

International Foundation for the Law of the Sea  
Summer Academy 2019

Promoting Ocean Governance and Peaceful Settlement  
of Disputes

**THE INTERNATIONAL CONVENTION ON  
LIABILITY AND COMPENSATION FOR  
DAMAGE IN CONNECTION WITH THE  
CARRIAGE OF HAZARDOUS AND NOXIOUS  
SUBSTANCES BY SEA  
(HNS CONVENTION)**

Måns Jacobsson  
Former Director  
International Oil Pollution Compensation Funds

9 August 2019

## **Introduction**

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention) was adopted at a Diplomatic Conference held under the auspices of the International Maritime Organization (IMO).

The 1996 HNS Convention, which deals with damage caused by hazardous and noxious substances, is modelled on the 1992 Civil Liability and Fund Conventions. It establishes a two-tier system of compensation, with the first tier being paid for by the individual shipowner or his insurer and the second by the International Hazardous and Noxious Substances Fund (HNS Fund).

The 1996 HNS Convention has not entered into force. In 2010 the 1996 Convention was amended by a Protocol which is not yet in force.

## **Definition of HNS**

The definition in the Convention of hazardous and noxious substances (hereinafter referred to as *hazardous substances*) is largely based on lists of individual substances that have been previously identified in a number of IMO Conventions and Codes designed to ensure maritime safety and prevention of pollution. The concept of *hazardous substances* is defined in Article 1.5 as any substances, materials and articles carried on board a ship as cargo set out in certain lists contained in the following instruments:

- (a) The International Convention for the Prevention of Pollution from Ships, 1973, as amended by the Protocol of 1978 relating thereto (MARPOL 73/78), Annex I Appendix I and Annex II Appendix II;
- (b) The International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983 (IBC Code);
- (c) The International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983 (IGC Code);
- (d) The International Maritime Dangerous Goods Code (IMDG Code);
- (e) The Code of Safe Practice for Solid Bulk Cargoes (BC Code).

The definition further covers liquid substances carried in bulk with a flashpoint not exceeding 60° as well as residues from previous carriage in bulk of substances referred to in the above instruments. The inclusion of such residues is important in view of the considerable risk of fire and explosion that ships in ballast constitute.

The references in the definition to the various instruments are to the instruments as amended, i.e. their most recent versions. As a result, amendments to these instruments adopted by the competent bodies of IMO will be automatically included in the HNS Convention, which in this manner will be continuously adapted to the developments within the chemical industry. There is one exception to this approach, namely the reference in Article 1.5(vii) which is to the IMDG Code in its 1996 version.

*Hazardous substances* include bulk solids, liquids including oils (both persistent and non-persistent), liquefied gases such as liquefied natural gases (LNG) and liquefied petroleum gases (LPG). A number of bulk solids such as coal, grain and iron ore are excluded because of the low hazards they present. Loss or damage caused by certain categories of radioactive materials is also excluded. Packaged goods are included if they are covered by the IMDG Code.

The number of substances covered by the definition of 'hazardous substances' is very large. The IMDG Code, for example, lists hundreds of materials which can be dangerous when shipped in packaged form. It is estimated that the Convention covers some 6 000 substances. In practice, however, the number of hazardous substances that are shipped in significant quantities is relatively small.

## **Concept of damage**

The concept of damage in the HNS Convention is much wider than in the 1992 Civil Liability Convention. The following types of damage will be covered under the HNS Convention:

- loss of life or personal injury on board or outside the ship carrying the hazardous substances;
- loss of or damage to property outside the ship;
- economic loss resulting from contamination of the environment;
- costs of reasonable measures to prevent or minimise damage (preventive measures) and damage caused by such measures;
- costs of reasonable measures of reinstatement of the environment.

