

AN OVERVIEW OF THE HNS CONVENTION

Explanatory note

1 The need to monitor the implementation of the HNS Convention became an ongoing item in the agenda of the Legal Committee of the Organization. The Committee noted the need to address the complexities of the treaty and to provide guidelines with explanations which should enable conditions for its entry into force to be met promptly.

2 The following overview of the HNS Convention was prepared by a Correspondence Group under the leadership of the United Kingdom and approved by the Legal Committee of IMO at its eighty-fourth session held in April 2002. It offers straightforward but fundamental information on the key issues that fall in the scope of the Convention. The overview should also provide a useful basis from which to answer any queries from interested parties while explaining the broad effects of the Convention as well as its purpose. The overview is merely explanatory and therefore does not contain any recommendation to be considered a source of any legal obligation regarding the implementation of the HNS Convention.

3 The overview is consistent with resolution A 932(22) adopted by the IMO Assembly at its twenty-second session. The resolution encourages States to participate in the ongoing work of the HNS Correspondence Group and urges them to place a high priority on working towards the Convention's implementation.

Introduction

4 Compensation for damage caused by the carriage by sea of hazardous and noxious substances (HNS) is regulated by the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the "HNS Convention"), which was adopted under the auspices of the International Maritime Organization (IMO).

5 The regime established by the HNS Convention is largely modelled on the existing regime for oil pollution from tankers set up under the International Convention on Civil Liability for Oil Pollution Damage 1992 (the "CLC") and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the "Fund Convention"), which covers pollution damage caused by spills of persistent oil from tankers.

6 The HNS regime is governed by one Convention, the purpose of 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. The HNS Convention covers both pollution damage and damage caused by other risks, e.g. fire and explosion.

7 Under the HNS Convention the shipowner is liable for the loss or damage up to a certain amount, which is covered by insurance (1st tier). A compensation fund (the HNS Fund) will provide additional compensation when the victims do not obtain full compensation from the shipowner or his insurer (2nd tier). The HNS Fund will be funded by those companies and other entities which receive HNS after sea transport in a Member State in excess of the thresholds laid down in the Convention.

Scope of application

8 The HNS Convention covers any damage caused by HNS 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 State Party and damage (other than pollution damage) caused by HNS carried on board ships registered in, or entitled to fly, the flag of a State Party outside the territory or territorial sea of any State. Costs of preventive measures, i.e. measures to prevent or minimise damage, are also covered wherever taken.

9 The HNS Convention does not cover damage caused during the transport of HNS to or from a ship. Cover starts from the time when the HNS enters the ship's equipment or passes its rail, on loading, and the cover ends when the HNS ceases to be present in any part of the ship's equipment or passes its rail on discharge.

10 The Convention covers incidents involving the carriage of HNS by sea by any sea-going craft of any type whatsoever, except warships and other ships owned or operated by a State and used, for the time being, only on Government non-commercial service. The Convention allows a State to exclude from the application of the Convention ships which do not exceed 200 gross tonnage and which carry HNS only in packaged form and while the ships are engaged on voyages between ports of that State.

11 The Convention defines the concept of HNS largely by reference to lists of individual substances that have been previously identified in a number of international Conventions and Codes designed to ensure maritime safety and prevention of pollution.

12 HNS includes both bulk cargoes and packaged goods. Bulk cargoes can be solids, liquids including oils or liquefied gases. The number of substances included is very large: the International Maritime Dangerous Goods Code (IMDG Code), for example, lists hundreds of materials which can be dangerous when shipped in packaged form. Some bulk solids such as coal and iron ore are excluded because of the low hazards they represent.

Damage

13 'Damage' includes loss of life or personal injury on board or outside the ship carrying HNS, loss of or damage to property outside the ship, loss or damage caused by contamination of the environment, loss of income in fishing and tourism, and the costs of preventive measures and further loss or damage caused by such measures. The Convention defines preventive measures as any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage. These include measures such as clean-up or removal of HNS from a wreck if the HNS present a hazard or pollution risk.

14 The HNS Convention does not cover pollution damage caused by persistent oil, since such damage is already covered under the existing international regime established by the 1992 CLC and Fund Convention. However, non-pollution damage caused by persistent oil, e.g. damage caused by fire or explosion, is covered by the HNS Convention. The HNS Convention does not apply to damage caused by radioactive material.

15 The amount available for compensation from the shipowner and the HNS Fund will be distributed among claimants in proportion to their established claims. However, claims for loss of life and personal injury have priority over other claims. Up to two thirds of the available compensation amount is reserved for such claims.

