PLACES OF REFUGE- The IUMI Solution

By: Ben Browne of Shaw and Croft, Solicitors, London

1. Introduction

Traditionally ships in distress had a right to enter the internal waters including ports of a foreign state. The right evolved essentially from humanitarian considerations and was firmly entrenched and time hallowed. As ships became larger and cargoes more dangerous distinctions were made between saving lives and saving hulls and cargoes. Over the last 30 years or so the traditional right of ships in distress has been eroded as powers have been given to port authorities and others to turn vessels in distress away.

For many years this has unsettled hull and cargo insurers and others who felt that states are often exercising their right to turn vessels in distress away too quickly often causing unnecessary loss to hull and cargo underwriters and potentially considerable environmental damage. The cases of the "ERIKA" (December 1999), the "CASTOR" (December 2000 to February 2001) and the "PRESTIGE" (sank 19th November 2002) have caused an outcry in the maritime community. The IMO are promulgating guidelines for the guidance of states and seafarers regarding vessels in distress and access to ports of refuge. The EU have brought out a directive regarding places of refuge and the CMI have carried out a general study into the law regarding the places of refuge amongst its member maritime law associations.

In the debate leading to these measures IUMI's voice has not been quiet. They produced a paper in February 2003 for the benefit of the IMO suggesting amendments to the wording of the guidelines (which have fortunately been adopted) and a longer term solution to the problem of the denial of access to places of refuge for vessels in distress. IUMI's suggestion was an international convention restoring the prima facie right of a vessel in distress to enter a place of refuge subject to overriding safety and environmental concerns. Serious casualties would be controlled by a regional supervisory body which would appoint from among their number an independent, suitably qualified person with the authority to make decisions on behalf of the authorities concerned (similar to the "SOSREP" in the U.K.). The IUMI solution would be wider and more far reaching than the ad hoc bilateral treaties currently in force around North West European waters and would facilitate the adoption of an objective non-political approach to the problem of admitting vessels in distress to places of refuge.

IUMI's proposals have received both support and opposition and the idea of a convention has been shelved pending the finalisation of the IMO guidelines. The purpose of this paper is to explain the places of refuge debate and the developments in detail and explore the possible impact of the current controversy on marine insurers.

2. Can a vessel in distress enter a place of refuge?

The “ERIKA”, “CASTOR” and “PRESTIGE” incidents have stimulated lively academic debate concerning the rights of vessels in distress to enter a place of safety. The debate has exposed two schools of thought.

The first school of thought supports the proposition that prima facie vessels have a right to enter places of refuge. D.J. Devine[1], Director of the Institute of Maritime Law in Cape Town, says that the right of a vessel in distress or subjected to force majeure to enter the internal waters and ports of a foreign state evolved from humanitarian considerations. In support of what he says he cites a number of cases regarding slavery and concludes that the right is “firmly entrenched and time hallowed”. It matters not whether the distress is self inflicted[2]. Professor Eric Van Hooydonk[3] agrees; he says:

> *“Foreign ships in distress have the right to seek and obtain shelter in ports and also to take such shelter in the territorial sea, in roadsteads, straits, bays, river mouths, lakes, rivers, canals even in ports closed to foreign commerce and military ports, until the state of distress is over. The cause of the distress situation is not relevant; entry and assistance may not be denied even if the danger was brought about by the negligence of the Master himself or the crew; only the objective situation is to be taken into account …As the right of entry of ships in distress was considered self-evident*

[1] D.J. Devine – Ships in Distress – A Judicial Contribution from the South Atlantic published in Marine Policy, Vol.20 no.3 pages 229 to 234 (1996)
[2] Merk and Djakimah –v- The Queen (1992) St. Helena Court of Appeal, Supreme Court Case No: 12.1991.
[3] Professor Eric Van Hooydonk “Some Remarks on Financial Securities Imposed by Public Authorities on Casualty Ships as a condition for entry into ports” published in Marine Insurance at theTurn of Millennium Vol.2 pages 117 to 136 – Antwerp 2000.

