PLACES OF REFUGE

Submitted by the Comité Maritime International (CMI)

SUMMARY

Executive summary: In accordance with the request made by the Legal Committee at its eighty-seventh session in October 2003, the CMI has carried out a further study on places of refuge, which is submitted in this document.

Action to be taken: Paragraph 25

Related documents: LEG 87/7/2

History of the project

1  At its eighty-seventh session, the Legal Committee received a report (document LEG 87/7/2) from the CMI, which summarized 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.

2  At the twenty-third regular session of the IMO Assembly, 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”.

3  At its thirty-eighth Conference in Vancouver, Canada in June 2004, the CMI devoted a day to discussing eight 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).

4  A report of the International Subcommittee is available as an Appendix to this document, and has been deposited in the IMO library. Copies will be made available in the English, Spanish and French languages by the CMI observer delegation to the Legal Committee.
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 Associations (P and I), 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**

6 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 recognized 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:

  (i) the rights and obligations of States when faced with a request for access to a place of refuge, but which recognizes 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;

  (ii) civil and criminal liability/immunity of States and others involved in place of refuge situations;

  (iii) compulsory insurance, direct action, financial compensation and security for States who grant access to places of refuge;

  (iv) the impartiality and objectivity of decision makers;

  (v) the application of consistent international approaches in relation to the predesignation and publicity of identified places of refuge;

  (vi) availability of funds to meet gaps in present liability regimes.

7 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 current system**

8 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.

9 There are four principal international conventions dealing with the liabilities arising from pollution damage: the 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) and the Bunkers Convention 2001. The proposed wreck removal convention will also have a role to play. Not all of these conventions are in force and even those which have wide support in the international community may not necessarily be in force in a State from whom access to a place of refuge is sought.

10 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, paragraph 2; HNS Convention Article 7, paragraph 2; Bunkers Convention Article 3.)

11 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, paragraph 3; HNS Convention Article 7, paragraph 3; Bunkers Convention Article 3, paragraph 4.)

12 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; Bunkers Convention Article 6.)

13 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 shipowner 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

14 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.

15 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.

16 A divergence of views amongst States as to whether it is appropriate to publicize predetermined places which are regarded as suitable for a place of refuge.

17 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.

18 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.)

19 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.

20 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.

21 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

22 Either preparation of an international convention which, if thought appropriate, could include provisions covering the following topics:

(i) the rights and obligations of States when they are in receipt of a request for a place of refuge;

(ii) the granting of immunity for States from any claims, including recourse actions, when they provide a place of refuge;

(iii) the consequences for States who unjustifiably fail to grant a place of refuge;

(iv) the circumstances in which States can require financial securities from shipowners, their form, limits and terms;
(v) 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;

(vi) the requirement for objectivity and technical expertise to be applied when decisions are made to grant or refuse a place of refuge;

(vii) the requirement for detailed reasons for refusal to be set out;

(viii) the requirements for places of refuge to be designated in advance by the coastal State and whether this should be publicized;

(ix) what, if any, criminal penalties are applicable when places of refuge are requested and granted or refused;

(x) whether compulsory liability insurance should be carried by all vessels seeking a place of refuge;

(xi) whether direct action against the insurer should be permitted in a place of refuge situation;

(xii) whether a shipowner requesting a place of refuge should be required to waive any applicable limitation of liability; and

(xiii) 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.


24 Or drafting Guidelines dealing with the matters listed in paragraph 22 (i) to (xiii).

Action requested of the Legal Committee

25 The Legal Committee is invited to consider the proposals contained in paragraphs 22, 23 and 24 above and to decide and comment as appropriate.