

LIABILITY FOR POLLUTION FROM HAZARDOUS AND NOXIOUS SUBSTANCES

The revival of the 1996 HNS Convention



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01/11/2011

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Acknowledgement

First and foremost, I would like to express my gratitude to my parents without whom I would never have been able to finish this degree. I would like to thank them both for their continuing advice and encouraging calls during my stay in Oslo. They kept my two feet on the ground while they offered me all opportunities to study my passion, shipping law.

I also would like to thank Erik, my partner in crime, for his constant support during the writing of this thesis and my studies in Norway and the Netherlands. Thank you for supporting me in all the endeavors that I wish to pursue. Being Erik's partner and living together in our little "palace" in Hamburg is my greatest joy.

Throughout my studies at the University of Oslo, my classmates were the ones who made my stay really worth it. As I was the youngest of the program, I could fully benefit from all their good advice and lessons in life. I would like to thank you all for the good laughs and cheering up. More in particular I want to thank my ghetto-mate Marija and my favorite Latinos: Gaston, Jan-Peder, Luciana and Lyndsay. I almost became a Latin myself during my 10 months stay in cold and snowy Oslo. Each of them inspired me, helped me discover hidden passions and made me stronger. Thank you for shaping and sharing my life's journey.

Also I thank the staff of the library of the International Tribunal for the Law of the Sea (ITLOS) to host me when I was conducting preliminary research in Hamburg. Additionally, I would like to thank my supervisor, Prof. Ulfbeck for giving me advice on my thesis and to invite me to come to Copenhagen to discuss the thesis. Last but not least, I want to thank Ida Stabrun for everything she has done. Without her, the LLM was simply not possible. She has an endless patience and was always there when something went wrong. She gave us excellent advice and was always interested in our lives and problems.

This version is submitted on 1/11/2011

Hamburg, Germany.

List of Abbreviations

CCC	Contributing Cargo Calculator
CLC	International Convention on Civil Liability for Oil Pollution Damage
CMI	Committee Maritime International
EU	European Union
EEZ	Exclusive Economic Zone
HNS	hazardous and noxious substances
HNS Convention	International Convention on Liability and Compensation for damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea
HS	High Seas
IMDG	International Maritime Dangerous Goods
IMO	International Maritime Organisation
IMO Conference	1984 International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea
IOPC	International Oil Pollution Compensation Fund
LNG	liquefied natural gas
LPG	liquefied petroleum gas
MARPOL 73/78	International Convention on Prevention of Maritime Pollution by Ships
P&I	Protection and Indemnity
SOLAS	International Convention for Safety of Life at Sea
TS	Territorial Sea

1 Introduction

1.1 Problem statement

Blasts and Fires Wreck Texas City of 15.000; 300 to 1.200 dead. Thousands Hurt, Homeless; Wide Coast Area Rocked, Damage in Millions¹

Texas City, Tex., Thursday, 17th April 1947

“[...]A chain of explosions set off by the blowing up of a nitrate-laden ship smote this Gulf port yesterday, killing hundreds and injuring thousands. It was the worst American disaster in ten years. Much of the boom industrial city of 15,000 population was destroyed or damaged. Property loss will run into millions of dollars. Fires followed the blasts. Poisonous gas from exploding chemicals was reported to be filtering through the area. Estimates of the fatalities ranged from 1,200 down to 450. Two new explosions rocked the city at 1 A. M. today, injuring many persons who survived yesterday's disastrous blasts. There were no immediate reports of additional deaths [...] The explosion was the worst in Texas history, exceeding even the New London school explosion in 1937 when in 294 school children were killed. It was the second worst disaster in Texas history, being exceeded only by that of the Galveston hurricane in 1900, when 5,000 to 8,0000 (sic) fled. [...]”

In the 17th century, the doctrine of “mare liberum”, introduced by the Dutch jurist Hugo Grotius, formed the basis of the classical international law of the sea.² The doctrine claimed that all states are free to use the seas to develop trade, which fitted the Dutch trading policy at that time.³ Soon it became clear that this doctrine did not have an absolute character and that new legislation should regulate the various uses of the sea. The example

¹ Headline New York Times, “Blasts and Fires Wreck Texas City of 15.000; 300 to 1200 dead; Thousand Hurt, Homeless; Wide Coast Area Rocked Damage in Millions”, April 17, 1947.