1st Tier - Liability of the Shipowner

(a) Strict liability of the shipowner

16 The registered owner of the ship in question is strictly liable to pay compensation following an incident involving HNS. This means that he is liable even in the absence of fault on his part. The fact that damage has occurred is sufficient to establish the shipowner's liability provided there is a causal link between the damage and the HNS carried on board the ship.

17 The shipowner is exempt from liability under the HNS Convention only if 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 by an act or omission done with the intent to cause damage by a third party; or
- (c) the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function; or
- (d) the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped either:
 - (i) has caused the damage, wholly or partly; or
 - (ii) has led the owner not to obtain insurance;

provided that neither the shipowner, nor his servants or agents knew or ought reasonably to have known of the hazardous and noxious nature of the substances shipped.

18 If the shipowner proves that the damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the shipowner may be exonerated wholly or partially from its obligation to pay compensation to such person.

19 The owner of the HNS involved in the incident is not liable under the HNS Convention.

(b) Limitation of liability

20 The shipowner is normally entitled to limit his liability under the HNS Convention to an amount calculated on the basis of the units of gross tonnage (GT) of the ship, as follows:

- (a) 10 million Special Drawing Rights (SDR)¹ for a ship not exceeding 2,000 GT;
- (b) for a ship in excess of 2,000 GT 10 million SDR plus:
 - (i) for each unit of tonnage from 2,001 to 50,000 GT, 1,500 SDR;
 - (ii) for each unit of tonnage in excess of 50,000 GT, 360 SDR.

The aggregate amount of the shipowners' liability shall not exceed 100 million SDR.

21 The shipowner will be denied the right to limitation of liability if it is proved that the damage resulted from his personal act or omission committed either with intent to cause damage, or recklessly and with knowledge that damage would probably result.

(c) Channelling of Liability

22 As set out above, the registered shipowner is liable for pollution damage under the HNS Convention. No claim for compensation may be made against the following persons unless the damage resulted from their personal act or omission committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result:

- (a) the servants or agents of the shipowner or members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer (including a bareboat charterer), manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any person taking preventive measures; and
- (f) all servants or agents of persons mentioned in (c), (d) and (e).

¹ The Special Drawing Rights is a monetary unit established by the International Monetary Fund (IMF); as at 31 December 2001, 1 SDR = £ 0.86558 or US\$1.25976.

(d) Compulsory insurance

23 The owner of a ship that carries HNS is required to take out insurance, or maintain other acceptable financial security to cover his liability under the HNS Convention.

24 The HNS Convention requires shipowners to provide evidence of insurance cover upon the ship's entry into port of any State which is party to the Convention by production of a certificate, regardless of whether the State of the ship's registry is party to the Convention. The certificates will be issued by the State of the ship's register or, if that State is not party to the Convention, by a State Party. States Parties are required to accept any certificate issued by any other State Party.

25 Claims for compensation may be brought directly against the insurer or person providing financial security.

2nd Tier - HNS Fund

26 The HNS Fund will pay compensation when the total admissible claims exceed the shipowner's liability, i.e. the Fund pays "top up" compensation when the shipowner, or his insurer, cannot meet in full the loss or damage arising from an incident.

27 The HNS Fund also pays compensation in the following cases:

- the shipowner is exonerated from liability; or
- the shipowner liable for the damage is financially incapable of meeting his obligations.

28 To claim against the HNS Fund, the Convention requires claimants to prove that there is a reasonable probability that the damage resulted from an incident involving one or more ships. The HNS Fund may in such cases be liable to pay compensation even if the particular ship causing the damage cannot be identified.

29 The HNS Fund is also not liable to pay compensation if the damage was caused by an act of war, hostilities, etc., or by HNS discharged from a warship or other ship owned or operated by a State and used for the time being, only on Government non-commercial service.