The HNS Convention does not apply to pollution damage as defined by the 1992 Civil Liability Convention. This exclusion applies whether or not compensation is payable under the latter Convention. As a result any pollution damage caused by persistent oil is excluded from the scope of the HNS Convention. The HNS Convention thus covers non-pollution damage caused by persistent oil as well pollution damage and non-pollution damage caused by non-persistent oil.

The HNS Convention does not apply to damage caused by bunker fuel oil but is confined to oil carried as cargo.

## **Shipowner's liability**

Under the HNS Convention, the shipowner – which in the case of that Convention means the person who is the registered owner of the ship in question – has strict liability (i.e. is liable also in the absence of fault) for any damage caused by hazardous substances in connection with their carriage by sea on board the ship.

The shipowner may under the HNS Convention invoke the same grounds of exoneration as those provided for in the 1992 Civil Liability Convention, namely that he proves that:

- (a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- (b) the damage was wholly caused intentionally by a third party, or
- (c) the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.

The shipowner is further exempt under the HNS Convention if the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped *either* caused the damage, wholly or partly, *or* lead to the owner not obtaining insurance. This defence is not available to the shipowner if he or his servants knew or ought reasonably to have known of the hazardous and noxious nature of the substances shipped.

The shipowner will normally be able to limit his liability to the following amounts:

- (a) 10 million SDR<sup>1</sup> (US\$13.9 million) for ships not exceeding 2 000 units of gross tonnage;
- (b) for ships with a tonnage in excess thereof, the following amount in addition to 10 million SDR
  - (i) for each unit of tonnage from 2 001 to 50 000 units, 1 500 SDR (US\$2 082);

---

<sup>1</sup> The unit of account in the HNS Convention is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this paper, the SDR has been converted into United States dollars at the rate of exchange applicable on 1 July 2019, i.e. 1 SDR = US\$1.390210

(ii) for each unit of tonnage in excess of 50 000 units, 300 SDR (US\$416);

up to a maximum of 100 million SDR (US\$139 million) for ships of 100 000 units of tonnage or over.

These amounts were increased in the 2010 Protocol to the HNS Convention by 15% for ships carrying hazardous substances in packaged form, as explained below.

As under the 1992 Civil Liability Convention, shipowners will pursuant to the HNS Convention be deprived of the right to limit their liability if it is proved that the damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

A State may declare that the HNS Convention does not apply to ships, which do not exceed 200 gross tonnage and which carry hazardous substances only in packaged form, while they are engaged on voyages between ports or facilities of that State. Two neighbouring States may agree to extend their declarations to cover voyages between them.

### **Compulsory insurance**

The owner of a ship actually carrying hazardous substances will be obliged to maintain insurance to cover his liabilities under the Convention.

As is the case under the Civil Liability Convention, the victims may pursuant to the HNS Convention bring action directly against the insurer. If such an action is brought, the insurer may not invoke defences that he would have been entitled to invoke in proceedings brought by the shipowner against him.

It is expected that this insurance will, at least for larger ships, normally be provided by one of the Protection and Indemnity Associations (P&I Clubs).

Unlike the Bunkers Convention there is no provision in the HNS Convention allowing States to delegate the issuance of insurance certificates to an institution or organisation. The IMO Assembly has however adopted a Resolution to the effect that such delegation is possible also under the HNS Convention.

The certification of insurance in respect of oil tankers under the 1992 Civil Liability Convention has not given rise to any difficulties to Flag States, but in that case certificates were required worldwide for some 4 000 tankers. The world's non-tanker fleet is far larger (some 40 000 ships), and the issuance of certificates under the Bunkers Convention imposes a much greater administrative burden on Flag States. It is likely that the number of ships falling under the compulsory insurance regime provided by the HNS Convention will be significantly greater than under the Bunkers Convention and the issuance of insurance certificates under the HNS Convention will, therefore, result in an even greater administrative burden.

Unlike the Bunkers Convention, the HNS Convention does not allow States to keep insurance certificates in electronic form.