² GROTIUS, H., *The freedom of the Seas*. (Translation with a revision of the Latin Text of 1633 by Ralph Van Deman Magoffin, and edited by James Brown Scott).

³ CHURCHILL, R.R., LOWE, A.V., *The law of the sea*, 1999, p 4.

of a disaster mentioned in the newspaper article above shows that there is a need for an international regime to all the problems that come with such a major accident.

After the Second World War, international trade, offshore exploitation and therewith the risk to pollute the marine environment increased dramatically. Not only the carriage of oil increased but also the carriage of other hazardous and noxious substances expanded tremendously during the early 1970s.⁴ Therefore states developed a range of measures to *prevent* such marine pollution accidents.⁵ Together with this, the international community thought of establishing also *repressive* measures, such as liability systems. Namely, the potential establishment of an international oil pollution liability regime within the IMO framework received much attention.⁶ At the contrary however, the establishment of a civil liability regime for pollution by hazardous and noxious substances other than oil caused by tankers was not considered to be urgently necessary. Several major chemical spills however ignited the idea that a new liability regime should be established in order to cover third parties for the severe damage that often results from marine chemical accidents.⁷

It was not until the mid-1990s that states, operating under the International Maritime Organization (hereinafter IMO), managed to adopt an Hazardous and Noxious Substances Convention, hereinafter the HNS Convention, regulating the liability for accidents caused by hazardous and noxious substances. Since its adoption though, many obstacles encountered the ratification of the 1996 HNS. Therefore, the Conference of State Parties adopted a Protocol in order to facilitate the entry into force of the Convention.⁸

Whether this Protocol overcomes the various barriers present for the ratification of the Convention is still obscure and needs further research. This thesis will therefore focus

⁴ GUNER-OZBEK, M., *The carriage of dangerous goods by sea*, 2008, p 241.

⁵ Conventions such as SOLAS and MARPOL were established. This will be discussed later in this thesis.

⁶ The 1992 Convention on Civil Liability for Oil Pollution damage (hereinafter CLC Convention). The CLC Convention was adopted in 1969, and entered into force in 1975. The Convention was replaced by a Protocol adopted in 1992 and entered into force in 1996.

⁷ Major reported chemical spills by tankers: Fire on board the *Ocean Liberty* [1947], which was carrying ammonium nitrate. This resulted in damage to the environment and human health; Loss of 51 cylinders of chlorine by the *SINBAD* [1979]; Fire on board the ship the *CASON* [1987] resulting in a spill of hazardous substances including diphenyl methane di-isocyanate orthocresol, aniline and sodium causing danger for the environment and human health; For more recent incidents involving vessel carrying HNS, see Report on incidents involving HNS, submitted by the UK, IMO Legal Committee, LEG 85/INF. 2, Annex p 6.

⁸ Protocol of 2010 to the International Conventions on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

on the following research question: “To what extent does the 2010 Protocol to the 1996 Convention strengthen the existing legal framework concerning the liability of marine casualties involving hazardous and noxious substances?”.

1.2 Scope and structure

In order to evaluate the 2010 Protocol, the discussion of the HNS Convention and its background is essential. The first part of the thesis will briefly touch upon the reasons why the international community needed an HNS Convention and will give a succinct overview of the drafting history of the Convention. The next chapter contains a thorough study of the *modus operandi* of the Convention in general. This discussion is essential to have a better understanding of the functioning and the rationale of the Protocol to the Convention, which will be discussed in the final chapter. In this last chapter, the reasons of the need for a new Protocol to the 1996 Convention will be put forward. This thesis will analyze the cause of the problems of the entry into force of the initial HNS Convention: are these problems due to the *procedural rules*, such as the reporting problem, or more to the *substantive rules*, such as the 2-tier system?⁹ And more importantly: are these problems concerning the substantive or procedural rules resolved by the 2010 Protocol to the Convention? The new features introduced by the Protocol will additionally be analyzed. The conclusion will finally set out the main findings of this research.

