

THE HNS PROTOCOL

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INTRODUCTION AND HISTORY

In April this year, IMO played host to a Diplomatic Conference which adopted a Protocol to the 1996 HNS Convention.

HNS is the acronym for “hazardous and noxious substances”, many of which are chemicals. The full title of the 1996 Convention is the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; for ease of reference, I will simply refer to it as the HNS Convention.

The HNS Convention is **one of a group of multilateral conventions** developed by the IMO Legal Committee since its inception in 1967. Taken together, these create a comprehensive liability and compensation regime mainly for environmental – that is pollution – damage resulting from incidents involving ships at sea.

The first treaties to be adopted in 1969 and 1971, respectively were the **Civil Liability and IOPC Fund Conventions**. The immediate incident that led to this development was the grounding, in 1967, of the supertanker **Torrey Canyon** with her cargo of 117,000 tonnes of crude oil off the English Coast; and it was in fact the French and United Kingdom Governments, as the coastal States most affected by the incident, which brought the matter to the IMO Council with a request that the Organization develop new international rules of liability and compensation to deal with the situation.

They requested these rules because of the problems they foreshadowed, both jurisdictional and evidential, if negligence claims were to be pursued through the national courts – problems that were compounded by the fact that the incident took place in what then comprised international waters.

The **Civil Liability and Fund Conventions were confined** to providing for liability and compensation in the case of oil pollution incidents **involving spills from oil tankers**. Their **main features** are of course very familiar to you, namely, a two tier system of liability and

compensation; strict and limited liability both of the shipowner and the Fund; compulsory insurance of the shipowner; and channelling of liability.

These two treaties have been revised and updated over time by the Legal Committee and have proved to be highly effective in regulating questions of liability and compensation for damage caused by oil spills at sea.

In 2001, the **Bunkers Convention** was adopted, the aim of which was to provide compensation in cases where damage results from spills of oil carried in **ships' bunkers**. The Bunkers Convention is modelled on the 1992 Civil Liability Convention –that is to say, it is a one-tier system of liability and compensation, based on a compulsory insurance scheme, with liability being channelled to the shipowner, whose liability is strict and capped. It entered into force in November 2008 and already has 57 States Parties, covering approximately 87% tonnage of the world fleet.

The **HNS Convention** has had a more **chequered history**. The first attempt at adopting this convention, at a Diplomatic Conference held at IMO in 1984, failed to achieve that result. The issue, however, refused to go away, and, after a period of time, it was brought back to the Legal Committee where, after negotiations lasting for more than 10 years, the draft text was finally considered ripe to present to a second Diplomatic Conference. This was held in 1996 and, this time, the Diplomatic Conference **was** successful.

MAIN FEATURES

What does the HNS Convention do? The HNS Convention is modelled on the Civil Liability and IOPC Fund Conventions and, like them, it **simplifies the issue of liability and compensation for damage caused** – in this instance, by the spill of hazardous and noxious substances **other** than oil. A major difference, however, is that **both tiers of liability are contained in a single treaty instrument**. And it is this feature that has contributed greatly to the very slow rate of ratifications and the fact that it is not yet in force.

The **basic features** include:

- **strict liability;**
- **compulsory insurance** on the part of the shipowner;
- **channeling** of liability;

- **limited** or **capped liability** established in accordance with a formula linked to the size of the ship; and
- a **second tier** of compensation, to be paid by a **fund** if, in any particular incident, the insurance proves to be **insufficient** to pay for all the damage, or for some reason insurance has not been taken out; **financed by a levy on receivers.**

The **merits** of this scheme, from the victim's perspective, are fairly obvious. The victim does not need to go to court to claim but can merely put in a claim, in the first instance, to the shipowner, or more usually, the shipowner's insurer. The victim then is effectively **guaranteed** a pay-out providing he or she can establish a causal link between the incident (that is the spill of HNS) and the resultant damage or injury. If the insurance is insufficient to meet the full cost of the claim, the balance can generally be recovered from the fund.