### **Channelling of liability**

The provisions on channelling of liability under the HNS Convention are the same as those in the 1992 Civil Liability Convention.

Claims for damage caused by hazardous substances can under the HNS Convention be made only against the registered owner of the ship concerned and his insurer. Claims may not be pursued against

the shipowner otherwise than in accordance with the Convention. This does not in principle preclude victims from claiming compensation outside the Convention from persons other than the owner, but such claims will not be based on the Convention but on the applicable national law.

However, the HNS Convention prohibits claims against the servants or agents of the shipowner as well as claims against the pilot or any other person who, without being a member of the crew, performs services for the ship. It also prohibits claims against any charterer (including a bareboat charterer), manager or operator of the ship, against any person performing salvage operations with the consent of the shipowner or on the instructions of a competent public authority, and against any person taking preventive measures, as well as claims against the servants or agents of any of these persons. This prohibition does not apply if the damage resulted from the personal act or omission of the person concerned, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

### **The HNS Fund's obligations**

The HNS Fund pays compensation to those suffering damage caused by hazardous substances in a State Party to the HNS Convention who do not obtain full compensation from the shipowner or his insurer in the following cases:

- (a) the shipowner is exempt from liability the HNS Convention because he can invoke one of the exemptions under that Convention; or
- (b) the shipowner is financially incapable of meeting his obligations under the HNS Convention in full and his insurance is insufficient to satisfy the claims for compensation for pollution damage; or
- (c) the damage exceeds the shipowner's liability under the HNS Convention.

The HNS Fund is only obliged to pay compensation under item c) if the shipowner is entitled to limit his liability.

The HNS Fund does not pay compensation if:

- (a) the damage occurred in a State which was not a Party to the HNS Convention; or
- (b) the damage resulted from an act of war, hostilities, civil war or insurrection or was caused by a spill from a warship; or
- (c) the claimant cannot prove that there is a reasonable probability that the damage resulted from an incident involving one or more ships as defined in the HNS Convention, i.e. a seagoing vessel or seaborne craft of any type.

The maximum amount payable by the HNS Fund in respect of any one incident is 250 million SDR (US\$ 350 million), including the sum actually paid by the shipowner (or his insurer) under the Convention.

### **Time bar**

Rights to compensation under the HNS Convention from the shipowner will be extinguished unless legal action is brought within three years from the date when the person suffering the damage knew or ought reasonably to have known of the damage and the identity of the owner.

Right to compensation from the HNS Fund will be extinguished unless legal action is brought within three years from the date when that person knew or ought reasonably to have known of the damage. Alternatively, the three years time bar period may be interrupted by a formal notification to the HNS Fund by the claimant of a legal action against the shipowner or the insurer.

In no case shall a legal action be brought more than ten years from the date of the incident.

## **Jurisdiction and enforcement of judgements**

The provisions on jurisdiction and enforcement of judgements in the HNS Convention are to a large extent the same as those in the 1992 Civil Liability Convention and the 1992 Fund Convention.

The courts in a State or States where the damage caused by the hazardous substances occurred or where preventive measures were taken have exclusive jurisdiction over actions for compensation under the Convention against the shipowner, his insurer and the HNS Fund.

There are special provisions on jurisdiction with respect to damage to the environment and damage outside the territorial sea of any state

A judgement that has been rendered by a court competent under the HNS Convention and which is enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, shall be recognised and enforceable in the other States parties. This does not apply where the judgement was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present his case.

## **The HNS Fund**

### *Structure*

The HNS Fund will operate in a similar way to the International Oil Pollution Compensation Funds (IOPC Funds) and will be governed by an Assembly composed of representatives of the Governments of all its Member States. The HNS Fund will also have a Committee on Claims for Compensation, which will be similar to the Executive Committee of the International Oil Pollution Compensation Fund 1992 (1992 Fund).

