

PLACES OF REFUGE FROM A PORTS' PERSPECTIVE

Introduction

The subject of places of refuge is for ports and harbors in general and for the International Association of Ports and Harbors (IAPH) in particular an important issue. It is evident that this is because of the constant that a place of refuge is very often a *port* of refuge in combination with the fact that major environmental, economic and financial interests are connected with the operation of giving shelter to a ship in distress. This is the reason why the policy issue of places of refuge has been kept under review by the IAPH over the past decade and why IAPH seeks at appropriate moments the floor to signal its standpoints and concerns.

This document gives information on how the subject of places of refuge is envisaged by IAPH. From this angle the proposed solutions are analyzed and will the present position of IAPH in the actual political context be elucidated. The problem of places of refuge is on-going and needs to be addressed as it is inevitable that the catastrophes will continue unless a proper solution is put in place.

Although major factors are at stake when offering refuge to a ship in distress, this does not mean that ports and harbors are adverse towards ships in distress. IAPH propagates a considered approach and applying a decision making process on a case by case basis in which all interests are taken into account in a transparent and verifiable way.

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What is a place of refuge?

When a ship gets into difficulties, one of the main options of an owner or master is to seek to put into sheltered waters where the difficulties can be remedied or minimised before proceeding on the

voyage. This place is known as a “place of refuge”. A place of refuge has been defined as “a place where a ship in need of assistance can take action to stabilise its condition, reduce the hazard to navigation, protect human life and the environment”.¹ Such a place can theoretically be located anywhere within the jurisdiction of a coastal State including a port or other place in internal waters, an anchorage or roadstead in the territorial sea or even a location within the exclusive economic zone. The essential criterion is that the place must be somewhere where a ship can go to “take action to stabilise its condition, reduce the hazard to navigation, protect human life and the environment.”² In practical terms, the great majority of suitable places of refuge are within the internal waters or territorial sea of a coastal State, but will very often be a port.

What is the Problem with places of refuge?

Places of refuge is currently an important issue in maritime circles because of an apparent change to what had been long accepted as customary international law of the sea, namely that requests for a place of refuge are rarely, if ever, refused. However, since the 1970s coastal States have begun to refuse refuge to ships in distress, particularly to ships carrying oil or other dangerous cargoes. Since 1999, there have been three major incidents involving ships laden with crude oil and other hazardous cargoes requesting and being refused access to places of refuge. In two of these cases – the *Erika* and the *Prestige* – the ships subsequently sank and caused severe pollution damage. In the third – the *Castor* – a disaster was narrowly averted.

The current problem with places of refuge is the conflict between the interests of coastal States and ship-owning interests in relation to ships in need of assistance. The fate of the *Erika* in 1999, the *Castor* in 2001 and the *Prestige* in 2002, exemplify the inadequacies of existing international law, under both treaty and customary international law, when faced with a ship needing a place of refuge but carrying with it the potential to damage or pollute the place in which refuge is sought. There was at the time and continues

¹ IMO Assembly, 23rd Session, Resolution A949(23) *Guidelines on Places of Refuge for Ships in Need of Assistance* adopted on 5 December 2003, Annex Article 1.19.

² Ibid.

to be no obligation under international law for coastal States to grant access to their ports either to ships in general or, with very limited exceptions, to ships in distress. Since 1999, and particularly since the sinking of the *Prestige* in November 2002, this inadequacy in international law has been recognised by the International Maritime Organization (IMO) and other international organisations as well as by various coastal States and the European Union. Action has been taken at national, regional and international levels to prevent similar disasters by changing the treatment given to requests for access to places of refuge by ships in distress.

What Solutions to the Problem Have Been Proposed?

Any proposal for reform must inevitably encounter two firmly entrenched and largely incompatible positions. On the one hand, shipowners and the various parties involved in the success of the marine adventure such as charterers, cargo owners, insurers, masters and crew and salvors have a strong interest in preserving the ship through timely intervention in a place of refuge. Allied to these interests are the interests of the flag State, the port States and the Classification Societies which play a role in ensuring the ship is kept in a seaworthy condition. On the other hand, coastal States through their port authorities and national governments have an equally strong interest in preserving their waters and territory from pollution damage and their populations and economic activities from danger from hazardous cargoes. In this, the demands of environmentalists, coastal communities, politicians and media play a major role.