In this regard, if the experience for **claims settlement** under the Civil Liability and IOPC Fund Conventions is any guide to go by, in most cases victims of HNS incidents should receive **full, adequate and effective compensation** – compensation that is paid out much more promptly than if the victim had been forced to sue through national courts – although one cannot entirely eliminate the use of lawyers or, occasionally, courts, in the process, depending on the complexity of the claim.

Cover under the Convention is fairly **comprehensive** because, although most claims arising from an HNS incident are likely to be for **pollution damage**, the Convention also pays out in respect of claims for **fire and explosion** as well as **death or personal injury** and, in fact, the latter have priority over all other claims. In respect of the latter – that is, death or personal injury – compensation will be available for everyone, including members of the **crew**, whether on board or outside the ship carrying the hazardous and noxious substances.

The fact that **liability is, effectively, shared** between shipowners and receivers means that the financial burden is not placed on the shoulders of one industry alone, while at the same time ensuring that full and adequate compensation will be more or less guaranteed to all victims of HNS incidents.

OBSTACLES TO RATIFICATION

Well, that, very briefly are all the positives. So **what has gone wrong? Why the need for the HNS Protocol?**

Having been developed with the highly successful models of the Civil Liability and IOPC Fund Conventions in mind, the HNS Convention was expected to be implemented without too much difficulty; however, this has not turned out to be the case, more than 14 years after it was adopted.

The **aim of the HNS Protocol** was, accordingly, to **expedite the entry into force** of the HNS Convention. How will it achieve this?

The short answer is that the Protocol addresses the problems that are thought to be acting as barriers to ratification of the HNS Convention. Some of the problems stem from the sheer **range and diversity** of hazardous and noxious substances that will be governed by the Convention and the consequent difficulties in collecting data and reporting to IMO on receipts of HNS, as required by the Convention.

To give you some sense of the scale of the problem, there are thought to be between three and a half to five thousand different substances that might be covered at any one time. Contrast this situation with the IOPC Fund Convention, which covers only oil carried as cargo and where the receivers are, in the main, the petroleum companies.

Three specific issues have been instrumental in discouraging States from ratifying the Convention.

1. CONTRIBUTIONS TO THE HNS FUND FOR PACKAGED GOODS

The **first problem** has related to the requirement, contained in the 1996 HNS Convention, to **collect data and set up a reporting system** on the volumes of **packaged HNS** which are imported and exported by sea. This requirement has been regarded as a very heavy burden, given the sheer volume and range of packaged goods transported by sea.

The solution adopted by the Protocol has been to **differentiate between bulk** hazardous and noxious substances **and packaged** hazardous and noxious substances and **to exclude**

packaged goods from the definition of contributing cargo contained in the Convention. This means, first, that **receivers** of these goods are **exempt from the obligation to contribute to the HNS Fund** in the event that the compensation to be paid exceeds the limits of liability of the shipowner under the first tier; and secondly, that there is, accordingly, **no need for States to report** on the movements of packaged goods, thus vastly simplifying their administrative burden.

However, victims of incidents involving packaged HNS will not be disadvantaged thereby as it was also agreed that packaged goods will remain covered by the Convention – that is to say, **damage caused by packaged goods remains, in the first instance, covered by the compulsory insurance provisions of the Convention** – the so-called “first tier” of liability. And, in cases where the shipowner’s insurance is insufficient to completely cover such damage, the deal worked out at the Conference, and included in the Protocol, is that the **HNS Fund will still pay out the excess, even though receivers of packaged goods will no longer contribute to financing the second tier.**

INCREASE OF LIABILITY LIMITS FOR SHIPS CARRYING PACKAGED GOODS

The decision to exempt receivers of packaged goods from the obligation to contribute to financing the second tier fund has had important ramifications for some other provisions of the Convention. When the original HNS Convention was negotiated back in 1996, the drafters of the Convention had in mind that the obligation to pay compensation should be split, in an equitable way, between the first and second tiers – that is to say, between shipowners, on the one hand, and receivers of HNS, on the other.

