

Diplomatic Conference adopts Protocol to the 1996 HNS Convention



Måns Jacobsson looks at the Protocol to the 1996 HNS Convention which was adopted earlier this year. Måns Jacobsson was Director of the International Oil Pollution Compensation Funds 1985-2006. He is a member of the Executive Council of Comité Maritime International (CMI) and represented Sweden at the 2010 Diplomatic Conference on the HNS Convention.

INTRODUCTION

In 1996 a Diplomatic Conference held under the auspices of the International Maritime Organization (IMO) adopted the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention). The Convention has not entered into force, and a number of States indicated that there were serious obstacles to their ratification of the Convention. It was considered, therefore, that it was necessary to amend the Convention by the adoption of a Protocol so as to remove these obstacles.

The author gives a short description of the content of the HNS Convention and sets out the obstacles to its entry into force. The amendments adopted by the 2010 Diplomatic Conference are examined, and the author makes an assessment of the outcome of the Conference.

MAIN CONTENT OF THE HNS CONVENTION

The HNS Convention was modelled on the regime governing liability and compensation for pollution damage caused by spills of persistent oil from tankers, i.e. the regime established by the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 Civil Liability Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention). As regards that regime, reference is made to the Annual Report 2009 of the International Oil Pollution Compensation Funds, p. 6. (See also Måns Jacobsson: “The International Liability and Compensation Regime for Oil Pollution from

Ships - International Solutions for a Global Problem”, *Tulane Maritime Law Journal* 2007, p. 2.)

The HNS Convention establishes a two-tier system of compensation, with the first tier being paid for by the individual shipowner and the second tier by the International Hazardous and Noxious Substances Fund (HNS Fund). (For a detailed description of the HNS Convention see Måns Jacobsson: *The HNS Convention - Prospects for its entry into force*, *Yearbook of Comité Maritime International*, 2009 p. 417.)

The definition of the hazardous and noxious substances to which the HNS Convention applies 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. These substances are very varied and include bulk solids, liquids including oils (both persistent and non-persistent), liquefied gases such as liquefied natural gases (LNG) and liquefied petroleum gases (LPG). Packaged goods are included if they are covered by the International Maritime Dangerous Goods Code (IMDG Code), which comprises a very wide range of chemicals although many of these are only carried in small quantities.

The definition of “damage” in the HNS Convention is much wider than that in the 1992 Civil Liability and Fund Conventions which only apply to pollution damage. The following types of damage will be covered by the HNS Convention:

- 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 of the environment, e.g. in the fishing, mariculture and tourism sectors
- costs of preventive measures, e.g. clean-up operations at sea and onshore
- costs of reasonable measures of reinstatement of the environment.

However, claims arising from pollution damage caused by tanker oil spills are excluded from the HNS Convention, since such damage is already covered by the Civil Liability and Fund Conventions.

Under the HNS Convention, a shipowner is strictly liable for any damage caused by HNS substances carried on board his ship as cargo, and has only very limited defences. The shipowner is obliged to maintain insurance to cover his liability under the Convention. The shipowner is normally entitled to limit his liability to the following amounts: 10 million Special Drawing Rights (SDR) (US\$15.3 million) for ships up to 2,000 units of gross tonnage (GT), rising to 100 million SDR (US\$153 million) for ships of 100,000 GT or more.

Once the compensation payments have reached the shipowner's limitation amount, compensation is paid from the second tier, the HNS Fund. The maximum amount payable in compensation under the two tiers together is 250 million Special Drawing Rights (US\$380 million) for any one incident.

The HNS Fund will be financed by contributions payable by the physical receiver of hazardous and noxious substances (HNS) received in the ports of a State party to the Convention or, as regards LNG cargoes, by the holder of title to the cargo immediately prior to its discharge. The contributions are to be calculated on the basis of reports submitted to the HNS Fund by the governments of the States parties. The HNS Fund will operate in a similar way to the International Oil Pollution Compensation Funds (IOPC Funds).

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

- in the previous calendar year a total of at least 40 million tonnes of cargo consisting of substances other than oil, LNG and LPG was received in the States that have ratified the Convention, and



Photo - Courtesy of Port of Felixstowe

- four of these States each have ships with a total tonnage of at least 2 million GT.