> *and moreover absolute the Contracting Parties to the International Regime of Maritime Ports (Geneva 1923) did not deem it useful even to mention the right in the Convention. Learned writers seem to accept the existence of the right of entry in distress unanimously".*

Although the UN Convention on the Law of the Sea (1982) ("UNCLOS") did not address the issue of ports of refuge directly it gives tantalising indications of what the draughtsmen felt about it. For example Article 17 confers a right on the ships of all states to enjoy the right of innocent passage through territorial seas. Article 18 requires innocent passage to be "*continuous and expeditious"* but includes stopping and anchoring if incidental to ordinary navigation or if "*rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress*". States are required to promote the establishment of an adequate and effective search and rescue service (Article 98 (2)). States may not impose conditions which prevent ships exercising a right of innocent passage (Article 24) which presumably includes passage to a port or place of refuge for vessels in distress. Article 39 (1)(c) makes it clear that while exercising a right of transit passage ships must "*refrain from any activities other than those incidental to their normal mode of continuous and expeditious transit unless rendered necessary by force majeure or by distress"*. This suggests that a vessel in distress may divert to a place of safety in the absence of a properly made order to the contrary.

Article 11 of the Salvage Convention 1989 provides:

> *"A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general".*

One convention which reflects the objectives of Article 11 of the Salvage convention is the International Convention on Oil Pollution Preparedness, Response and Co-operation ("OPRC") 1990 which has been ratified by a large number of states which are party to the 1989 Salvage Convention. OPRC does not expressly mention the admission of ships in distress to a place of refuge but it does envisage the development by states of oil pollution response contingency plans; indeed a few states have such plans which expressly provide for the possibility of admission of ships in distress to places of safety in their waters where there is a threat of pollution.

The Intervention Convention 1969 gives powers to coastal states to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution of the sea by oil following a maritime casualty. The U.K. has used this convention to justify the exercise of wide ranging powers to direct the movement of ships which threaten such damage.

Measures taken under the Intervention Convention must however be proportionate to the actual or threatened damage. If these limits are exceeded the Intervention Convention provides that a state may pay compensation to those affected by the arbitrary or excessive exercise of these powers.

Some limitation on the overriding power of states to order vessels away from their waters can be found in the Dumping Convention. The London and Oslo Dumping Conventions (both 1972) and OSPAR Convention (1992) prevent deliberate disposal of "waste" at sea. "Dumping" includes "any deliberate disposal" at sea of vessels, aircraft, offshore installations or pipelines. They impose no positive duty on the state parties to provide a safe haven for vessels in distress except by indirect implication. However OSPAR does provide for the establishment of a commission, made up of representatives of each of the contracting parties to draw up, implement and supervise programmes for the fulfilment of the obligations of the parties to the Convention. The Convention provides a mechanism for arbitrating any disputes which arise between the parties but its decisions are not otherwise enforceable against an unco-operative state. As far as I am aware nobody has yet sought to test the argument that to refuse a vessel in distress access to a place of refuge in circumstances where there is a strong likelihood that the vessel would sink if towed out to sea is in breach of the Dumping Conventions in certain circumstances.

Broadly speaking therefore the position regarding the admission of vessels in distress to ports of refuge is not directly governed by any international public law convention. This lacuna in international public

law has been filled piecemeal in a number of ways. Some governments have entered into bilateral agreements with their neighbours concerning casualty response such as Mancheplan (the U.K. and France) and Norbritplan (Norway and Britain). An increasing number of countries have developed contingency plans of their own particularly in response to the European Union directive as part of the "ERIKA 2" package of reforms. Many countries have given their public bodies powers under domestic legislation to turn dangerous vessels away (e.g. the U.K.'s Dangerous Vessels Act 1985). Together of these measures derogate from the basic common law principle to such an extent that there is a strong body of academic opinion which believes that the true position is that states can turn away vessels in distress if they can demonstrate that the threat to ship and cargo are outweighed by the threat to the interests of the coastal state concerned. This, for example, is the position taken by the International Association of Ports and Harbours' submission to the IMO (Leg 84/7/1 dated 19th March 2002) where they say:

> *"This right of ships in distress may come into conflict with another absolute right under international law, the right of self-protection of any sovereign state and port. If a ship in distress poses a serious threat to a fundamental interest of the state or port where it seeks refuge, there may be such conflict. Many writers take the view that, eventually, these two absolute rights should be balanced. Such a balance implies that, at least in the first instance, the coastal state must judge whether any of its vital interests is threatened by the entry of a ship in distress: If so, the coastal state has to balance its duty to offer refuge against its right to self-*

protection. In IAPH's view, this implies that not only a coastal state but a port as well is entitled to stipulate conditions of entry, if and to the extent that the fulfilment of such conditions could redress the balance in such a way that the entry of the ship in distress can be allowed."

The right of governments to seek guarantees as a condition of entry into ports is supported by the Dutch case of the "LONG LYN" a decision of the Dutch State Council, the Supreme Administrative Court of the Netherlands which pronounced judgment on 10th April 1995[4].

Coastal states who feel threatened however cannot simply turn casualties away and "wash their hands". The threat to the coastal state must be "quite compelling" and the state must accept a certain degree of risk[5].

Thus it can be seen that the position in international law regarding the admission of vessels in distress to places of safety is confused: states effectively act independently or in small groups and there is little uniformity. In practice political circumstances often dictate the course of action a country takes in response to a request from a vessel in distress for admission to a place of refuge. Political reactions can override scientifically based assessments from those with the appropriate expertise such as salvors, naval architects and others and may result in substantially

[4] Raad Van State (Netherlands), Afdeling Bestuursrechtspraak 10th April 1995, m.s. "LONG LYN" Schip en Schade, 1995, 394, no. 96. – An interesting commentary on this decision can be found in Professor Eric Van Hooydonk's article (see note 3 supra).

[5] Augustin Blanco – Bazan: Law of the Sea: Places of Refuge. Canadian Council on International Law (eds) Globalism: People Profits and Progress 2002 Kluwer Law International. Page 65 to 69 – Austin Blanco Bazan is the Senior Deputy Director Head of the Legal Office at the IMO.

greater losses than would otherwise be the case. How did this situation arise?

3. The developments of International Places of Refuge Legislation

There have been numerous examples of cases where vessels in distress have been refused access of places of safety usually during the course of salvage operations. These include:

- The “ANDROS PATRIA” (1978).
- The “AEOLIAN SKY” (1979).
- The “KHARK V” (1989).
- The “PROTOKLETAS” (1992).
- The “YA MAWLAYA” (1994).
- The “SMIRDAN” (1997).
- The “VENTURA” (1999).
- The “BISMIHITA LA” (2001).

There are many others which could be mentioned.

The refusal of government authorities to allow vessels in distress into places of refuge can give rise to threats of:

- Loss of life.
- Greater Salvage Awards and Article 14/SCOPIC liabilities.
- Pollution
- Loss of ship and/or cargo (with wreck removal implications).

- Salvors being deterred from trying to attend casualties unless they are absolutely sure of being paid under Article 14/SCOPIC (which will not always be the case).

Warnings that the refusal to allow vessels in distress into places of safety could cause environmental catastrophe were ignored until the “ERIKA” (December 1999). However in December 2000 the European Commission published a “Second Set of Community Measures on Maritime Safety following the sinking of the oil tanker “ERIKA” (more usually known as “ERIKA 2”). As a result of this Directive was issued on 27th June 2002 ("the "ERIKA" 2 Directive") Article 20 of which read:

> “*Member States shall make necessary arrangements to ensure that ports are available on their territory which are capable of accommodating ships in distress. To this end, having consulted the parties concerned, they shall draw up plans specifying, for each port concerned, features of the area, the installations available, the operational and environmental constraints and the procedures linked to their possible use to accommodate ships in distress.*
>
> *Plans for accommodating ships in distress shall be made available upon demand. Member States shall inform the Commission of the measures taken in application of the preceding paragraph.”*

The directive required Member States to inform the Commission of the steps taken to draw up contingency plans specifying places of refuge by

February 2004; however following the “PRESTIGE” incident this was brought forward to July 2003.