This was reflected in the formulae for limitation of liability adopted in the Convention. So, **article 9 of the 1996 HNS Convention limits the shipowner’s liability** – in respect of any one incident – to an aggregate amount depending on the units of tonnage involved (for example, 10 million units of account for a ship not exceeding 2000 units of tonnage), with the proviso that this aggregate amount “shall not in any event exceed 100 million units of account”.

The second tier of liability, as with the IOPC Fund Convention, is comprised of a fund, financed, in the main, by **receivers of HNS, who are required to make an initial contribution** to establish the HNS fund and, thereafter, **as required, they must make**

annual contributions to the HNS fund (article 16(3)). The exact amount of each contribution is to be determined by the HNS fund Assembly. As with compensation under the first tier, the aggregate amount of compensation payable by the HNS fund in respect of any one incident is limited according to a formula – this time set out in article 14(5). **Including compensation from the first tier**, the compensation available is subject to a **ceiling of 250 million SDRs**. If this is not sufficient to satisfy all claims, a pro rata reduction will be made.

The decision at the Diplomatic Conference to exempt receivers of packaged goods from contributing to the HNS fund, while at the same time, requiring the fund to pay out in the event of an incident involving packaged goods, was seen as **disturbing the balance of liability between shipowners and receivers that had been so carefully worked out in 1996**.

To remedy this, during the debates on this subject in Fund Assembly Working Group, where the issue was first discussed, and in the Legal Committee, prior to the Diplomatic Conference, it was agreed that the **shipowner's** limits of liability under the first tier would be **increased**. There was some talk of this increase being on a voluntary basis, but ultimately it was made mandatory. The precise amount of this increase was settled at the Diplomatic Conference and is reflected in **the inclusion of a new paragraph which sets out the formula for determining the shipowner's liability in cases where the damage has been caused by packaged HNS**, or where damage has been caused by or both bulk HNS and packaged HNS, or where it is not possible to determine whether the damage originating from the ship has been caused by bulk HNS or by packaged HNS (article 9(1)(b)). The shipowner's liability for packaged HNS is now some 15% higher than it is for bulk HNS.

2. LIABILITY FOR CONTRIBUTIONS IN RESPECT OF LIQUIFIED NATURAL GAS (LNG) CARGOES

Another **problem** addressed by the HNS Protocol relates to **the question of liability for contributions in respect of liquefied natural gas – LNG**.

A distinctive feature of the HNS Convention, and one that differentiates it from the 1992 Fund Convention, is the fact that the **second tier is divided into four separate accounts**, namely, a general account, the oil account, the LNG account, and the LPG account.

The original draft of the HNS Convention had envisaged that the second tier of liability would consist of a single account and that all contributors would become liable to pay into that one account. However, during preliminary discussions in the Legal Committee prior to the 1996 Diplomatic Conference, it became apparent that such a system, if adopted, would disadvantage those industries in which large volumes of cargo of a particular type were carried by sea. It was regarded as unfair that these high volume cargoes, while **not necessarily more dangerous but, simply because of their sheer mass**, would be obliged to cross subsidize other hazardous and noxious cargoes carried in much lower volumes. Certain sectors of the market, notably the LNG industry, also maintained that, in view of their exceptional safety and environmental record, they should not be expected to cover the liabilities incurred by other, less safe industries.

This led to the suggestion, which was accepted, that a **system of separate accounts should be established** which would finance the second tier on a market-sector basis.

The effect of having separate accounts is that receivers of oil, LNG, and LPG will only become liable to contribute if and when an incident occurs involving oil, LNG or LPG, respectively. By comparison, receivers in the general account will be called on collectively to provide compensation in respect of incidents triggered **by any** of the hazardous and noxious substances covered by the general account.

In the case of the **general account as well as the oil and LPG accounts**, the person responsible for making the initial as well as any subsequent annual contributions is the **receiver**. This clearly follows the IOPC Fund model. By comparison, pursuant to the 1996 HNS Convention, **the person liable for making contributions to the LNG account is the person who, in the preceding calendar year, held title to an LNG cargo immediately prior to discharge.** This provision was arrived at in view of what was considered to be the unique contractual arrangements for the purchase and transport of LNG.