The following 14 States have ratified the HNS Convention: Angola, Cyprus, Ethiopia, Hungary, Liberia, Lithuania, Morocco, Russian Federation, Saint Kitts and Nevis, Samoa, Sierra Leone, Slovenia, Syrian Arab Republic and Tonga. Only three of these States (Cyprus, Liberia and the Russian Federation) have ships with a total tonnage of 2 million GT.

A State should, when ratifying the HNS Convention and annually thereafter until the Convention enters into force for

that State, submit to the Secretary-General of IMO data on the relevant quantities of contributing cargo received or, in the case of LNG, discharged in that State during the preceding calendar year. Of the States that have ratified the Conventions, only two, Cyprus and Slovenia, have submitted this data. The entry into force conditions are therefore far from being fulfilled.

PREPARATIONS FOR A REVISION OF THE 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 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 version.

In view of this situation the 1992 Fund set up a Working Group to develop solutions to the issues which 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 which 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.

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.

2010 DIPLOMATIC CONFERENCE

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 results in amendments to the 1996

Convention on the following points.

i) Packaged goods

One of the main difficulties in implementing the HNS Convention had been how to organise the system for reporting contributing cargo. While bulk cargoes had not been considered to be 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 HNS presented many complex problems for both industry and States and, as a result, there was the potential for large-scale and long-term under-reporting.

For these reasons packaged HNS goods will under the Protocol be excluded from the contribution system to the HNS Fund, but incidents involving packaged goods will still be covered by the HNS Fund 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 cargo interests, the draft protocol contained a provision to the effect that the shipowner's limitation amount for ships carrying packaged HNS goods would be increased in comparison with the original HNS Convention. The draft protocol did not contain any proposal as regards the level of this increase, since it had been considered by the Fund Working Group and the Legal Committee that it was a matter for the Diplomatic Conference to decide.

The International Group of P&I Clubs had provided data on compensation claims relating to incidents involving the carriage of HNS between 2002 and 2006. This data shows that the vast majority of claims arising from such incidents would have been met in full by the shipowner within the limits laid down in the HNS Convention in its original version if it had been in force at the time of the incident.

When this issue was discussed at the Diplomatic Conference a number of delegations took the view that no increase was necessary, whereas a number of other delegations proposed increases ranging from 5 per cent to 50 per cent. After a long debate the Conference decided that the shipowner's limitation amount for ships carrying packaged HNS goods should, under the Protocol be increased by 15 per cent in comparison with the original HNS Convention.

ii) Liquefied natural gases (LNG)

Under the 1996 Convention contributions for liquefied natural gases (LNG) would not have been paid 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 that the titleholder might not be subject to the jurisdiction of any State party. Under the draft protocol prepared by the 1992 Fund Working Group the

physical receiver would be liable for the contributions also in respect of LNG cargoes. On this issue, however, a significant minority of delegations (mostly of States that are major importers of LNG) was in favour of retaining the titleholder as primarily liable for contributions.

In order to ensure a consensus at the Diplomatic Conference the Legal Committee proposed a compromise solution to the effect that the person liable for contributions should 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. This compromise solution was accepted by the Diplomatic Conference.

iii) Non-submission of reports on contributing cargoes

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 was considered essential that this problem should 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 HNS cargoes for all years prior to the incident in question. This sanction will, however, not apply to claims for compensation for personal injury and death.

ASSESSMENT OF THE OUTCOME OF THE DIPLOMATIC CONFERENCE

It appears that the 2010 Protocol provides appropriate solutions to the problems identified by a number of States as obstacles to ratification. There should, therefore, be a good possibility that the Protocol will be ratified by a reasonable number of States and enter into force within a relatively short period of time.

It is likely that the 2010 revision of the HNS Convention is the last possibility to bring about a global regime governing these matters. A failure to bring the 2010 Protocol into force within a reasonable period of time may well encourage regional initiatives.

In view of the international character of maritime transport, such a development would, in the author's opinion, be regrettable. A regionalisation in this field of law on liability and compensation would, in his view, be detrimental to international shipping and, in particular, to victims of damage caused by hazardous and noxious substances carried by sea. Ⓢ