

OVERVIEW ON INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA (HNS) 1996

Junior Lecturer Phd. Oana Adăscăliței^x

Constanta Maritime University^x

ABSTRACT

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) 1996 provides for the first time a legal international framework dedicated to pollution from hazardous and noxious substances carried by ships. The HNS 1996 is largely modelled after the CLC-IOPC Fund regime, with a system of liability/compensation on two tiers sharing the costs between the ship-owner and the cargo receiver. A Protocol to the Convention – 2010 HNS Protocol – was adopted with a view to introduce modifications that facilitate a faster entry into force of the Convention. The herein Article aims to present the main features of the 1996 HNS Convention.

Keywords: *hazardous and noxious substances; 1996 HNS Convention; 2010 HNS Protocol; limitation of liability;*

1. INTRODUCTION

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS 1996) was adopted in 1996 aiming to “fill a regulatory gap in connection with the by the transport of hazardous and noxious substances by ship” [1].

The structure of the Convention which is based on the 1992 CLC and 1992 Fund Conventions regarding oil pollution, establishes a two tiers compensatory framework with the ship-owners (and their P&I Clubs) paying claims up to a certain limit and a Fund contributed to by cargo receivers paying claims in excess of the first tier of compensation. [2]

Although its ratification has proved to be stringent, HNS Convention is not yet in force. [3] A number of obstacles to ratification have been identified among them the most important being: packaged HNS goods, contribution to LNG account, “non-submission of contributing cargo reports” and the definition of “the hazardous and noxious substances” [2].

Many practical problems that had prevented many States from ratifying the Convention were addressed through a second conference held in 2010 [4]. The 2010 HNS Protocol, elaborated under IOPC Fund auspices, seems to provide adequate solutions to the problems identified by states as obstacles to its ratification [5]. Meanwhile, a number of practical measures were taken by the Legal Committee, in order to assist States in the ratification and implementation process of the HNS 1996 and the 2010 HNS Protocol [6]. Guidelines to assist countries in meeting reporting requirements under the 2010 HNS Convention were endorsed by the Committee [7].

More recently, an Assembly resolution aimed at encouraging implementation and entry into force of 2010 HNS Protocol has been approved by the Legal Committee [8].

2. SHIPS SUBJECT TO THE 1996 HNS

The 1996 HNS is applicable to “any seagoing vessel and seaborne craft, of any type whatsoever” [9].

Mobile offshore units although clearly within the definition of ship under the 1996 HNS if used for storage rather than transportation will be excluded from the domain of the HNS Convention” [10]. If a State Party doesn’t decides otherwise, warships and state ships will be normally excepted from application [9].

3. HAZARDOUS AND NOXIOUS SUBSTANCES

According to Article 7.1, 1996 HNS Convention, the liability for the pollution caused by hazardous and noxious substances is directed solely to the ship owner [9].

Hazardous and noxious substances are considered the following: oils carried in bulk, noxious liquid substances carried in bulk, dangerous liquid substances carried in bulk, “dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, liquefied gases”, “liquid substances carried in bulk with a flashpoint not exceeding 60° C”, “solid bulk materials possessing chemical hazards” [9]. Residues from the previous carriage in bulk of substances above mentioned are also included. [9]

Substances that do not pose such a great danger as iron ore, coal, and grain are not included in the definition [5]. “Hazardous and harmful substances in packaged form” are included if they are covered by the IMDG Code. [5]

4. DAMAGES COVERED

The Convention applies to claims, “for damage arising from the carriage of hazardous and noxious substances” except those “claims arising out of any contract for the carriage of goods and passengers” [9]. According to the Convention, damage means “loss or damage by contamination of the environment caused by the hazardous and noxious substances”, “loss of or damage to property outside the ship carrying the

hazardous and noxious substances caused by those substances”, “loss of life or personal injury on board or outside the ship carrying the hazardous and noxious substances caused by those substances” [9].

“The costs of preventive measures and further loss or damage caused by these preventive measures” fell under the definition of damage as provided by the Convention” [9].

The scope of the HNS convention is much larger than that of the CLC 1992 which refers only to the “damage caused outside the ship carrying oil products by contamination” [11]. Even if compensation for oil pollution damage is not payable under the CLC 1992, the HNS 1996 does not apply to it [9]. The measure was taken to avoid a conflict between two conventions making both reference to the persistent oils [10]. Despite of that, “non-pollution damage caused by persistent oil, such as damage caused by fire or explosion”, shall be covered by the HNS Convention [12].

