazardous and noxious substances.
    - (iv) wreck removal expenses.
    - (v) damage by impact or explosion.
  - (b) that gives a direct right of action against the insurer, with no intervening "pay to be paid" condition.
11. States shall draw up plans to accommodate in the waters under their jurisdiction ships seeking assistance and such plans shall contain the necessary arrangements and procedures to take into account operational and environmental constraints to ensure that ships in distress may immediately go to a place of refuge, subject to

authorisation by the State, or competent authority. Such plans shall also contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response.

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

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## APPENDIX 1

### APPLICABLE INTERNATIONAL CONVENTIONS

The following Conventions and Protocols are considered relevant.

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



- Convention on Limitation of Liability for Maritime Claims (LLMC), 1976.
- International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969.
- International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992.
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992.
- Hazardous and Noxious Substances Convention 1996.
- Bunker Convention 2001.
- Facilitation of International Maritime Traffic 1965.
- International Regime of Maritime Ports 1923
- Convention and Statute on Freedom of Transit 1921.
- Convention on Regime of Navigable Waters of International Concern 1921.

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## APPENDIX 2

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

Dear Sirs

#### Heading – Details of Ship, Casualty and Place of Refuge

In consideration of:-

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

and upon condition that:-

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

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

1. limited in any event to the total aggregate sum of US\$[                    ], less:
  - (a) Any amounts we (name of Club/Bank/Financial Institution/Insurer) have paid under any Certificate of Financial Security issued by us or on our behalf in respect of or relating to the Claims; and
  - (b) Any amounts paid or payable by (name of Owners) the Owners [(name of bareboat charterers) the bareboat charterers] of the (name of ship) or by us in respect of or relating to the Claims, whether paid under this Guarantee or otherwise; and
  - (c) Any amount equal to any limitation fund(s) constituted by us and/or (name of Owners) the Owners [(name of bareboat charterers) the bareboat charterers] of the (name of ship) in relation to the Claims in accordance with any applicable law; and
  
3. without prejudice to or waiver of:-
  - (a) any rights (name of Owners) the Owners [(name of bareboat charterers) the bareboat charterers] of the (name of ship) may have to limit their liability under any applicable law or convention;
  - (b) any rights (including the right to limit liability) or defences which we (name of Club/Bank/Financial Institution/Insurer) may have under any applicable law or convention.

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

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

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