The task of trying to reconcile the varying interests and demands through existing laws and institutions has proved to be difficult, if not impossible. Attempts at reconciling these various interests are evident in the main solutions proposed for the problem of places of refuge.

There are currently two main suggested solutions to the problem, one of which is in operation and one that is a proposal.

The first has been put forward by the IMO in the form of voluntary guidelines which are designed to provide a framework within which a decision on a request for access to a place of refuge can be assessed according to various risk factors. As there is no

obligation to grant access and use of the *IMO Guidelines* is voluntary, they would initially appear to favour coastal States.

The alternate proposal has been put forward by the Comité Maritime International (CMI) in the form of a binding international convention under which coastal States are obliged to grant access to a place of refuge and contains provisions to deal with any unintended damage consequent upon such access. In form, the proposal appears to favour shipping interests. While both approaches attempt to provide a balance between the competing interests, both have significant defects that could threaten this balance and lead to States failing to adopt or properly apply either or both solutions.

Are These Proposed Solutions Viable?

Both of the solutions presently proposed could potentially provide an appropriate answer to the places of refuge problem but there is still great scope for either or both solutions to fail to receive sufficient support from coastal States and the shipping industry. The reasons for this fall outside the actual wording and intent of the instruments themselves. Other factors can and do influence the willingness of coastal States to subject their waters, national territory, environment, populations and economic activities to the risks associated with granting access to a place of refuge to a ship in need of assistance. These factors include:

- a. the age and design of ships carrying oil and other noxious substances,
- b. the lack of confidence of coastal States in the industry regulators due to past failures in the *Erika* and *Prestige*, and, most importantly,
- c. the failure of the *IMO Guidelines* and the international conventions dealing with liability and compensation to provide compensation to the coastal States for all the damage that could be caused by granting access to ships in need of assistance.

All these factors need to be addressed at the same time as implementing either or both of the proposed solutions. Failure to do so could influence whether or not coastal States apply the *IMO Guidelines* at all or, if they do, whether they are applied properly and, in the event of the CMI draft Instrument becoming a convention, whether or not coastal States will sign it.

As stated the problem of places of refuge is on-going and needs to be addressed as it is inevitable that the catastrophes will continue unless a proper solution is put in place.

IAPH Position on Places of Refuge

IAPH has had an interest in places of refuge since the problem first arose and has made regular contributions to the debates in the IMO Legal Committee and other committees and in CMI from the ports perspective.³

IAPH first highlighted the need for a solution to places of refuge soon after the *Castor* incident and recommended to MEPC, by a Resolution of the Board of Directors that contingency plans be reviewed by coastal States so that assistance can be provided to ships in distress. These plans should take into account not only safety of life at sea and environmental concerns, but also the operational and commercial interests of the port.⁴

A subsequent paper to the Legal Committee of the IMO⁵ stressed the need for a balanced approach to dealing with requests for access to a place of refuge. It suggested that, in addition to its earlier comments to MEPC, consideration be given to a geographical regional approach of designation of places of refuge and a supranational approach to the methodology of assessing requests. With respect to liability, it suggested immunity be given to those responding to requests for access and a system of liability that falls primarily on the ship and not the port. As for compensation it suggested a special fund for any damaged caused by the

³ Frans van Zoelen, "An Instrument on Places of Refuge from a Ports' perspective" *CMI Yearbook 2009 Part II*, CMI, Antwerp, 2009 (Comite Maritime International, 2009) 181, 184.

⁴ MEPC, 47th Session, *Implementation of the OPRC Convention and the OPRC-HNS Protocol and*

Relevant Conference Resolutions –Places of Refuge for Ships in Distress – Outcome of MSC 74, LEG 83 and NAV 47 – Submitted by the International Association of Ports and Harbors (IAPH) MEPC 47/5/4 dated 18 December 2001.