1.3 Legal method

In order to answer the research question put forward above, there will be a focus on the Protocol to the HNS Convention. Naturally, the discussion will not be limited to the Protocol only. The HNS Convention in general and other relevant legal documents from the IMO will be examined as well. This thesis will shortly touch upon other systems of civil liability in other Conventions - such as the CLC Convention - in order to create a better understanding of the regime established by the HNS Convention and its Protocol. The research will not only focus on what the new Protocol brings about but also on whether this Protocol will encourage, or at the contrary, discourage states to ratify the HNS

⁹ This will be discussed at a later stage in this thesis.

Convention. This rather succinct thesis is therefore timely as the research question is very topical and not much research is conducted about this new Protocol to the HNS Convention.

2 Background to the HNS Convention

2.1 The need for an 1996 HNS

The example of an HNS accident mentioned in the introduction shows that this kind of incidents poses tremendous risks to the environment and human health. Furthermore, it is generally accepted that international transport of chemicals is increasing dramatically. Additionally, scientific evolution brings about various new chemical substances with unknown characteristics.¹⁰ The *prevention* of such accidents and the development of a *civil liability system* are therefore critical points where the international community should focus on.

2.1.1 Prevention under pollution Conventions

The IMO already addressed the *prevention* of pollution by chemicals in its various regulations contained in Conventions. One important example is the 1974 International Convention for Safety of Life at Sea (hereinafter SOLAS Convention). The first SOLAS Convention was signed in 1914. This Convention states about dangerous goods¹¹ that, in principle, they cannot be transported if they endanger the lives of the passengers or the safety of the ship.¹² This is a pure preventive measure. The later SOLAS Conventions also prohibited the transport of dangerous goods. It was not until the end of the Second World War, when maritime trade increased, that the IMO set up a SOLAS Convention dealing specifically with the Carriage of Grain and Dangerous Goods.¹³ An IMO Conference adopted Recommendation 22 in 1948,¹⁴ which stressed the importance of international uniformity concerning safety precautions. After some revisions of the 1948 Convention, the 1974 Convention evolved and entered into force in May 1980. This Convention both deals with dangerous goods in package form and with bulk cargo. In general, the 1974 Convention still prohibits transport of dangerous goods, unless it is in accordance with the

¹⁰ SAHEB-ETTABA, A., “La protection juridique de l’environnement marin dans le cadre du transport maritime de substances nocives et potentiellement dangereuses”, *Revue Juridique Themis*, 2001, p 500.

¹¹ The definition of “dangerous goods” is not given in this Convention. The task to define dangerous goods was left to national law. For further details see *Ibid*.

¹² GUNER-OZBEK, M., *The carriage of dangerous goods by sea*, 2008, p 8.

¹³ *Ibid*, p 9.

¹⁴ *Ibid*, p 9, see further www.imo.org

provisions put forward in SOLAS.¹⁵ This Convention is therefore one of the most important Conventions concerning preventive measures against accidents involving dangerous goods. Together with this, the IMO established several guidelines such as the IMDG (International Maritime Dangerous Goods) Code, IBC (International Bulk Chemical) Code, IGC (International Gas carrier) Code and INF Code (International Code for the Safe Carriage of Package Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Waste on board Ships). The IMO updates these Codes regularly. Other Conventions such as the aforementioned SOLAS Convention and the 1973/1978 International Convention on Prevention of Maritime Pollution by Ships (hereinafter MARPOL73/78) often incorporate provisions of the Codes.¹⁶

Both the MARPOL73/78 Convention, the SOLAS Convention and its corresponding Codes have the purpose to avoid accidents and to improve safety by dealing for example with the carriage of chemicals in bulk on chemical tankers¹⁷ and chemicals carried in package forms.¹⁸ These Conventions are of course indispensable in order to avoid accidents where HNS are involved. However, these Codes do not establish a liability system like other Conferences, as will be mentioned below.

2.1.2 Liability Conventions

Besides these preventive measures, the international community established a repressive regime dealing with *civil liability and compensation of oil spills*.¹⁹ This Convention is “to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying vessels”²⁰. It only focuses on oil pollution and not on pollution that is caused by other hazardous and

¹⁵ Ibid, p 10., according to regulation 2.3

¹⁶ Due to the narrow scope of this thesis, these Conventions and regulations will not be further addressed.

