

THE DRAFT PROTOCOL TO THE HNS CONVENTION

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THE HNS CONVENTION

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 by the Diplomatic Conference in April 1996 convened by the International Maritime Organization (IMO). This convention aims to ensure adequate, prompt and effective compensation for loss of life and personal injury, loss of or damage to property outside the ship carrying HNS and economic losses, costs of preventive measures, clean-up and reasonable measures of reinstatement of the environment, which are caused by **Hazardous and Noxious Substances (HNS)** in connection with their transport by sea.

Development of the HNS Convention

After the establishment of the international compensation regime of the Civil Liability Convention (CLC) 1969 and Fund Convention (FC) 1971, IMO gave first priority to the adoption of a new convention regarding compensation for damage in connection with the carriage of HNS. A Diplomatic Conference was held in 1984; however, it failed to agree on a text of the HNS Convention.

IMO continued its efforts towards the HNS Convention and the Convention was agreed in 1996. The secretariats of the IOPC Funds, with IMO’s Legal Committee (LEG), have been engaged in promoting the entry into force of the HNS Convention as a resolution on setting up the HNS Fund as instructed.

In 2007 the HNS Focus Group was established by the IOPC Fund Assembly and considered revision of the Convention. The IOPC Funds submitted the draft Protocol to IMO in 2008, and the Legal Committee discussed the draft. IMO has convened a Diplomatic Conference in April 2010 to consider and adopt the draft Protocol to the HNS Convention.

Limits of compensation

The HNS Convention provides for shipowners’ liability as a first tier and compensation by the HNS Fund as a second tier. In the first tier, a shipowner is entitled to limit liability according to the gross tonnage (GT) of the ship as follows:

- (a) For a ship not exceeding 2,000 GT, 10 million SDR

(b) For a ship in excess of 2,000 GT, the following amount in addition to 10 million SDR:

For each GT from 2,001 to 50,000 GT, 1,500 SDR

For each GT in excess of 50,000 GT, 360 SDR

Provided that this aggregate amount shall not exceed 100 million SDR.

The aggregate amount of compensation payable by the HNS Fund shall not exceed 250 million SDR, including the applicable limit of the shipowner.

Comparison with CLC/FC regime

The HNS Convention is very similar to the CLC/FC system; however, there are some differences.

Firstly, the HNS Convention covers a very wide range of substances in both bulk and packaged form.

Secondly, not just pollution damage but other types of claims such as death and personal injury, fire and explosion risks shall be compensated.

Thirdly, the contribution system to the HNS Fund is much more complicated, due to the wide range of substances included as contributing cargo.

Comparison with CLC/FC regime – Limits of compensation

The HNS Convention provides a higher amount of shipowners' liability than that of the 1992 CLC:

The minimum is 10 million SDR in the HNS Convention compared with 4.5 million in the 1992 CLC, and the maximum is 100 million SDR in the HNS and 89.8 million SDR in the 1992 CLC.

The maximum amount of 250 million SDR payable by the HNS Fund is higher than 230 million SDR payable by the 1992 Fund, but lower than 750 million SDR payable by the Supplementary Fund.

THE DRAFT PROTOCOL TO THE HNS CONVENTION

The draft Protocol to the HNS Convention was made to revise the HNS Convention in order to resolve three main issues as follows:

- 1. Concept of “Receiver”**
- 2. Contributions to the LNG Account**
- 3. Non-reporting of contributing cargo**

The draft Protocol was not intended as a wholesale revision of HNS Convention

1. THE CONCEPT OF “RECEIVER”

The HNS Convention provides the definition of “receiver” in article 1 paragraph 4(a);

Receiver means...:

- (a) the person who physically receives contributing cargo discharged in the ports and terminals of a State Party; provided that if at the time of receipt the person who physically receives the cargo acts as an

agent for another who is subject to the jurisdiction of any State Party, then the principal shall be deemed to be the receiver, if the agent discloses the principal to the HNS Fund; ...

This definition may create an administrative burden for reporting of packaged HNS. For example, in case of a RoRo port or terminal, which simply provides the infrastructure to enable a truck or lorry to disembark a ferry, it would be difficult to identify a receiver.

Bulk HNS and packaged HNS

Hazardous and noxious substances (HNS) are defined in the article 1 paragraph 5, which says “any substances, materials and articles carried on board a ship as cargo” referred to in each sub-paragraph. Residues from the previous carriage in bulk of substances are included in the definition of HNS.

HNS can be roughly classified into two groups, bulk HNS and packaged HNS.

Bulk HNS

- (i) Oils carried in bulk
- (ii) Noxious liquid substances carried in bulk
- (iii) Dangerous liquid substances carried in bulk
- (v) Liquefied gases
- (vi) Liquid substances carried in bulk with a flash point not exceeding 60°C
- (vii) Solid bulk materials

Packaged HNS

- (iv) Dangerous, hazardous and harmful substances, materials and articles in packaged form

The definition of each category above refers to the related Appendixes of the relevant Annexes of international convention such as MARPOL73/78 or international codes such as the IMDG Code.