The HNS Fund will be administered by a Secretariat. Given the similarities between the HNS Fund and the International Oil Pollution Compensation Funds (IOPC Funds,) it is likely that these Funds will have a joint Secretariat.

There will be some important differences in the way the HNS Fund will operate compared to the IOPC Funds. The IOPC Funds only deal with claims for pollution damage, whereas the HNS Fund will have to deal with a wider range of potential claims, e.g. also claims for death and personal injury. The system of contributions to the HNS Fund is much more complex than that for contributions to the IOPC Funds.

### *Financing of the HNS Fund*

The HNS Fund will be financed by contributions paid by receivers of hazardous substances that have been transported by sea to the ports and terminals of Member States.

The HNS Fund will have up to four accounts: separate accounts for oil, LNG and LPG and a general account for bulk solids and other hazardous substances. However, until the quantities of hazardous substances received in all States Parties reach certain thresholds, operation of the relevant separate account will be postponed and the account will form a new sector within the general account.

Contributions by individual receivers to the separate accounts and sectors will be in proportion to the quantities of HNS received, provided that the quantities are above certain thresholds.

The special accounts will only meet claims resulting from incidents involving the respective types of cargo, i.e. there will be no cross-subsidization.

### *Concept of receiver*

The basic concept of receiver in the HNS Convention is the same as in the 1992 Fund Convention, i.e. that contributions are payable by the physical receiver of the contributing cargo discharged in the ports and terminals of a State Party. However, if at the time of receipt the person who physically receives the cargo acts as an agent for another person who is subject to the jurisdiction of any State Party, then the principal shall be deemed to be the receiver, on condition that the agent discloses the principal to the HNS Fund. In case the principal is not subject to the jurisdiction of a State Party, the agent remains the receiver for the purpose of the Convention.

In addition, a State may apply its own definition of the term "receiver", namely the person in the State Party who in accordance with the national law of that State Party is deemed to be the receiver of contributing cargo discharged in the ports and terminals of a State Party. A State using its own definition of receiver must however ensure that the total contributing cargo received according to such national law is substantially the same as that which would have been received if the definition laid down in the Convention had been used.

With respect to crude and heavy fuel oil, i.e. oils that fall within the concept of contributing oil as defined in the 1992 Fund Convention, the provisions on contributions in the HNS Convention are identical to those in the 1992 Convention.

### *Contributions in respect of LNG*

As regards LNG, under the original text of the HNS Convention the contributions are payable by the person who immediately prior to its discharge held title to the LNG cargo. This was changed by the 2010 Protocol to the HNS Convention, as explained below.

### **Simplified procedure for increase of limitation amounts**

As is the case in respect of the 1992 Civil Liability and Fund Conventions, the HNS Convention provides for a simplified procedure for amendments to the limits laid down therein (known as "the tacit acceptance procedure"). Under that procedure amendments to these limits may be decided by the IMO Legal Committee by a two-thirds majority, and such an amendment is deemed to have been accepted unless within a period of 18 months at least one fourth of the States Parties communicate their objection to IMO. An amendment deemed to have been accepted enters into force for all States Parties, also for those that have opposed the amendment, 18 months after its acceptance.

There are certain restrictions on the amendments that may be made to the limits. Firstly, no amendments may be considered less than five years from the date of the entry into force of the previous amendment. Secondly, no limit may be increased so as to exceed an amount which corresponds to the original limit increased by 6% per year calculated on a compound basis from the date when the Convention was opened for signature. Finally, no limit may be increased so as to exceed the original limit multiplied by three.

### **Entry into force conditions of the 1996 HNS Convention**

The 1996 HNS Convention will enter into force 18 months after ratification by at least 12 States, subject to the following conditions:

- (a) in the previous calendar year a total of at least 40 million tonnes of cargo consisting of bulk solids and other hazardous substances contributing to the general account (i.e. cargoes other than oil, LNG and LPG) was received in States that have ratified the Convention, and
- (b) four of these States each have ships with a total tonnage of at least 2 million GT.