¹⁷ See for example SOLAS chapter 7(carriage of dangerous goods) and 74/78 MARPOL Annex II (regulations for the control of pollution by noxious liquid substances in bulk)

¹⁸ See for example SOLAS part A of chapter VII and MARPOL annex III

¹⁹ 1969 Convention on Civil Liability for Oil Pollution Damage (1969 CLC, replaced by the 1992 Protocol) and its Fund Convention

²⁰ See preamble 1992 CLC.

noxious substances²¹, as some states not considered this to be necessary.²² However, a decennium after the adoption of the CLC in 1969 impelled by the Torrey Canyon disaster in 1967, it became clear that the international community should also consider to adopt a civil liability convention concerning maritime transport of chemicals²³ The unique character of chemicals, the lack of information about their possible environmental effects²⁴ together with the difficulties in identifying the supplier of these chemical products resulted in the conclusion that an extension of the 1969 CLC regime was not satisfactory enough to bridge the gap of a civil liability regime for HNS pollution other than oil²⁵. A new instrument of liability was thus necessary. Consequently, states put the drafting of a civil liability Convention for HNS accidents other than oil high on the agenda in the late 1970s.²⁶ The next part of this thesis will deal with some major topics²⁷ that delegations discussed during the negotiation process that lead to the adoption of the HNS Convention. Thereafter, this thesis will shed some light on the 1996 HNS Convention as it was concluded.

2.2 The establishment of the 1996 HNS

Before the 1996 HNS Convention was adopted, a period of serious negotiations in order to draft an HNS Convention preceded. During the drafting process, the working group addressed firstly the party liability before other issues were discussed. The informal working group discussed several possibilities.²⁸ The first possibility was to hold only the shipowner²⁹ strictly liable for paying compensation to persons who suffer damage caused by HNS incidents. This was in accordance with the traditional maritime law that channels

²¹ 1992 CLC, Art 1.

²² This mainly due to a lack of scientific, insurance and commercial data available about chemical substances.

²³ IMO LEG XXXII/10, Para 82.

²⁴ This however was also an argument for some states to refrain from any further efforts towards drafting an HNS Convention.

²⁵ SAHEB-ETTABA, A., “La protection juridique de l’environnement marin dans le cadre du transport maritime de substances nocives et potentiellement dangereuses”, *Revue Juridique Themis*, 2001, p 502.

²⁶ See for example IMO docs LEG. XXXIII/5 Para. 52.

²⁷ which are important for the aim of this thesis

²⁸ See for example IMO docs LEG. XXXIII/5 Para. 65.

²⁹ And not the operator of the ship because (1) international Conventions created a precedent of shipowner’s liability (2) shipowner’s identity is more easily to find in public documents of ship registries. This facilitates victims to identify shipowners better than ship operators. (3) The shipowner is responsible to insure the vessel, not the operator. To claim directly from the shipowner would therefore be more convenient. See also IMO LEG 63/14.

the liability to the shipowner and not to the shipper.³⁰ A second discussed option was to hold only the shipper liable. A third possibility was to hold the shipowner and the shipper joint and severally liable. Another option was to create a two-tier system that holds the shipowner liable in the first place and the shipper for the excess liability. Finally, the working group considered another two-tier system that holds the shipper liable in the first place and the shipowner for the excess.

During this first period of negotiations, there was some support for the liability of the shipper as the inherent damaging nature of HNS goods or the insufficient packing and description of the goods, which lies within the responsibility of the shipper, often cause harm.³¹ Later on, the negotiating parties considered the shippers' liability in the context of "risk-spreading" in order to distribute the liability among many.³² The shippers counter-argued that the risks involved in operating a vessel carrying HNS could not be put on their part.³³ On the 44th session held in 1979, one decided to focus more on two of the five alternatives discussed in the 36th session, among which the first and fourth option mentioned in the previous paragraph of this thesis. In the end, states mostly favored the fourth option - establishing the two-tier system of strict³⁴ liability - as it applies risk-spreading by imposing primary liability on the shipowner and secondary liability on the shipper for the residue of those claims that could not be covered by the owner.³⁵ This is the case when the shipowner is insolvent or when the damage exceeds the liability of the owner confined by the global limitation.

The 1984 International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea (hereinafter the IMO Conference) also considered this two-tier system and a considerable majority favored this

³⁰ FAURE, F., *Tort and Insurance Law*, 2003, p 165.

³¹ GUNER-OZBEK, M., *The carriage of dangerous goods by sea*, 2008, p 246

³² LEG XXXIV/7, Para 38.

