



**International Association of Ports and Harbors  
World Ports Association, World Ports Conference**

Comite Maritime International (CMI)  
Attn. Stuart Hetherington  
Chairman IWG Places of Refuge

Rotterdam, 22 June 2007

Subject: CMI's draft Instrument on Places of Refuge – position International Association of Ports and Harbors (IAPH)

Dear Mr. Hetherington

Your e-mail of Tuesday 5 June 2007 with which you circulated CMI's draft Instrument on Places of Refuge was received in good order. The draft text resulted from inter alia the exchange of thoughts during CMI's ICS meeting on 22 May 2007 in London.

During the discussions various subjects were tabled. From IAPH's side special attention was asked for paragraph 7 of the draft Instrument. My colleague Wilko Tjisse Claase of Port of Amsterdam explained that ports as potential suppliers of (often well-equipped) places of refuge consider 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, as an important sub-instrument in the context of giving a ship in distress access to a place of refuge. Mr Wilko Tjisse Claase also explained that ports are particularly worried about the wording of paragraph 7 which limits the amount of the financial security to the applicable limit of liability. It was agreed that IAPH would explain its position on this specific point further.

IAPH fully agrees with the approach that the decision to give or deny access to a place of refuge to a ship in distress should be based on a case by case approach. In this approach the potential for damage immanent to refusing access should be compared with the potential for damage immanent to permitting the ship in distress to access the place of refuge. In case the risk of damage if the ship were to remain on the high seas is higher than the potential for damage to be caused in the place of refuge, the ship should in principle be given access to remedy its troubles in a place of refuge.

However, this approach will only work if proper consideration is also given to the interests of those parties who will absorb these lesser risks when giving access to a place of refuge to a ship in distress. In the present wording of paragraph 7 where the security to be provided is restricted to the limited liability, this reality is not recognised. It is indeed not uncommon that the damage caused in a place of refuge exceeds the applicable limit of liability, also taking into account that at present important international conventions in this field, such as the HNS Convention, the Bunkers Convention and the Wreck Removal Convention, are not yet in force. From a policy perspective, it is IAPH's view that it is unfair to 'punish' a party who allows a ship in distress access to a place of refuge by imposing limits of



liability or limits on the amount of security to be given in return for the permission to enter. After all, by allowing access to a place of refuge that party already subordinates his own other interests as well as the interests of local people and businesses to the serving of an even wider concept of the (often international) public good which includes the general interests of promoting safety at sea, of preventing pollution of the environment and of overall mitigation of damage.

Why should that party also accept only a limited recovery of his resulting damage, if thanks to his permission of entry to the ship in distress many other parties escaped from suffering damage altogether or were able to mitigate their damage considerably?

In addition, imposing limitation of liability in the context of places of refuge may also prove counter-productive, because it introduces improper financial considerations for parties involved in a decision making process that should be focused on providing the most effective and cost-efficient assistance to a ship in distress.

As the right to limitation of liability of the ship-owner by its very nature is an optional right, IAPH fails to see why the permission to enter a place of refuge could not be made conditional on open-ended security and a waiver by the ship-owner of this right to limitation.

It should be borne in mind that in any of these cases this potential damage in a place of refuge is nevertheless not exceeding the potential for damage of a scenario where the ship remains on the high seas. It is worth noting in this regard, that the ship-owner by being allowed access to the place of refuge, may not only avoid (exposure to) liabilities towards third parties which may be subject to limitation under the 1976 LLMC Convention (and the 1996 Protocol), or under the CLC Convention as the case may be, but that he may also avoid such liabilities as for wreck and cargo removal, for which in some jurisdictions the ship-owner can not limit liability at all and in other jurisdictions he must put up a separate and considerably higher limitation fund. In fact, the financial benefits of the ship-owner and his underwriters are even greater than that, because if the ship in distress is allowed access to the port of refuge the ship-owner may even be able to save the ship and freight. However, the potentially high salvaged values of the ship and freight are currently not taken into consideration when determining the appropriate level of security to be granted to the party who allows the ship in distress access to a place of refuge.

From an overall point of view and taking into account all interests concerned including that of the safety of seafarers, the protection of the environment, the ship and the cargo, it is clear that an incentive is needed for those parties who are expected to absorb the (lesser) potential for damage in a place of refuge. This is not an uncommon approach in maritime law. In this respect I would point to the salvage fee where there is an incentive paid to the salvor on the basis of the value of the cargo recovered - and sometimes also taking into account - somewhat artificially – any sums that might have been spent would the ship have remained at the high seas. It is however not the position of the ports to adopt this salvage fee approach when giving access to a ship in distress, i.e. asking for a reward if the operation is successfully finalised. The approach would rather be that the actual costs and damages of any party involved in such operations is borne by the ship and the other interests involved without any limitation.

In view of the above considerations, I would like to stress that paragraph 7 of the draft Instrument is not acceptable to IAPH. When further discussing this draft Instrument, could you please take due note of our standpoint in order to avoid misrepresentations.



We trust that the above information will be of assistance to you in understanding our position. Further we trust that on this basis the combined interests of the ship-owner, the cargo and the environment (i.e. the coastal States) will cooperate in finding an appropriate solution in case of an incident ship seeking shelter in a place of refuge being a port.

Faithfully yours,

International Association of Ports and Harbors



Frans van Zoelen,  
Chair, Legal Committee