It is quite difficult to make an exhaustive list of HNS, as there would probably be more than 6,000 substances included in the definition. Such a list would also be outdated rapidly, since the Conventions to which reference is made in the definition of “HNS” are updated regularly.

Concept of the “receiver” - Solution by the draft Protocol

The draft Protocol solves the issue of the “receiver” as follows. In order to avoid the problem of reporting for packaged HNS, the draft Protocol maintains coverage for packaged HNS for compensation under the HNS Convention, but excludes packaged HNS for contributions to the Fund, which means receipts of packaged HNS do not need to be reported. (Article 1 paragraph 2 of the draft Protocol)

As a consequence of this amendment, in the case of an incident caused by a packaged HNS, compensation shall be paid by the HNS Fund in excess of the shipowners' liability, but the source of compensation for such incident will be contributions by bulk HNS receivers. To adjust the financial burden of extra contributions by receivers of bulk HNS, the draft Protocol will also increase the limit of shipowners' liability for incidents which are caused by packaged HNS only. The amount of the increased limit will be decided at the Diplomatic Conference. (Article 7 of the draft Protocol)

2. CONTRIBUTIONS TO THE LNG ACCOUNT

The second issue is contributions to the LNG account. The definition of contributor to the LNG account raises the issue that contributors may not be subject to the jurisdiction of a State Party and therefore payment of contributions cannot be enforced.

Contributors to the HNS Fund

The HNS Convention provides in article 18 that annual contributions to the HNS Fund shall be made by any person who was the receiver, i.e. the person who physically receives cargo. This includes all types of cargo except LNG and persistent oil. Regarding persistent oil any person who is liable to pay contributions to the IOPC Fund shall pay contributions to the HNS Fund.

Different from above, for LNG cargoes the Convention provides that any person who held title to an LNG cargo immediately prior to discharge in a port or terminal of a State Party shall contribute to the LNG account of the HNS Fund. In the case of LNG cargo sold as Ex-Ship contract, the seller/exporter of the LNG cargo keeps the title of the cargo before discharge, so the titleholder means the seller/exporter. If the seller/exporter is located in the exporting country which is not a State Party to the HNS Convention, it may be difficult to enforce the titleholder to make payment of contributions because they are outside of the jurisdiction of any States Parties.

Contributors to the LNG account - Solution by the draft Protocol

Article 11 of the draft Protocol solves the issue of contribution to the LNG account as follows:

Contributions to the LNG account shall be made by "receivers", which means physical receivers as with other HNS cargos.

However, any contributions shall be made by the titleholder of an LNG cargo where:

- (i) the titleholder has entered into an agreement with the receiver that the titleholder shall make such contributions; and
- (ii) the receiver has informed the State Party that such an agreement exists,

provided that, if the titleholder does not make the contributions or any part thereof, the receiver shall be obliged to make the remaining contributions.

3. NON-REPORTING OF CONTRIBUTING CARGOS

The third issue relates to the non-submission of contributing cargo reports by Contracting States, contrary to their obligation under the Convention to do so.

14 States have ratified the HNS Convention up to the end of 2009 but only 2 of these States have submitted reports to IMO. Once the Convention has entered into force, it would be unfair that claimants in those non-reporting States would still be eligible for compensation by the HNS Fund. Also, the non-submission of reports upon ratification of the Convention makes it difficult to determine whether the conditions for entry into force of the HNS Convention have been met.

Conditions for entry into force of the HNS Convention

The HNS Convention provides in article 46 that it shall enter into force 18 months after the date on which the following conditions are fulfilled:

- (a) at least 12 States, including 4 States each with not less than 2 million of gross tonnage, have ratified, and
- (b) 40 million tonnes of contributing cargo (bulk solids and other HNS, not oil, LNG nor LPG) have been received in these States in the previous calendar year

The condition (a) above is fulfilled, but condition (b) cannot be determined because of the lack of information from contributing cargo reports.

Non-reporting of contribution cargos - Solution by the draft Protocol

The draft protocol solves the issue as follows:

No compensation for any incident shall be paid by the HNS Fund for damage in a State Party until the obligations of reporting have been complied with. This solution follows the similar provisions of the 2003 Supplementary Fund Protocol for oil pollution incidents. (Article 14 of the draft Protocol)

Regarding the report at the time of ratification, a State which has ratified the Protocol and which has not submitted the data on contributing cargo shall be temporarily suspended from being a Contracting State until it has submitted the report. (Article 20 paragraph 7 of the draft Protocol)

CONCLUSION

The international regime for oil pollution has in general worked well and has been used as a model for other Conventions, most probably the HNS Convention. The draft Protocol to the HNS Convention was made to resolve the issues which obstructed entry into force of the HNS Convention, and is expected to be adopted at the Diplomatic Conference in April this year. For further information, please visit our website (www.iopcfund.org).