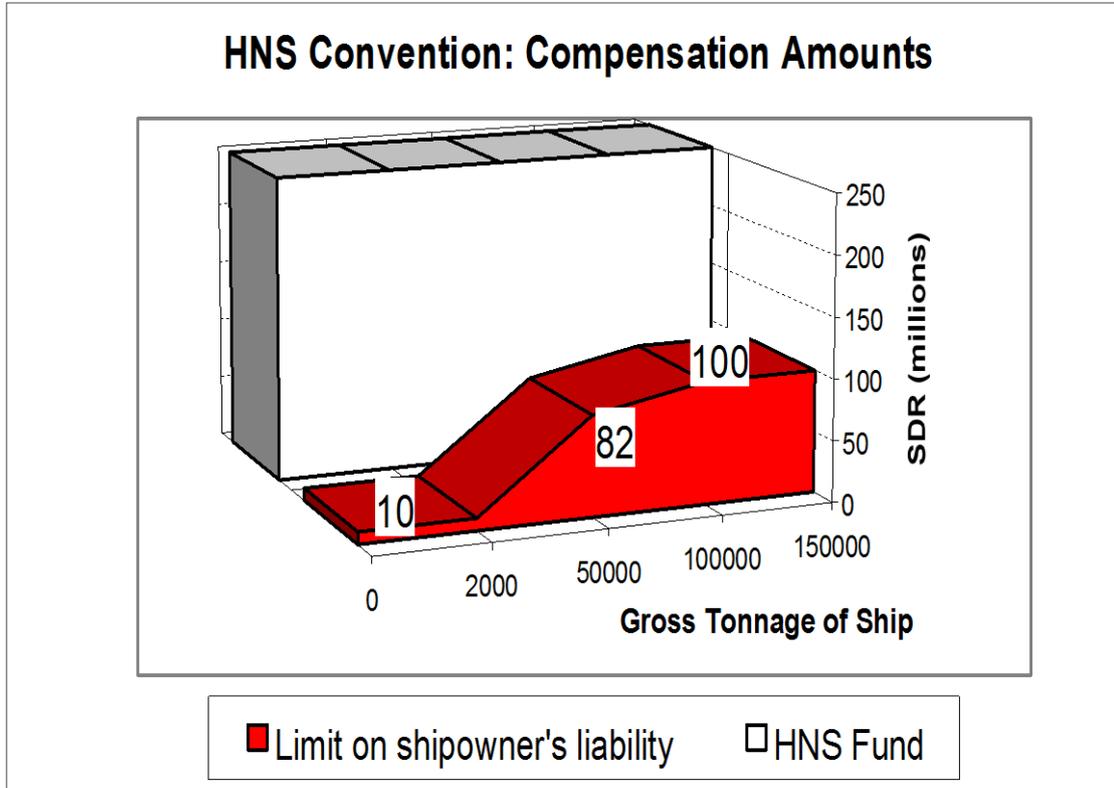
30 If the HNS Fund proves that the damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the HNS Fund may be exonerated wholly or partially from its obligation to pay compensation to such person. However, there shall be no such exoneration of the HNS Fund with regard to preventive measures.

(a) Limit of compensation by the HNS Fund

31 As illustrated in Figure 1 below, the maximum amount payable by the HNS Fund in respect of any single incident is 250 million SDR, including the sum paid by the shipowner or his insurer. The HNS Convention also provides a simplified procedure to increase the maximum amount of compensation payable under the Convention in the future.

32 If the total amount of the admissible claims does not exceed the maximum amount available for compensation, then all claims will be paid in full. Otherwise the payments will have to be prorated i.e. all claimants will receive an equal proportion of their admissible claims.

Figure 1. Compensation amounts under the HNS Convention, 1996.



Financing of the HNS Fund

(a) Contributions to the HNS Fund

33 Compensation payments made by the HNS Fund will be financed by contributions levied on persons which have received, in a calendar year, contributing cargoes after sea transport in a Member State in quantities above the thresholds laid down in the HNS Convention. For each contributor the levies will be in proportion to the quantities of HNS received by that person each year.

34 For the purpose of the contribution system, not only imported cargoes, but also cargoes received after sea transport between ports in the same State are taken into account. However, cargo is not considered to be contributing cargo so long as it is in transit. That is, provided that the cargo is not imported, consumed or transformed, transshipment does not lead to a requirement for the payment of a contribution to the HNS Fund.

35 The contributions to finance the HNS Fund's compensation payments will be made post-event, i.e. levies will only be due after an incident involving the HNS Fund occurs. Levies may be spread over several years in the case of a major incident.

36 The HNS Convention allows persons who physically receives HNS on behalf of a third party, e.g. a storage company, to designate that third party as the receiver for the purposes of the Convention. Both the person who physically receives the contributing cargo in a port or terminal, and the designated third party must be subject to the jurisdiction of a State Party.

37 For liquefied natural gases (LNG), the receiver is any person who, immediately prior to its discharge, held title to an LNG cargo discharged in a port or terminal of a State Party.

38 States are allowed to establish their own definition of “receiver” under national law. Such a definition must however result in the total quantity of contributing cargo received in the State in question being substantially the same as if the definition in the Convention had been applied. This allows States flexibility to implement the Convention in conjunction with existing national law, without giving any State the possibility of obtaining an unfair commercial advantage.