The public and media interest in the “CASTOR” case caused the Secretary General of the IMO to include the subject of places of refuge in the work programme of the Legal Committee at the meeting in October 2001. The Sub-Committee on Safety of Navigation (NAV) was the principal co-ordinating sub-committee but it has received input from many other interested sub-committees such as the Maritime Safety Committee and the Legal Committee. NAV established a working group to develop two sets of guidelines: one for the Master of a vessel in need of a place of refuge (including salvors) and the second for the coastal state in whose waters the proposed place of safety is to assist them in evaluating the risks associated with the provision of such places of safety.

In August 2002 NAV submitted a draft assembly resolution with an annex containing the recommended wording for both sets of guidelines.

The Guidelines recommend a two step analysis should be carried out by the coastal state when considering an application for a place of refuge from a vessel in distress once the situation has been appraised and the hazards identified. In the first place the Guidelines list a number of factors which should be taken into account when considering the suitability of any proposed place of refuge. This is normally known as the “event – specific assessment”: amongst the many factors to be taken into account in carrying out the event specific assessment is whether the ship is insured and, if it is, the identification of the insurer and the limits

of liability available. The Guidelines do not specify what type of insurance they are referring to; it is assumed that P and I insurance would be the most important type of insurance for the purposes of this analysis but both P&I and marine property insurers could be potentially involved.

The second part of the assessment is described as the "expert analysis". This is carried out by an inspection team designated by the coastal state who are to board the ship if possible to gather information. The expert analysis seeks to compare the risks involved if the ship remains at sea and the risks that it would pose to the place of refuge and its environment if allowed in. The comparison must cover each of the following points:

"- Safeguarding of human life at sea;
- *Safety of persons at the place of refuge and its industrial and urban environment (risk of fire or explosion, toxic risk);*
- *Risk of pollution;*
- *If the place of refuge is a port, risk of disruption to the port's operation (channels, docks, equipment, other installations); and*
- *Evaluation of the consequences if a request for place of refuge is refused, including the possible effect on neighbouring states."*

Following representations from IUMI NAV agreed that this paragraph of the draft Guidelines should be amended to include a recommendation to the effect that:

> *"States should have regard to the preservation of the hull, machinery and cargo of a ship in need of assistance when considering the analysis".*

The Guidelines make it clear that when permission for access to a place of refuge is requested there is no obligation on the coastal state to grant it, but the coastal state should weigh all factors and risks in the balance and give shelter wherever reasonably possible (paragraph 3.2.1).

As regards demands for security for entry into a place of refuge the Guidelines state:

> *"As a general rule, if the place of refuge is a port, a security in favour of the port is required to guarantee payment of all expenses incurred in connection with the operation: measures to safeguard the operation, port dues, pilotage, towage, mooring operations, miscellaneous expenses." (Paragraph 3.2.3.).*

The Guidelines do not have the force of law and unless the country concerned has passed enabling legislation there may be some doubt as to the legality of requesting guarantees for entry into a port of refuge[6].

It is likely that the IMO Guidelines will be adopted in November 2003.

Among the many organisations to make submissions to the IMO in connection with the debate regarding places of refuge was the Comite

[6] See Prof Eric Van Hooydank op.cit. Note 3 Supra)

Maritime Internationale who sent out two questionnaires to the Maritime Law Associations affiliated to them. The studies have shown that a large number of the international conventions are only partially or imperfectly incorporated into the domestic laws of the countries that have ratified or acceded to them. Only a small minority of countries have oil spill contingency plans for example although the majority have ratified conventions which require them to have such plans. Despite this there can be little doubt that international conventions are a force for uniformity and the raising of standards world-wide.

4. **IUMI's Submission to the IMO**

IUMI's submission to the IMO recommended:

(a) That IMO's draft guidelines should have regard to the preservation of the ship in distress and its cargo when considering whether to permit it to have access to a place of refuge. This has been adopted.