The 2010 HNS Convention shall not apply to “damage caused by a radioactive material of class 7” [9].

5. THE GEOGRAPHICAL SCOPE OF APPLICATION

The application of the 1996 HNS is complicated by a coupling between the type of the damage suffered, the jurisdictional area in which the damage was suffered and the flag of the ship [10]. So the Convention shall apply to “any damage caused in the territory, including the territorial sea, of a State Party” [9]. Also, is applicable to “damage by contamination of the environment” caused in the exclusive economic zone of a State Party, established in accordance with international law, or in a similar area if a State Party has not established such a zone [9].

To note, “for the Economic Exclusive Zone, the application of the 1996 HNS is restricted only to damages to the environment” [10].

Furthermore, the 1996 HNS Convention shall apply where the “damage has been caused by a substance carried on board a ship registered in a State Party” [9] and such damage, other than “damage by contamination of the environment”, is “caused outside the territory, including the territorial sea, of any State” [9].

Last but not least, “the Convention is applicable to preventive measures, wherever such measures are taken” [9].

6. LIABILITY

Legal liability provisions are similarly with those in CLC 1992. The liability for damage caused by “hazardous and noxious substances” being carried on board ship is placed upon the ship-owner defined as “the person or persons registered as the owner of the ship” [9]. The liability rests with the ship owner even than according to the charter party, the demise charterer is made liable to the ship owner for any pollution incident. [13]

The owner’s liability intervenes “from the time when the hazardous and noxious substances enter any part of the ship’s equipment, on loading, to the time they cease to be present in any part of the ship’s equipment, on discharge” [9].

The owner’s liability is absolute and no legal action is permitted against his servants or the pilot of the ship or persons performing salvage operations [9]. The ship-owner retains a right of recourse against “the shipper or the receiver of the substance causing the damage or any third party” [9]. Such a legal action will be an action under national applicable law rather than an action under the Convention. [14].

The ship-owner may evade liability in the following exceptional circumstances: “the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character” [9]. Another possibility is that “the damage was wholly caused by an act or omission done with the intent to cause damage by a third party” [9].

Finally, where 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, the ship owner is also excepted from liability” [9].

Apart from these circumstances that are practically similar to that set out in CLC 1992, the Convention added the event in which the shipper does not comply to the obligation to provide the necessary information on the hazardous and noxious nature of the substances shipped [9]. The last defence is not available to the ship owner if the dangerous nature of the substances shipped was known to him or his servants [5].

The ship-owner may be exonerated from liability where he can prove “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” [9].

7. INSSURANCE ISSUES

The ship-owner “is required to maintain insurance or other financial security” which shall “be carried on board the ship” [9]. The insurer can be sued directly under 1996 HNS but he benefits from the limitation of liability [9]. In addition, he can use the defences “which the owner would have been entitled to invoke” [9].

The insurer may also invoke in his defence that the damage resulted from the wilful misconduct of the owner, except for that defences which the defendant might have been entitled to invoke in proceedings brought by the owner against him. [9]

8. LIMITATION OF LIABILITY

The ship-owner “is entitled to limit his liability in respect of any one incident up to a certain aggregate amount” [15]. The limit of the ship-owners liability is calculated based on the vessel’s tonnage and it is different depending on the category of substances causing the damage - hazardous and noxious substances in bulk or in packaged form [15].

The Convention provides for limitation as follows: where the damage has been caused by bulk HNS, “the ship owner is” normally “entitled to limit his liability to 10 million units of account for a ship not exceeding 2,000 units of tonnage” [9]; in cases where the ship is over 2000

GT, the ship owner will have to pay in addition 1,500 units of account for each unit of tonnage from 2,001 to 50,000 units of tonnage; likewise where the tonnage is over 50,000 units, the supplementary amount to be paid is 360 units of account for each unit in excess this amount; However, the 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, the ship owner is entitled to limit his liability to 11.5 million units of account for a ship not exceeding 2,000 units of tonnage. [9] Similar to previous situation, an additional amount has to be paid for each unit of tonnage in excess of 2,000 GT or 50,000 GT depending on the case [9].

The owners of two or more ships involved in an incident, being jointly and severally liable, shall be entitled to the limits of liability applicable to each of them [9].

The ship-owner's right of limitation "will be lost if it is proved that the damage resulted from the personal act or omission of the owner, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result" [9]. The insurer may retain the right to limitation even if the ship owner is not entitled to limit its liability [9].

