

DRAFT INSTRUMENT ON PLACES OF REFUGE

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PREAMBLE

THE STATES PARTIES TO THE PRESENT INSTRUMENT

CONSIDERING that the availability of places of refuge to ships in need of assistance significantly contributes to the minimization of hazards to navigation, human life, ships, cargoes and the marine environment and to the efficiency of salvage operations,

RECOGNISING that the legal framework for the efficient management of situations involving ships in need of assistance and requiring a place of refuge should take into account the interests of all concerned parties,

CONSCIOUS of the fact that existing international conventions do not establish a comprehensive framework for legal liability arising out of circumstances in which a ship in need of assistance seeks a place of refuge and is refused, or is accepted, and damage ensues,

NOTING that the principle of customary international law that there is an absolute entitlement of a ship in need of assistance to a place of refuge has in recent times been questioned,

BEARING IN MIND the Guidelines on Places of Refuge for ships in need of assistance, adopted by IMO Resolution A949(23) and the IMO Guidelines on the control of ships in an emergency (adopted as IMO Circular MSC.1/Circ.1251),

MINDFUL OF THE NEED for an Instrument which seeks to establish a framework of legal obligations concerning the granting or refusing of access to a place of refuge to a ship in need of assistance,

INTENDING that this Instrument shall govern the actions of States, competent authorities, shipowners, salvors and others involved, where a ship seeks assistance; encourage adherence to international Conventions relating to the preservation of human life, property and the environment, and balance those interests in a fair and reasonable way; and shall be construed accordingly,

HAVE AGREED as follows:

1. Definitions

For the purposes of this Instrument:

- (a) "ship" means a vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms.
- (b) "ship in need of assistance" means a ship in circumstances that could give rise to loss of the ship or its cargo or to an environmental or navigational hazard.

- (c) “place of refuge” means a place where action can be taken in order to stabilise the condition of a ship in need of assistance, to minimize the hazards to navigation, or to protect human life, ships, cargoes or the environment.
- (d) “competent authority” means a State and any organisations or persons which have the power to permit or refuse entry of a ship in need of assistance to a place of refuge.
- (e) “assessment” means an objective analysis in relation to a ship in need of assistance requiring a place of refuge carried out in accordance with any applicable IMO guidelines or any other applicable regional agreements or standards.
- (f) “ship owner” includes the registered owner or any other organization or person such as the manager or the bareboat charterer who has assumed the responsibility for operation of the ship from the owner of the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended.
- (g) "registered owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship; however, in the case of a ship owned by a State and operated by a company, which in that State is registered as the operator of the ship, “registered owner” shall mean such company.

2. Object and purpose

The object and purpose of this Instrument is to establish:

- (a) a legal framework for the efficient management of situations involving ships in need of assistance requiring a place of refuge and
- (b) the responsibilities and obligations concerning the granting or refusing of access to a place of refuge.

3. Legal obligation to grant access to a place of refuge

- (a) Except as provided in Article 3 (b) any competent authority shall permit access to a place of refuge by a ship in need of assistance when requested.

OPTION 1

- [(b) The competent authority may deny access to a place of refuge by a ship in need of assistance when requested, following an assessment which on reasonable grounds establishes that the condition of the ship is such that it and/or its cargo is likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is refused.
- (c) The competent authority shall not deny access to a place of refuge by a ship in need of assistance when requested on the grounds that the shipowner fails to provide an insurance certificate, letter of guarantee or other financial security.]

OPTION 2

- [(b) Notwithstanding Article 3 (a) a competent authority may, on reasonable grounds, deny access to a place of refuge by a ship in need of assistance when requested, following an assessment and having regard to the following factors:
- (i) the issue of whether the condition of the ship is such that it and/or its cargo is likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is refused, and
- (ii) the existence or availability of an insurance certificate, letter of guarantee or other financial security but the absence of an insurance certificate, letter of guarantee or other financial security, as referred to in Article 7, shall not relieve the competent authority from the obligation to carry out the assessment, and is not itself sufficient reason for a competent authority to refuse to grant access to a place of refuge by a ship in distress, and the requesting of such certificate, or letter of guarantee or other financial security shall not lead to a delay in accommodating a ship in need of assistance.]

OPTION 3

- [(b) Notwithstanding Article 3 (a) the competent authority may deny access to a place of refuge by a ship in need of assistance when requested :

(i) following an assessment which on reasonable grounds establishes that the condition of the ship is such that it and/or its cargo is likely to pose a greater risk if permission to enter a place of refuge is granted than if such a request is refused or

(ii) on the grounds that the shipowner fails to provide an insurance certificate, or a letter of guarantee or other financial security in respect of such reasonably anticipated liabilities that it has identified in its assessment, but limited in accordance with Article 7.]

(d) If access is denied the competent authority shall use its best endeavours to identify a practical or lower risk alternative to granting access.