(b) IMO should work towards a convention on places of refuge along the lines outlined in paragraph 14 of the submission. Paragraph 14 of IUMI's paper said:

"14. A Possible Solution

What then is needed to address this difficult problem? In the UK, as we have seen, the SOSREP can now override the Harbour

Master's orders pursuant to the Secretary of State's powers. This provides a unified command and control structure for handling casualties whose perspectives are necessarily wider than that of the Harbour Master who is (rightly) concerned with the protection of his harbour and immediate adjacent waters alone. This model could well be adapted for wider use in the rest of the world.

IUMI believes that there is a need for a Port of Refuge Convention which applies world-wide: the maritime leprosy problem needs international co-ordination – at the moment it is easy for a country simply to turn away a vessel in distress in the hope that it will just go away and become someone else's problem. An obligation to provide places of refuge (similar to those which currently exist between the members of the OPRC Convention) needs to be imposed on as many countries as possible world-wide. Ideally some kind of international body should be able to recommend a course of action to states in relation to serious incidents. It could identify and recommend safe havens within the territorial waters of signatory states to which vessels in distress can be directed. A good start on this has been made in Europe with the OPRC Convention coupled with the Directive made in June 2002. This is a welcome development of the duty which already exists under Article 11 of the 1989 Salvage Convention as implemented in the UK's National Contingency Plan (which recognises the need for places of refuge). However, it is limited in its geographical spread to Western Europe and contains no duty to provide a place of refuge to vessels in distress, no way of determining now best to

deal with a particular crisis and no guarantee of compensation should the worst fears of the country which is providing the safe haven come to pass.

IUMI believes that marine insurers could have a valuable part to play in the shaping of a convention on this topic.

What then should an international convention concerning the provision of ports of refuge to vessels in distress contain? The precise terms of any convention would depend upon a host of factors, not all of them related directly to addressing the Ports of Refuge problem. Some measures proposed would have consequences far beyond this issue alone. However, some of the issues which should be considered include:-

(i) An obligation upon Convention States to provide ports or places of refuge in signatory states for vessels in distress.

(ii) An overall body (the "Supervisory Body") or a number of regional bodies which can direct vessels in distress to particular places of refuge as the needs of the particular incident require. To facilitate the provision of ports or places of refuge the Supervisory Body should be manned by appropriate independent professional, technically competent, non-political personnel. They should identify certain ports, anchorages and areas within the convention state waters which are suitable for vessels in

distress and locate and identify equipment and vessels which can go to their assistance.

(iii) The Supervisory Body (whether world-wide or, probably more workably, regional) would have the overall interests of the environment, protection of life and property in mind and would make its recommendations on an international basis. Ideally they would have powers to override national governments. However, it would be impractical to imagine that many countries' politicians would be prepared to relinquish their country's sovereignty over its own territorial waters. Most probably the Supervisory Body's decisions would (a little like those of OSPAR's Commission) be recommendations only (but see (iv) below).

(iv) Convention countries in the area surrounding a vessel in distress would have an obligation to co-operate with each other in the event of a maritime emergency (similar to the obligation contained in OPRC). However, if any state authorities failed to comply with a decision of the Supervisory Body provisions could be introduced to make that state authority liable in damages to any third party which suffers damage as a consequence unless it can show that on the balance of probabilities the action it took avoided or minimised damage or a risk of damage to the environment, life and property more effectively than the

measures recommended by the Supervisory Body. Some states may refuse to volunteer to accept liability in this way on principle but most have already conceded the principle by virtue of Article VI of the Intervention Convention.

(v) Vessels would be required to have compulsory insurance for compensation in relation to

(a) Pollution damage arising out of a spillage of bunkers and oil cargoes

(b) Pollution damage caused by a spillage of hazardous and noxious substances

(c) Wreck removal expenses

(d) Possibly also damage by impact, explosions etc.

The insurance would include a direct right of action against insurers with no intervening "pay to be paid" complications for bona fide claimants.