9. THE LIMITATION FUND

The "owner shall, for the purpose of benefitting from the limitation constitute a fund for the total sum representing the limit of liability with the court or other competent authority of any one of the States Parties in which action is brought or in which an action can be brought" [9]. The value of the Fund is calculated *per* ship's tonnage according to the limits prescribed in the Convention. [9]

The Fund shall be constituted by the owner or his insurer simply depositing the sum or other bank guarantee accepted by the Court. [9]. After that, the ship and any other property of the ship owner will be released subject to the access of the claimant to the Fund [9]. In addition no other right should be exercised against any other assets of the owner. [9]

After a fund has been constituted, the competent Court will have exclusive jurisdiction relating to the distribution and apportionment of the claims. [9]

10. JURISDICTION

The 1996 HNS Convention provides for a jurisdictional competition depending on two potential circumstances. Firstly, where an incident has caused damage in the territory, including the territorial sea or economic exclusive zone of one or more States Parties, claims against the owner "may be brought only in the courts of any such States Parties" [9].

Pollution incidents may also occur beyond national jurisdictional areas of a State Party, such as the High Seas or Economic Exclusive Zone of non-contracting States, in particular loss of life inside or outside the vessel and

damages to property outside the ship [10]. In this situation the 1996 HNS Convention establishes an alternative jurisdiction. Any legal action against the ship owner may be commenced only "in the courts of the State Party where the ship is registered" or "in the State Party where the owner has habitual residence/where the principal place of business of the owner is established" or in "the State Party where a fund has been constituted" [9].

11. THE INTERNATIONAL HAZARDOUS AND NOXIOUS SUBSTANCES FUND (HNS FUND)

The second layer of compensation is provided by The International Hazardous and Noxious Substances Fund (HNS Fund). HNS Fund intervenes where the compensation afforded by ship owner is "inadequate or not available" [9]. In other cases, the HNS Fund shall pay because either the ship owner is exonerated from liability or the ship owner it is "financially incapable of meeting the obligations under this Convention in full" [9].

As provided by the Convention, there is an overall amount of damages payable by the HNS Fund, inclusive of any compensation provided by the ship owner, capped to a sum not exceeding 250 units of account" [9]. All the expenses incurred by the ship owner in order to minimise or deter the effects of the pollution shall count as damages and may be claimed for recovery against the Fund. [9]

The annual contributions to "the Fund shall be made in respect of each State Party by any person who was the receiver in that State in the preceding calendar" year "of aggregate quantities exceeding 20,000 tonnes of contributing cargo" [9].

The 2010 HNS Protocol is amending the contributory system in two major aspects [14]. Firstly, hazardous and noxious substances in packaged form are excluded from the contributory system. Secondly, the contributions for LNG cargo are to be paid by the receivers. [14]

Claims in respect of death or personal injury have priority over other claims, for a cumulative value up to the two thirds of the total amount established. [9] The remaining claims for personal injury together with any other property or loss claims are paid out in proportion up to the limit of liability. [10]

12. JURISDICTION AND THE HNS FUND

Any action against the HNS Fund for compensation shall be instituted "only before a court having jurisdiction in respect of actions against the owner who liable for damage caused by the relevant incident" [9].

In the event that the ship carrying the hazardous or noxious substances which caused the damage has not been identified actions for compensation may be brought only in front of courts which would have jurisdiction had the ship owner been liable [9].

13. TIME BAR

Rights to compensation against the ship owner "shall be extinguished unless an action is brought thereunder within three years from the date when the person suffering the damage knew or ought reasonably to have known of

the damage and of the identity of the owner” [9]. Similarly, the rights for compensation against the Fund are extinguished within a period of three years. [9]

Any action shall be barred if it is brought later than 10 years from the date of the incident which caused the damage [9].

14. CONCLUSIONS

The necessity of ratification of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) 1996 and its 2010 Protocol is beyond doubt. The HNS 1996 complements the international legal framework of the conventions intended to address to various forms of pollution at sea. Although theoretically the obstacles met during the ratification were mainly surpassed with the adoption of the 2010 HNS Protocol, the States are reluctant to consider the ratification of the actual HNS 1996 Convention.

IMO through its Legal Committee has adopted a series of measures in order to facilitate a faster adoption of the 2010 HNS Convention. The international efforts with the IMO and IOPC Fund framework should become more specific in order to raise awareness among national decisional factors concerning the necessity to adopt the 2010 HNS Convention. Solving pollution incidents through national legislation is less desirable in comparison with an international legal instrument.

15. REFERENCES

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