⁵ Legal Committee, 84th Session, *Places of Refuge – Submitted by the International Association of Ports and Harbors (IAPH)* LEG 84/7/1 dated 19 March 2002; Frans van Zoelen, "An Instrument on Places of Refuge from a Ports' perspective" *CMI Yearbook 2009 Part II*, CMI, Antwerp, 2009 (Comite Maritime International, 2009) 181, 185.

granting of access.⁶ All of these suggestions have been taken up either wholly or in part by the *IMO Guidelines*, the European Union initiatives and the draft CMI instrument.

At the 2004 Conference of CMI, where the decision was made to proceed with a specific draft instrument for places of refuge, the IAPH provided a paper dealing with the issues raised by CMI and subsequently provided to the Legal Committee⁷ of IMO. Issues central to the interest of IAPH mainly concerned liability and compensation.⁸ It was pointed out that, while IMO members should be encouraged to expeditiously ratify the outstanding international conventions, even with such ratifications, there will exist gaps in the coverage. Significantly these include pure economic loss which is non compensable by the laws of a number of common-law countries.⁹ They also include a number of cargoes such as on general cargo ships, coal, steel, timber, vehicles and livestock which are not covered by specific compensation conventions and which will therefore be covered only by the significantly lower limits of the *Convention on Limitation of Liability for Maritime Claims*.¹⁰

The IAPH supported the initiatives of the CMI and recommended that either a new convention be developed or the existing compensation conventions be amended to ensure compensation for all losses a port may suffer.¹¹ Guidelines were not supported due to their non mandatory nature.¹²

⁶ Legal Committee, 84th Session, *Places of Refuge – Submitted by the International Association of Ports and Harbors (IAPH)* LEG 84/7/1 dated 19 March 2002, paragraph 16.

⁷ International Association of Ports and Harbors (IAPH), “Places of Refuge – Discussion Paper of the International Association of Ports and Harbors” *CMI Yearbook 2004 Part II* (Comite Maritime International, 2004) 236.

⁸ Legal Committee 90th Session *Places of Refuge - Submitted by the International Association of Ports and Harbors* LEG 90/8/1 dated 18 March 2005, paragraph 3.

⁹ *Ibid* paragraph 4.

¹⁰ *Convention of 19 November 1976 on Limitation of Liability for Maritime Claims*, opened for signature 19 November 1976, 1456 UNTS 221 (entered into force 1 December 1986) (as amended); Legal Committee 90th Session *Places of Refuge - Submitted by the International Association of Ports and Harbors* LEG 90/8/1 dated 18 March 2005, paragraphs 11-12.

¹¹ *Ibid* paragraph 15.

¹² *Ibid* paragraph 16.

The position of the IAPH with regard to the CMI draft instrument is that it does not provide the coastal States with sufficient incentives to balance the increased benefits accorded shipping interests.¹³ To properly balance the interests, shipowners must be prepared to waive any limitation of liability and provide unlimited guarantees to cover all potential damages.¹⁴ The final view is that the current CMI draft instrument does not grant coastal States sufficient incentive to waive their sovereign rights to determine who enters its internal waters and under what conditions.¹⁵

At this stage, the position of the IAPH is similar to that of the IMO to the extent that first priority should be given to the closing of the liability and compensation framework. This means encouraging the ratification of the Bunkers Convention, the 2007 Nairobi Wreck Removal Convention and the HNS Protocol 2010. If after having experience with these conventions in place inadequacies appear to exist with a view to liability and compensation and places of refuge, the need for a special purpose convention on places of refuge should be reconsidered. This need for reconsideration will be accelerated if it will become obvious that one of the aforementioned conventions e.g. the HNS Protocol 2012, will not come into operation.

¹³ Frans van Zoelen, "An Instrument on Places of Refuge from a Ports' perspective" *CMI Yearbook 2009 Part II*, CMI, Antwerp, 2009 (Comite Maritime International, 2009) 181, 182.

¹⁴ *Ibid* 186.

¹⁵ *Ibid* 186-187.