As at 1 July 2019, fourteen States had ratified the 1996 HNS Convention. There has not been any ratification after July 2009.

Only three of these States (Cyprus, Liberia and the Russian Federation) fulfil the condition under (b) above.

The conditions for the entry into force of the 1996 HNS Convention have therefore not been fulfilled.

### **Preparations for a revision of the 1996 Convention**

As requested by the 1996 Conference that adopted the HNS Convention, the International Oil Pollution Compensation Fund 1992 (1992 Fund) had carried out significant work to prepare for the entry into force of the HNS Convention. However, a number of important States had indicated that there were serious obstacles to their ratification of the HNS Convention, and it became clear that it was unlikely that the Convention would enter into force in its original (1996) version.

In view of this situation the 1992 Fund set up a Working Group to develop solutions to the issues that had been identified as inhibiting its entry into force, namely

- issues relating to the reporting of receipts of packaged goods
- contributions in respect of LNG substances
- non-submission of contributing cargo reports.

The 1992 Fund Working Group prepared a draft protocol to the HNS Convention containing amendments that addressed these three issues. After having been approved by the 1992 Fund Administrative Council, the draft protocol was submitted to IMO for consideration by its Legal Committee which approved the solutions proposed by the 1992 Fund except on one important issue, as set out below.

### **2010 Diplomatic Conference**

The draft protocol as approved by the Legal Committee was submitted for consideration by a Diplomatic Conference which was held from 26 to 30 April 2010 under the auspices of IMO.

The 2010 Diplomatic Conference adopted a Protocol to the HNS Convention. The 1996 HNS Convention as amended by the 2010 Protocol will be known as the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (2010 HNS Convention).

### **The 2010 Protocol**

The 2010 Protocol was open for signature from 1 November 2010 to 31 October 2011. As at the latter date, the Protocol had been signed, subject to ratification, by eight States, viz. Canada, Denmark, France, Germany, Greece, the Netherlands, Norway and Turkey.

As at 1 July 2019 the 2010 Protocol had been ratified by four States, namely Denmark, Canada, Norway and Turkey.

The 2010 Protocol's entry into force conditions are identical to those of the 1996 Convention. so the Protocol has not entered into force.

The 2010 Protocol results in amendments to the 1996 Convention on the following points.

### *Packaged goods*

One of the main difficulties in implementing the HNS Convention had been how to organise the system for reporting contributing cargo. Whilst bulk cargos had not been considered a problem, it had not been possible to find a practical way to collect data and make reports on packaged goods. The reporting of packaged hazardous substances presented many complex problems for both industry and States and that as a result there was a potential for large-scale and long-term under-reporting.

For these reasons hazardous substances carried in packaged form will under the 2010 Protocol be excluded from the contribution system to the HNS Fund, but incidents involving packaged goods will still be covered by the HNS Fund for compensation purposes to ensure that victims will be protected in case of a major incident.

In order to maintain the concept of shared liability between the shipping industry and the cargo interests, the 2010 Diplomatic Conference decided that the limitation amount for ships carrying packaged hazardous substances should under the 2010 Protocol be increased by 15 % in comparison with the original HNS Convention.

### *Liquefied natural gases (LNG)*

In the case of liquefied natural gases (LNG) contributions would under the 1996 Convention have been paid not by the receiver but by the person who held title to an LNG cargo immediately prior to its discharge in a port of a State Party. It was considered that this could cause major difficulties in its application, in particular due to the fact the titleholder might not be subject to the jurisdiction of any State Party.

Under the 2010 Protocol the person liable for contributions will normally be the receiver, except that by agreement between the titleholder and the receiver the titleholder will be liable, provided that the State where the substances are received is notified of the agreement. However, if the titleholder defaults on the contribution payments, the receiver will be liable.