Problems of application arose, however, due to the fact that, while the HNS Convention requires the receiver to be subject to the jurisdiction of a State Party, the titleholder need not be; and in those cases it would, therefore, be very **difficult for administrations, and by extension the HNS Fund, to enforce payment of contributions.**

The **solution** set out in the Protocol has been to **shift the responsibility for payment to the receiver** at the point of discharge, **unless** there is an agreement for the titleholder to

assume that responsibility. This brings LNG much more into line with the other categories of HNS regulated by the Convention.

3. SANCTIONS AGAINST STATES THAT DO NOT FULFIL THEIR OBLIGATIONS TO REPORT RECEIPT OF HNS CARGOES

The **third problem** that was identified standing in the way of ratification and implementation relates to the **obligation** of Contracting States to **submit reports** on **contributing cargo**, in the first place, at the **time of ratifying the HNS Convention** and, thereafter, on an **annual basis**. Such reports are essential both for meeting the entry into force requirements, as well as for the long-term functioning of the HNS fund.

The **entry into force provisions** of the HNS Convention are to be found in article 46. This provides that the Convention will enter into force 18 months after the **following conditions** have been fulfilled:

- at least 12 States, including four States each with not less than two million units of the gross tonnage, have expressed their consent to be bound by it, and
- the Secretary-General has received information that those persons in these States, who would be liable to contribute to the HNS fund, have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.

These somewhat complex requirements reflected the concern of delegations at the 1996 Diplomatic Conference that it would be inadvisable to allow the Convention to enter into force simply on the basis of the number of States Parties. To ensure the financial viability of the Convention, and in order to spread the burden of compensation more equitably, it was also regarded as important that, among the States becoming parties to the Convention, a sufficient number should be major shipping nations and, in addition, the volume of contributing cargo to the general account should represent a sufficiently high volume of trade.

At the time of the 2010 Diplomatic Conference, a total of only 14 States had ratified the Convention and, of these, **only two had complied with the obligation to submit initial**

reports, and, of these, **only one State had complied with the obligation to submit annual reports thereafter**. This situation has not changed since.

The **failure of States to submit their initial reports** has, consequently, been a major contributing factor in **blocking the entry into force** of the Convention. That was seen to be the **immediate problem**.

In addition, based on actual experience over the years within the IOPC Funds regime, there has been a growing awareness of the need to prevent an invidious situation arising, once the HNS Convention does finally enter into force, where those States which have failed or omitted to submit their annual reports on contributing cargo are able to claim compensation in the event of an accident occasioning them loss, whilst at the same time, **avoiding their liability to contribute** to the HNS fund.

The problem is that, in the absence of reports on contributing cargo, the HNS Convention contains no mechanism to calculate what the fair share of the compensation payments for non-reporting States should be, forcing those States which **have** complied with the obligation to report, to **shoulder all** the costs of compensation. This is clearly not a desirable situation.

The draft Protocol deals with these problems in different ways. **To deal with the entry into force aspect**, it now expressly provides that, **in order to ratify the Protocol**, States will be required, **at the same time as depositing their instrument of ratification**, to submit reports on contributing cargo and **IMO, as Depositary, will not be able to accept any instrument of ratification, accession or approval which is not accompanied by such a report**.

The Protocol further obliges Contracting States to submit reports annually thereafter until the Protocol enters into force. States which fail to submit reports **after ratification but prior to entry into force of the Protocol**, will be **temporarily suspended** from being a Contracting State – until such time as the reports are duly made, when they will resume their status as Contracting States.

To deal with the problem of States Parties failing to submit annual reports, once the Protocol enters into force, the Protocol **prohibits such States from claiming compensation** until such time as they bring their reports up to date. The only exception will be with regard to claims for death and personal injury.

These provisions are, to say the least, novel. Some delegations consequently expressed concern during the preliminary debate in the Legal Committee over their validity but, by the time of the Diplomatic Conference, concern over these aspects of the Protocol seem to have abated. Nonetheless, some concern remains as to how they will operate in practice. Time alone will tell.