39 States are liable for any financial losses incurred by the HNS Fund as a result of the non-submission of reports. States also have the option of developing national regimes for the collection of contributions in respect of receipts of cargoes carried in domestic traffic (i.e. the trade by sea from one port or terminal to another within the same State).

40 States Parties are required to inform the Director of the HNS Fund of the name and address of receivers of quantities of contributing cargo exceeding the thresholds during the preceding year together with the quantities of cargo received by each of them.

41 When ratifying the HNS Convention and annually thereafter until the Convention enters into force for a given State, States Parties are obliged to submit information to IMO on contributing cargoes received. This will enable the Secretary General of the IMO to determine the date of the entry into force of the Convention.

(b) HNS Fund Accounts

42 The HNS Fund, when fully operational, will have four accounts:

- Oil
- Liquefied Natural Gas (LNG)
- Liquefied Petroleum Gas (LPG)
- A general account with two sectors:
 - Bulk solids
 - Other HNS

43 Each account will meet the cost of compensation payments arising from damage caused by substances contributing to that account, i.e. there will be no cross-subsidization.

44 Each separate account will only come into operation when the total quantity of contributing cargo received in Member States during the preceding year, or any such year as the HNS Assembly decides, exceeds the following levels:

- 350 million tonnes for the oil account
- 20 million tonnes for the LNG account
- 15 million tonnes for the LPG account

45 However, during the early existence of the HNS Fund, there may not be sufficient contribution basis in the form of the quantities of HNS received in Member States to set up all the four separate accounts. Initially, the separate accounts may be **postponed** and the HNS Fund may therefore have only two accounts:

- one separate account for oil
- one general account including four sectors:
 - LNG
 - LPG
 - Bulk solids
 - Other HNS

46 In addition, the separate accounts could be **suspended** if the total unpaid contributions to that account exceed 10 % of the most recent levy to that account. As a result, any contributions due to a separate account that has been suspended will be paid into the general account and any relevant claims will be met from this account. Any decision to suspend or re-instate the operation of an account requires a two-thirds majority of the Assembly.

47 Receivers of HNS might have to contribute to one or more of the accounts. The levies applying to individual receivers will be calculated according to the quantities of contributing cargo received and, in the case of the general account, according to the Regulations in Annex II of the Convention. Liability to contribute to the HNS Fund will arise for a given receiver only when his annual receipts of HNS exceed the following thresholds:

Oil	persistent oil	150 000 tonnes
Oil	non-persistent oil	20 000 tonnes
LNG		no minimum quantity
LPG		20 000 tonnes
Bulk solids and other HNS		20 000 tonnes

Competence of courts

48 Claimants can normally only take legal action in a court in the State Party in whose territory or waters the damage occurred. In this context waters means the territorial sea² or the Exclusive Economic Zone (EEZ)³, or an equivalent area, of a State Party. This also applies to legal actions against any provider of insurance or financial security for the owner's liability i.e. the shipowner's insurer.

49 Different rules apply if damage other than pollution damage to the environment occurs exclusively beyond the territorial seas of States Parties.

² The breadth of the territorial sea is established in Article 3 of the United Nations Convention on the Law of the Sea (UNCLOS) as " up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." The normal baseline is the low water line along the coast (Article 5 of UNCLOS).

³ The Exclusive Economic Zone is an area beyond the territorial sea defined in Article 57 of UNCLOS as not beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

50 Actions against the HNS Fund should be brought before the same court as actions taken against the shipowner. However, if the shipowner is exempted from liability, or for another reason no shipowner is liable, legal action against the HNS Fund must be brought in a court which would have been competent had the shipowner been liable. Where an incident has occurred and the ship involved has not been identified, legal action may be brought against the HNS Fund only in States Parties where damage occurred.

Administration

51 The HNS Fund will have an Assembly, a Secretariat and a Director, mirroring the organisation of the International Oil Pollution Compensation Funds (IOPC Fund).

52 The Assembly will consist of all States Parties to the HNS Convention. The Assembly will have a number of functions, including approving settlements of claims against the HNS Fund, and deciding on amounts to be levied as contributions.

Entry into force of the HNS Convention

53 The HNS Convention will enter into force eighteen months after ratification by at least twelve States subject to the following conditions:

- (i) four States must each have a registered ship's tonnage of at least 2 million GT; and
 - (ii) contributors in the States that have ratified the Convention must, between them, have received during the preceding calendar year a minimum of 40 million tonnes of cargo consisting of bulk solids and other HNS liable for contributions to the general account.
-