### *Non-submission of reports on contributing cargos*

In the operation of the IOPC Funds there has been a problem due to the fact that a number of States Parties have not fulfilled their obligations to submit to the Funds reports on the quantities of oil received in the ports of these States. It has been considered essential that this problem will not be repeated in the HNS Fund. The 2010 Protocol contains therefore a provision to the effect that the HNS Fund will not pay any compensation for damage in a State until that State has fulfilled its obligation to submit reports on contributing cargoes for all years prior to the incident question. This sanction will, however, not apply to claims for compensation for personal injury and death.

### **Preparations for the entry into force of the 2010 HNS Convention**

As requested by the 2010 Diplomatic Conference, the IOPC Funds' Secretariat is carrying out the administrative tasks necessary for the setting up the HNS Fund.

The IMO Legal Committee has approved a consolidated text of the 2010 HNS Convention which had been prepared in consultation with the IOPC Funds' Secretariat and is available on the IMO and HNS websites ([www.imo.org](http://www.imo.org) and [www.hnsconvention.org](http://www.hnsconvention.org)). The Committee has also approved a Contributing Cargo Reporting Form developed by the IOPC Funds' Secretariat to facilitate reporting and designed to assist in the ratification process..

A consolidated list of substances to be covered by the 2010 Protocol has been prepared by the IOPC Funds' Secretariat in co-operation with IMO and is available in digital form on the above-mentioned

websites.<sup>2</sup> The IOPC Funds' Secretariat has developed software to assist States and potential contributors to fulfil their reporting requirements, the Contributing Cargo Calculator, which is available on these websites. Several information documents have also been published.

### **Assessment of the outcome of the Diplomatic Conference and prospects for entry into force of the 2010 HNS Convention**

It appears that the 2010 Protocol provides appropriate solutions to the problems identified by a number of States as obstacles to ratification. The question is, however, whether there is a political will to proceed to ratification of the Protocol by a sufficient number of States to bring the Protocol, and consequently the 2010 HNS Convention, into force within a reasonable period of time.

It should be noted that European Union (EU) Member States need permission of the EU Council to ratify the 2010 Convention, since it contains provisions on jurisdiction and enforcement of judgements; these issues fall within the exclusive competence of the EU. Such authorisation was given on 25 April 2017.

### **References**

M Jacobsson: The IMO, Liability, Compensation and Global Ocean Governance, in *The IMLI Treatise on Global Ocean Governance*, Vol. III: IMO and Global Ocean Governance, Chapter 3 (2018).

M Jacobsson: Liability and Compensation for Ship-source Pollution, *The IMLI Manual on International Maritime Law*, Volume III, Marine Environmental Law and Maritime Security Law, Chapter 9 (2016)

M Jacobsson: The HNS Convention and its 2010 Protocol, in *Pollution at Sea: Law and Liability*, Chapter 3, B. Soyer & A Tetterborn (eds), Lloyds List 2012

M Jacobsson: La Convention SNDP entrera-t-elle en vigueur? *Le Droit Maritime Français* 2009 p. 356

M Jacobsson: El Protocolo de 2010 relativo al Convenio Internacional sobre Responsabilidad e Indemnización de Daños en Relación con el Transporte Marítimo de Sustancias Nocivas y Potencialmente Peligrosas, 1996 (Convenio SNP) – ¿Se han eliminado los obstáculos para la entrada en vigor del Convenio? *Revista de Estudios Marítimos No 58*, Agosto 2014, Buenos Aires

The 2010 HNS Convention, brochure published by the IOPC Funds, September 2014

The 2010 HNS Convention: Why it is needed, brochure published by the IOPC Funds, ITOPF and IMO

---

<sup>2</sup> The list of substances is accessible through a search engine called "the HNS Finder", providing the user with an indication of whether the substance in question is included in the list and therefore covered for the purpose of compensation, under which category it is falling (bulk liquids, LNG etc), and whether it is subject to contributions to the HNS Fund.