

PLACES OF REFUGE

Submitted by the International Association of Ports and Harbours (IAPH)

Summary

Executive summary:

This document contains the position of IAPH concerning the current liability and compensation regime in Place of Refuge situations. In the opinion of IAPH the current system is not-conclusive and therefore not satisfactory. IAPH underlines therefore the necessity of a conclusive liability and compensation system on the matter and is therefore a strong advocate for the development of a convention on Places of Refuge.

Action to be taken:

Paragraph 8

Related documents:

LEG 84/7/1

1. With great interest IAPH has taken notice of the Report on Places of Refuge submitted by the Comité Maritime International to the IMO Legal Committee (LEG 89/7). IAPH wants to complement CMI with this analysis which brings much more clarity and uniformity to this complicated topic. The report is the outcome of the CMI-Conference of June 2004 in Vancouver during which the subject of Places of Refuge was prominently on the agenda. IAPH participated intensively in the debate in Vancouver and in the discussions which followed.

2. IAPH recalls, in this respect, also its own submission for the Legal Committee from 19 March 2002 (LEG 84/7/1) in which IAPH asked attention for the followings points of specific interest.

- The decision-making process concerning Places of Refuge has to be modelled via a balance of interests (i.e. ship and marine environment) on a case-by-case basis and has to be laid down in a rule of international law.

- A legal framework for immunity for those responding to ships in distress or offering them shelter and more generally in the event of an accident, a liability that is incumbent on the ship rather than the port.

In the current legal framework the acceptance or refusal of a ship in distress to a place of refuge could entail risks for the public and/or port authority, both in terms of financial risks and liability. The system has to ensure that a public and/or port authority taking the necessary measures will have a remedy for recovering its losses and expenses. Besides this the public and/or port authority has to be protected against liability-claims following the cause of the accommodating a ship in distress. In this respect, the coverage of economical losses is a point of concern for IAPH.

- Additional measures have to be created in order to safeguard those (in most cases ports) which have to abide by the decision of a State to grant access to a ship in distress. It has come to the knowledge of IAPH that there are systems of national law that don't cover (all) the costs of ports who have to abide a State's decision.

- A separate regime has to be created for non-compensable damage caused by a ship in distress for a Place of Refuge.

3. CMI states that, besides more practical concerns identified in the present system, there are several legal deficiencies in the current system like:

- No single international convention identifies the rights and obligations of a state when it is faced with a request for a place of refuge.

- Several conventions dealing with the liabilities arising from pollution damage, like the HNS-Convention, the Bunker-Convention and the Wreck Removal Convention, are not yet in force.

For IAPH, it comes without saying that until the moment that the HNS-Convention and the Bunker Convention come into force, a discrepancy will remain with respect to the way damage caused by hazardous materials carried on ships which are not oil tankers will be assessed and compensated because of the LLMC-scope. There is in this respect no regime of strict liability, nor is there any second layer of protection in the form of a compensation fund available. More over in the absence of insurance requirements for all ships, there is no guarantee the ship has sufficient liability insurance and, even if it has, claimants may not have access to it if the insurer can use any of its defences. The Wreck Removal Convention is at this stage still in a draft phase; not clear is therefore to what extent it will provide an element towards a conclusive system.

In this respect IAPH welcomes the proposal of the International Group of P&I Clubs concerning the provision of financial security by means of a letter of guarantee to authorities in relation to vessels granted a place of refuge (LEG 89/7/1) but has also some hesitations. In the opinion of IAPH the total aggregate sum of US\$10 million is arbitrary given the deductability of several amounts that otherwise are paid by the P&I Clubs in a concrete situation and the possible limitation of liability.

IAPH wants to point out that, although the entry into force of the HNS Convention and the Bunker Convention will represent a significant contribution to the existing liability and compensation situation, because a set of potential types of damage, ships and cargoes will be subject to the liability and compensation system, there will be types of damage, ships and cargoes that are not covered by a specific convention and therefore will stay within the scope of the LLMC, for example bulk solids as coal and iron; containerships or a car carriers like the Tricolour. IAPH is concerned about the scope of the LLMC which results in a significant lower protection and leaves damages and costs unsolved.

In the LLMC-system the exact amount of the liability varies due to right of limitation. This right depends on factors such as the size of the ship, the version of the LLMC which applies in the State concerned, the type of claims that are at issue and on the extent to which specific reservations have been made. Besides this, claims will also have to compete for the limited funds available. The absence of third party insurance requirements on ships increases the risks of not receiving full compensation. There is the risk that the ship may not be insured at all. Even if a ship is properly insured, claimants don't always have access to or direct action against this insurance or the insurer will use his right to limit his liability. This imposes substantial financial risks on a port that has to face such ships in distress. It's not impossible that those ships will be abandoned after granting access to a place of refuge. On the other

hand, the absence of sufficient compensation increase the possibility that claims will be directed against the port or public authorities as stated before.

- The liability-conventions that could apply have within them limitations or even exclusions from liability.

- Furthermore the regimes have limitation provisions which could let to non-compensation in a Place of Refuge situation.

4. To solve these lacunas CMI brings forward the following solutions:

Either preparation of an international convention, draft amendments to existing International Conventions or Guidelines which, if thought appropriate, could include provisions covering *inter alia* the following topics:

- the rights and obligation of States when they are in receipt of a request for a place of refuge;
- 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.
- whether compulsory liability insurance should be carried by all vessels seeking a place of refuge;
- 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.

5. IAPH supports the CMI's conclusions concerning the identified gaps in the international system. Furthermore IAPH backs up strongly the solution that is presented by CMI that in order to remedy the deficiencies in the present regime identified in the Report either an International Convention, or amendments to existing Conventions, or Guidelines need to be prepared, covering the different topics in the Report.

6. Herewith, IAPH is in favour to overcome this problem either with an International Convention, or amendments to existing Conventions. IAPH indicates that the draft of Guidelines would probably not lead to a sufficient solution because of the non-mandatory character of this instrument.

7. IAPH wants to express her concerns about the gaps in the current liability and compensation regimes as mentioned above. Only a conclusive system where all damage and costs made in the course of a place of refuge situation will be covered shall allow public and/or port authorities, given the limited decision-time, to focus on the key issue: refusing or granting a ship in distress on technical-environmental considerations.

8. Once again IAPH wants to stress that CMI has done a great job with the clear analysis in which this topic has been expressed in a transparent and accessible way. IAPH hopes that the matter of 'Places of Refuge' will be picked up accordingly to the solutions that are presented by CMI and is of course willing to participate in the further development and elaboration of the solutions that will be chosen