ABSTRACT

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS 1996) was adopted by an International Conference organised by the International Maritime Organization in London in May 1996. It defines damage as including loss of life or personal injury, loss of or damage to property outside the ship, loss or damage by contamination of the environment, the costs of preventative measures and further loss or damage caused by them based on the highly successful model of the International Convention on Civil Liability for Oil Pollution Damage (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND). The HNS 1996 introduces strict liability for the shipowner and the system of compulsory insurance certificates while hazardous and noxious substances are defined by reference to lists of substances included in various IMO Conventions and Codes. A lack of ratifications meant that the HNS 1996 was failing to come into force and as a result, a Protocol was developed to address practical problems that had prevented many States from ratifying the original HNS 1996. The author is analysing the achievements and urging for the entry into force of the new wording of 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).

Key words: 2010 HNS Convention, hazardous and noxious substances, carriage by sea, liability, compulsory insurance

1 FOREWORD

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS 1996) aims to ensure adequate, prompt and effective compensation for damage to persons and property, costs of clean up and reinstatement measures and economic losses resulting from the maritime transport of hazardous and noxious substances.

The HNS 1996 was adopted by an International Conference organised by the International Maritime Organization in London on 3rd May 1996. Being based on the highly successful model of the International Convention on Civil Liability for Oil Pollution Damage (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), it was assumed that the HNS 1996 would not present much difficulty in the way it would be implemented. However, this has not proved to be the case for a number of reasons, including the sheer range and diversity of hazardous and noxious substances covered by the Convention; the associated difficulty of putting in place the measures needed to collect data and report on packaged HNS; issues related to contributions to the liquefied natural gas (LNG) account; and the poor record of submission of the reports required by the Convention, both prior to and following ratification.
With the passing of time it became evident that the conditions set for the Convention to come into force, particularly the condition relating to the requirement for States to report on receipts of contributing cargo, would not be met within a reasonable time for the instrument to become international law. A lack of ratification meant that HNS 1996 was failing to come into force.

A second International Conference adopted on 30 April 2010 a Protocol to the HNS Convention (2010 HNS Protocol) that was designed to address practical problems that had prevented many States from ratifying the original Convention. Once the 2010 HNS Protocol enters into force, the HNS 1996, as amended by the 2010 Protocol, will be called 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).

2 THE LEGAL FRAMEWORK

The HNS legal regime is governed with the purpose which is to provide adequate, prompt and effective compensation for loss or damage to persons, property and the environment arising from the carriage of HNS by sea. It covers both pollution damage and damage caused by other risks, e.g. fire and explosion.

The definition of hazardous and noxious substances set out in the HNS Convention is based on lists of individual substances identified in a number of IMO Conventions and Codes, designed to ensure maritime safety and prevention of pollution. HNS represent a wide array of chemical substances of varying properties and hazards, which include both bulk cargoes and packaged goods. There are a large number of substances covered by the Convention, such as the International Maritime Dangerous Goods Code (IMDG Code), which represents only one of the Codes covered by the Convention and lists hundreds of substances which can be dangerous when shipped in a packaged form.

In terms of hazardous and noxious substances covered by the 1996 HNS Convention, it should be noted that the definition relevant in respect of certain bulk cargoes makes reference to both the International Maritime Solid Bulk Cargoes Code, as amended and the International Maritime Dangerous Goods Code in effect in 1996. Hence, the definition excludes relevant bulk cargoes which are subject to the IMDG Code as amended post-1996 but were not subject to the IMDG Code in effect on from 1996. Therefore, if and when the HNS 1996 as amended by the 2010 HNS Protocol enters into force, it will not apply in respect of some hazardous cargoes which have been added to the list of substances subject to the IMDG Code since 1996. Agreement on this issue proved to be an important element of the compromise reached by delegations at the Diplomatic Conference.

As with the original oil pollution compensation regime, the 2010 HNS Protocol will establish a two-tier system for compensation to be paid in the event of accidents at sea, in this case, involving hazardous and noxious substances, such as chemicals.

Tier one will be covered by compulsory insurance taken out by shipowners, who would be able to limit their liability. In those cases where the insurance does not cover an incident, or is insufficient to satisfy the claim, a second tier of compensation will be paid from a Fund, made up of contributions from the receivers of HNS. Contributions will be calculated according to the amount of HNS received in each Member State in the preceding calendar year.