(e) The obligations imposed by this Article shall not prevent the competent authority from making any claim for salvage to which it may be entitled.

4. Immunity from liability where access is granted reasonably

Subject to the terms of this Instrument, if a competent authority reasonably grants access to a place of refuge to a ship in need of assistance and loss or damage is caused to the ship, its cargo or other third parties or their property, the competent authority shall have no liability arising from its decision to grant access.

5. Liability to another State, a third party, the ship owner or salvor where refusal of access is unreasonable

If a competent authority refuses to grant access to a place of refuge to a ship in need of assistance and another State, the ship owner, the salvor, the cargo owner or any other party prove that it or they suffered loss or damage (including, in so far as the salvor is concerned, but not limited to, the salvors inability to complete the salvage operations) by reason of such refusal such competent authority shall be liable to compensate the other State, ship owner, salvor, cargo owner, or any other party, for the loss or damage occasioned to it or them, unless such competent authority is able to establish that it acted reasonably in refusing access pursuant to Article 3(b).

6. Reasonable conduct

For the purposes of ascertaining under Articles 3, 4 and 5 of this Instrument whether a State or competent authority has acted reasonably courts shall take into account all the circumstances which were known (or ought to have been known) to the competent authority at the relevant time, having regard, inter alia, to the assessment by the competent authority.

7. Guarantees

OPTION 1

[(a) When agreeing to grant access to a place of refuge to a ship in need of assistance, the competent authority may request the ship owner to provide evidence of an insurance certificate, or a letter of guarantee by a member of the International Group of P&I Clubs, or other financial security from a recognised insurer, bank or financial institution in a reasonable amount in respect of such reasonably anticipated liabilities that it has identified from its assessment. Subject to the following paragraph of this Article, such letter of guarantee or other financial security shall not be required to exceed an amount calculated in accordance with the most recent version of Article 6(1)(b) of the Convention on Limitation of Liability for Maritime Claims, 1976 or the corresponding provision on limitation for claims other than passenger, loss of life or personal injury claims of any other international convention replacing the previously mentioned convention, in force on the date when the insurance certificate, or letter of guarantee or other financial security is first requested, whether or not the State in question is a party to that convention.

(b) Nothing in this Article shall prevent a competent authority from requiring the shipowner to provide a certificate or letter of guarantee under any other applicable International Convention other than this Instrument.]

OPTION 2

[(a) When agreeing to grant access to a place of refuge to a ship in need of assistance, the competent authority may request the ship owner to provide evidence of an insurance certificate, or a letter of guarantee by a member of the International Group of P&I Clubs, or other financial security from a recognised insurer, bank or financial institution in a reasonable amount in respect of such reasonably anticipated liabilities that it has identified from its assessment. Subject to paragraph (c) of this Article, such letter of guarantee or other financial security shall not be required to exceed an amount calculated in accordance with the most recent version of Article 6(1)(b) of the Convention on Limitation of Liability for Maritime Claims, 1976 or the corresponding provision on limitation for claims other than passenger, loss of life or personal injury claims of any other international convention replacing the previously mentioned convention, in force on the date when the insurance certificate, or letter of guarantee or other financial security is first requested, whether or not the State in question is a party to that convention.

(b) In cases where claims described in Article 2 paragraphs 1 (d) or (e) of the Convention on Limitation of Liability for Maritime Claims are not subject to limitation the reasonable amount shall be calculated in accordance with Article 7 (a), with the addition of such amount as is likely in total to compensate the competent authority in respect of such liabilities.

(c) Nothing in this Article shall prevent a competent authority from requiring the shipowner to provide a certificate or letter of guarantee under any other applicable International Convention other than this Instrument.]

OPTION 3

[(a) When agreeing to grant access to a place of refuge to a ship in need of assistance, the competent authority may request the ship owner to provide evidence of an insurance certificate, or a letter of guarantee by a member of the International Group of P&I Clubs, or other financial security from a recognised insurer, bank or financial institution in a reasonable amount in respect of such reasonably anticipated liabilities that it has identified from its assessment.

(b) Nothing in this Article shall prevent a competent authority from requiring the shipowner to provide a certificate or letter of guarantee under any applicable International Convention other than this Instrument.]

8. Plans to accommodate ships in need of assistance

States shall draw up plans to accommodate ships in need of assistance in appropriate places under their jurisdiction around their coasts and such plans shall contain the necessary arrangements and procedures to take into account operational and environmental constraints to ensure that ships in need of assistance may immediately go to a place of refuge, subject to authorisation by the competent authority, granted in accordance with Article 3. Such plans shall also contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response.

9. Identification of competent authority

States shall designate the competent authority to whom a request from a ship in need of assistance for admission to a place of refuge appropriate to the size and condition of the ship in question should be made, and use all practicable means, including the good offices of States and organisations, to inform mariners of the identity and contact details of such competent authority.