(vi) A policing mechanism would have to be introduced to ensure that vessels could not call at ports in Convention States without having the compulsory insurance outlined in (v) above. This policing mechanism is already in place in

many countries of the world which require the provision of CLC Certificates. The certification could perhaps be along the lines of CLC Certificates issued by liability insurers but simply covering more risks. The objective of the compulsory insurance scheme is to reassure countries which are designated as being required to provide safe havens that at least they will receive compensation if anything goes amiss as a result of them providing assistance to vessels in distress.

Until a scheme of this sort is implemented vessels in distress will continue to be turned away with considerable risk to the lives not only of the ships' crews but also salvors, the environment and those interested in the ships and cargoes concerned."

5. **Views on the call for a Place of Refuge Convention**

Article 197 of UNCLOS calls upon member states to "*cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features*".

IUMI's call for an international Places of Safety Convention is clearly in the spirit of UNCLOS. It also has the support of a number of academic writers. As long ago as 1991 Professor Nicholas Gaskell in his paper on the 1989 Salvage Convention and the Lloyd's Open Form Salvage Agreement[7] made the following comments which are equally relevant today:

> *"Salvors have found that, whilst states are loud in their support for introducing legal rules to protect the environment, not all are sufficiently active when it comes to casualties in their own waters. … States are also reluctant to take into their ports the "international leper", the damaged oil tanker under tow. Article 11 is a rather empty exhortation to states to "take into account" the need for co-operation when exercising powers relating to salvage operations. An unlikely combination of environmental organisations and shipowners wanted this provision strengthened in order to put an obligation on states to admit vessels in distress to their ports but there was no support for such a proposal and it was withdrawn. Once again, this is a matter that would be best dealt with in a general public law convention dealing with rights and obligations arising out of casualties threatening the environment"*

Professor Eric Van Hooydonk[8], talking of the right to request guarantees as a condition of entry into places of refuge by casualties says:

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[7] Tulane Maritime Law Journal Volume 16 (1991)
[8] Op cit at page 132

> *"We nevertheless agree with the view that the express regulation of the status of casualty ships in a new convention is desirable. Such a convention should recognise the right of entry as a general principle and further only allow expressly and exhaustively specified restrictions"*.

Professor Van Hooydonk, writing in 2000 concludes his article as follows:

> *"The problem of casualty ships becoming maritime lepers, not welcome in any port of refuge, is certainly not a recent one. It may be called surprising that so far no action has been undertaken in order to work out an international convention, establishing rights and duties to shipowners and their insurers, salvors and coastal states. In our view an international regulation is indispensable for two main reasons. First, it is unclear to what extent a state is entitled to refuse entry and to impose special financial conditions; the legal basis of present day practice of some states at least is questionable. Moreover, the inhospitable attitude of many states is in flat contradiction to the long standing customary right of entry of ships in distress, the continuing existence whereof is nevertheless maintained by a quasi-unanimity of legal writers. Secondly, state practice, even on a regional European sale, completely lacks uniformity; some States categorically refuse casualties, other try to exact (and collect) huge financial securities as a condition for entry, and still others*

seem only too happy to welcome damaged ships in their repair yards. Does one really have to await another shipping disaster before international maritime law is adjusted? A new catastrophe purely provoked by the unclarity of the law in this field and by the lack of a co-ordinated policy of coastal states is in no way a fanciful hypothesis.

We therefore agree with the view expressed earlier by others that an express regulation of the status of casualty ships in a new convention is desirable. Such a convention should recognise the right of entry as a general principle, and further only allow expressly and exhaustively specified restrictions. Demanding financial securities as a condition for admittance should be completely excluded. or at least radically restricted. Ships in distress should be treated more favourably than normal ships, not the other way round."

Within 18 months after that article was published we saw the "CASTOR" and the "PRESTIGE" incidents and several less well known ones.

Despite this support for the convention idea it was felt that "there was, for the time being, no need to develop an IMO Convention on places of refuge as proposed by IUMI". The only paper to comment on the IUMI proposals was produced by the United Kingdom. Although it came out in support of some of the ideas in the IUMI paper, such as compulsory insurance and the amendment of the draft guidelines, they opposed the concept of a pre-identified place of refuge saying that "such a decision

can only be made on a case by case basis using appropriately developed methodology to enable an assessment for the appropriate location of a place of refuge". The IUMI proposal does not advocate that in all cases only pre-identified places of refuge should be used. A case by case approach to casualty handling is entirely consistent with the IUMI approach and in this respect therefore the United Kingdom's criticism of IUMI approach is misconceived.