Receiver means either: (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; or (b) 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, provided that the
total contributing cargo received according to such national law is substantially the same as that which would have been received under (a).

3  2010 HNS CONVENTION COVERAGE

The 2010 HNS Convention covers damage in the territory or territorial sea of a State Party to the Convention. It also covers pollution damage in the exclusive economic zone, or equivalent area, of a Member State and damage (other than pollution damage) caused by HNS carried on board ships registered in the flag of the Member State outside the territorial sea of any State.

Damages are defined as loss of life or personal injury on board or outside the ship carrying the HNS, loss of or damage to property outside the ship, economic losses resulting from contamination and the costs of preventive measures.

The 2010 HNS Convention does not apply to oil pollution damage from tankers, as defined in the CLC, nor to loss or damage as covered by the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER). Loss or damage caused by radioactive materials is also excluded.

4  HNS LIABILITY ISSUES

4.1  Liability of the shipowner

Under the 2010 HNS Convention, the shipowner will have strict liability for any damage caused by HNS, i.e. the owner at the time of an incident shall be liable for damage caused by any hazardous and noxious substance in connection with their carriage by sea on board the ship, provided that if an incident consists of a series of occurrences having the same origin the liability shall attach to the owner at the time of the first of such occurrences. The shipowner will be obliged to maintain insurance to cover his liabilities under the Convention. This insurance will normally be provided by protection and indemnity insurers.

The owner of a ship shall be entitled to limit liability under this Convention in respect of any one incident to an aggregate amount calculated as follows: (a) Where the damage has been caused by bulk HNS: (i) 10 million units of account for a ship not exceeding 2,000 units of tonnage; and (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i): for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 units of account; for each unit of tonnage in excess of 50,000 units of tonnage, 360 units of account; provided, however, that this aggregate amount shall not in any event exceed 100 million units of account.

Where the damage has been caused by packaged HNS, or where the damage has been caused by both bulk HNS and packaged HNS, or where it is not possible to determine whether the damage originating from that ship has been caused by bulk HNS or by packaged HNS:(i) 11.5 million units of account for a ship not exceeding 2,000 units of tonnage; and (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i): for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,725 units of account; for each unit of tonnage in excess of 50,000 units of tonnage, 414 units of account; provided, however, that this aggregate amount shall not in any event exceed 115 million units of account.

The owner of a ship registered in a State Party and actually carrying hazardous and noxious substances shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution.

The compulsory insurance shall contain name of the ship, distinctive number or letters and port of registry; name and principal place of business of the owner; IMO ship identification
number; type and duration of security; name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and period of validity of certificate, which shall not be longer than the period of validity of the insurance or other security.

4.2 Establishment of the HNS Fund

The shipowner will have strict liability for any damage caused by HNS, i.e. the shipowner will be liable even without fault on the part of the ship or its crew. The shipowner will be obliged to maintain insurance to cover his liabilities under the Convention. This insurance will normally be provided by protection and indemnity insurer.

The International Hazardous and Noxious Substances Fund (HNS Fund) is to provide compensation for damage in connection with the carriage of hazardous and noxious substances by sea, to the extent that the protection afforded by liability of the owner is inadequate or not available.

The HNS Fund shall have tasks to consider claims made against the HNS Fund; to prepare an estimate in the form of a budget for each calendar year of expenditure and income. Moreover, the tasks are to use at the request of a State Party its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or mitigate damage arising from an incident in respect of which the HNS Fund may be called upon to pay compensation under this Convention; and to provide, on conditions laid down in the internal regulations, credit facilities with a view to the taking of preventive measures against damage arising from a particular incident in respect of which the HNS Fund may be called upon to pay compensation under this Convention.

In addition, the 2010 HNS Protocol excludes packaged goods from the definition of contributing cargo, and accordingly, receivers of these goods will not be liable for contributions to the HNS Fund. However, given that incidents involving packaged goods will remain eligible for compensation, shipowners’ liability limits for incidents involving packaged HNS were increased.