The United Kingdom also does not support the reference to a Supervisory Body on a regional basis on the grounds that it would "interfere with existing arrangements within member states, be bureaucratic and unworkable during times of duress where rapid decisions must be made". The bilateral agreements which the UK has with such countries as France and Norway are not widespread worldwide and although they offer a satisfactory solution to the problem so far as the United Kingdom is concerned, they do not address the wider problem which those on vessels in distress and their salvors face in the Mediterranean or the Atlantic or most of the rest of the world. Further, such bilateral arrangements almost invariably do not start from the basis that vessels in distress have a right to a place of refuge; rather they address issues such as co-ordinated anti-pollution measures and search and rescue procedures, issues which could sometimes be avoided by the adoption of a suitably worded places of refuge convention.

The criticism that a regional Supervisory Body would be "bureaucratic and unworkable" assumes that the salvage would be organised by committee; this is not what IUMI have in mind. Precisely how the

regional Supervisory Body would work would be a matter for it to decide but certainly detailed decisions on the handling of casualties should not be taken by the committee but by someone neutral, independent and expert chosen from a panel by the Supervisory Body acting in roughly the same sort of way that the SOSREP does in the UK. IUMI recognises that their proposal would in many cases take decisions about how to handle casualties out of the hands of politicians and possibly result in a reduction loss of sovereignty but on the other hand it would reduce the number of occasions on which vessels in distress are turned away from places of refuge thereby benefiting the environment and saving lives and property.

The present position is that NAV only decided that there is no need to develop an IMO Convention on Places of Refuge "for the time being". The issue has not gone away. Neither the guidelines nor the Salvage Convention nor the "ERIKA 2" Directive of imposes any obligation, either absolute or qualified, on States to provide places of refuge. The IMO guidelines are not legally binding. The "ERIKA 2" Directive merely requires states to make plans for accommodating ships in distress but not to actually admit vessels in distress to the designated places of refuge. So after all we have been through since December 1999 we are still further away from having an obligation to admit vessels in distress to places of refuge than we were 50 years ago.

Only an IMO Convention on Places of Refuge with a clear statement obliging States party to admit vessels in distress to such places of refuge can do this. The obligation need not be absolute; clearly where there is a

greater danger to the coastal state concerned than to the casualty there will have to be a proviso allowing the coastal state to turn the casualty away but this should only be permissible where the coastal state can show that it faced a risk of greater damage by admitting the casualty than by turning it away.

Until an IMO Convention on Places of Refuge is introduced along these lines , no real advance can be made towards a solution to the problem of places of refuge.

6. **Conclusion**

Since the "ERIKA" sank in December 1999 a great deal of thought has been given to the places of refuge problem. The IMO guidelines and the "ERIKA" 2 Directive are certainly better than nothing and should go a little way towards reducing the number of occasions upon which vessels in distress are turned away. However, they impose no obligation upon states to allow vessels in distress into places of refuge in their territorial waters. The decision to admit vessels into places of refuge is (with certain exceptions like UK and the USA) a matter for politicians and not necessarily experts. While this remains the case the temptation to turn casualties away where danger of any kind is faced by the coastal state will be too great for politicians to resist and the result could be that further incidents like the "ERIKA", the "CASTOR" and the "PRESTIGE" will occur in the future with all the losses that go with them.

It is for this reason that IUMI's members should lobby for an IMO Convention on Places of Refuge through their local maritime law associations and political channels. If the idea of a Convention on Places of Refuge remains on the IMO agenda then in time a Convention which obliges states to give refuge to vessels in distress could emerge.

BEN BROWNE
Shaw and Croft
115 Houndsditch,
London EC3A 7BR
Telephone: 020 7645 9000
Fax: 020 7645 9001
Email: Ben.Browne@shawandcroft.com

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