4.3 Limits of liability under the 2010 HNS Protocol

Under the 2010 Protocol, if damage is caused by bulk HNS, compensation would first be sought from the shipowner, up to a maximum limit of 100 million Special Drawing Rights (SDR). Where damage is caused by packaged HNS, or by both bulk HNS and packaged HNS, the maximum liability for the shipowner is 115 million SDR.

Once this limit is reached, compensation would be paid from the second tier, the HNS Fund, up to a maximum of 250 million SDR (including compensation paid under the first tier). The Fund will have an Assembly, consisting of all States Parties to the Convention and Protocol, and a dedicated secretariat. The Assembly will normally meet once a year.

5 ENTRY INTO FORCE CRITERIA FOR 2010 HNS PROTOCOL

The 2010 HNS Protocol will enter into force eighteen months after at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it; and the Secretary-General has received information that those persons in such States who would be liable to contribute have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo.

Entry into force of the 2010 HNS Protocol will, for Contracting States, lead to entry into force of the HNS 1996 as amended by the 2010 Protocol. In this context, it should be noted that the requirements for entry into force are in one respect more stringent than in the original
HNS 1996. In addition to the existing requirements, entry into force is conditional on Contracting States complying with their relevant annual reporting requirements as regards contributory cargo contributing to the general account.

The 2010 HNS Protocol sets out revised detailed reporting requirements for States on contributing cargo at the time of ratification of the Protocol, as well as regularly thereafter, accompanied by sanctions for non-compliance with these requirements. Failure of a Contracting State to comply with its annual reporting requirements, before entry into force of the Protocol, leads to temporary suspension from being Contracting State until the relevant data have been submitted. Therefore, even after ratification by the required number of States, entry into force of the 2010 HNS Protocol is conditional upon all of the relevant States having complied with their respective reporting requirements.

6 POSSIBLE SOLUTION TO REMOVE OBSTACLES FOR 2010 HNS CONVENTION ENTERING INTO FORCE

HNS 1996 has the heavy burden on States of having to report the vast range of packaged substances received by them. The 2010 HNS Protocol is a remedy adopted to differentiate between bulk and packaged HNS goods by excluding packaged goods from the definition of contributing cargo, and exempting receiving States from the obligation to make contributions to the HNS Fund for them. However, damage caused by packaged goods remains covered under the compulsory insurance of the shipowner, and any excess is met from the HNS Fund.

In order to maintain the two-tier system, in view of the exclusion from contributions to the Fund, the shipowner’s limitation amount for carrying packaged goods was also increased.

HNS 1996 in the case of liquefied natural gas (LNG) cargoes provided that the person responsible for making contributions should be the title holder, who may, however, not be subject to the jurisdiction of a State Party, and the contributions may not, therefore, always be recoverable. The 2000 Protocol now shifts responsibility for payment to the receiver, unless the titleholder has agreed to assume that responsibility.

Moreover, HNS 1996 non-submission of contributing cargo reports, on ratification of the and annually thereafter was also a serious obstacle. The 2000 Protocol require States to submit reports on contributing cargo as a condition of becoming Contracting States to the Convention, and thereafter to submit reports annually, in default of which they will be temporarily suspended from being Contracting States. States Parties failing to submit annual reports, after the entry into force of the Convention, will be unable to claim compensation until their reports are brought up to date. The only exception will be claims for deaths and personal injury.

The mentioned achievements of the 2010 HNS Protocol, in author’s opinion, are drives to solving problems that had prevented many States from ratifying the 2010 HNS Convention.

7 CONCLUSION

The HNS Convention excludes pollution damage as defined in CLC and to avoid an overlap with these Conventions. However, HNS covers other damage (including death or personal injury) as well as damage caused by fire and/or explosion when oils are carried, i.e. it covers far the most pressing environmental hazard.

Presently if an incident were to occur involving a spill at sea of hazardous and noxious substances, there would still be no international legal regime in place to provide compensation to victims for any loss or damage suffered as a result. Therefore, the author is urging the need to introduce strict liability for the shipowner and a system of compulsory insurance and insurance certificates and to bring into force without delay the 2010 HNS Convention as a
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widespread agreement on the need for a binding international instrument on liability and compensation for HNS damages.

In the shipping industry corporate social responsibility principles should ensure prompt, adequate and effective compensation to third parties suffering loss or damage, environmental or otherwise, as a result of vessel-sourced HNS incidents.

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