³³ SAHEB-ETTABA, A., "La protection juridique de l'environnement marin dans le cadre du transport maritime de substances nocives et potentiellement dangereuses", *Revue Juridique Themis*, 2001, p 506.

³⁴ Most of the state parties agreed on the fact that a strict liability system, which means liability without any proof of a culpable conduct, should be set up. The Legal Committee agreed on this issue in its 60th session: see IMO LEG 60/3. /3.

³⁵ BIEVRE, A., "Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea", *Journal of Maritime Law and Commerce*, 1986, p 72.

system. However, there was some discussion about the methodology of the term “shipper”. The identification of the “shipper” when it comes to HNS goods is not as easy as in the oil industry, where often one company drills, transports and distributes the cargo.³⁶ In the HNS industry, there are usually more parties who have an interest in the goods. Later on, a proposal surfaced that comprises that the second tier, funded by a collective levy³⁷ from cargo-insurers, would compensate the victims when the limits of the first tier shipowner’s liability exceeded.³⁸

Secondly, member states questioned what limitation amount should be adopted for both the shippers’ and owners’ liability within the framework of the two-tier system.³⁹ Some countries favored a fixed liability rate for shipowners rather than a rate based on vessels tonnage. The second tier will collect levies and will function as a sort of stand-by fund.⁴⁰

Thirdly, there was a discussion about which cargoes the draft HNS Convention should cover. The idea among participating states of including only bulk HNS and not packaged HNS prevailed⁴¹ because the sole inclusion of bulk HNS in the Convention’s coverage leads to more convenience in defining the term “shipper” and in enforcing compulsory insurance requirements.⁴² However, the majority of the states were in favor of a rather wide scope of HNS, which included both bulk and packaged cargo causing all kinds of damage.⁴³

2.3 Conclusion

This chapter pointed out that there is a definite need for an HNS Convention. One should take into consideration that there is increasing transport over sea. Ships transport not only oil across the ocean but also other HNS goods. Having preventive measures is indispensable to avoid accidents. Luckily, the international community reacted to this need

³⁶ GUNER-OZBEK, M., *The carriage of dangerous goods by sea*, 2008, p 251.

³⁷ So no direct liability for the shipowner. See also IMO LEG/65/3/8.

³⁸ IMO LEG 60/3/4.

³⁹ IMO LEG/CONF.6/22.

⁴⁰ IMO LEG/62/4/2.

⁴¹ Ibid, p 248.

⁴² Ibid, p 248.

⁴³ Not only catastrophic incidents were included in the liability system. See LEG/62/4/1.

of implementing preventive measures quite rapidly. Parties adopted conventions such as SOLAS Convention and MARPOL Convention at an early stage. If, notwithstanding all the preventive measures, an accident occurred, a liability system should be applied. However, there is no such liability system for HNS Goods other than oil. Victims of HNS accidents were left alone. When HNS goods damaged beaches as a result of a casualty and when cleanup was impossible, victims should go “to the swimming pool” instead, by means of saying. The non-existence of a liability system was not bearable anymore and therefore the international community reacted. States started negotiations to set up an HNS Convention. This was however not concluded over one night sleep. It took a considerable amount of time to conclude a Convention. Firstly, parties negotiated whom should be liable when HNS damage occurred. Secondly, they discussed limitation amounts and how the first and second tier system should operate. Finally, states decided on the controversial issue of the definition of HNS.

This part of the thesis highlighted some of the many problems with regard to the adoption of the HNS draft Convention. Some of these issues will be again discussed in Chapter 4, after the next chapter addresses the final adopted HNS Convention.

3 The *modus operandi* of the 1996 HNS

This chapter will deal in general with the several definitions given in the 1996 HNS Convention that delimit the scope of the Convention. More in particular the definition of ship, HNS and damage will be further analyzed together with the geographical scope of the Convention. However, before this analysis, a short discussion will follow about the working mechanism in the CLC Convention, which is often called the mother of the HNS Convention.

3.1 The scope of the 1996 HNS

The final working mechanism decided upon in the Conventions' Conference will be discussed in this part of the thesis. This discussion will evidence that the earlier CLC and its Fund Convention was a model for the HNS Convention. In order to fully comment on the HNS Convention, a succinct overview of the main features of the 1969/1992 CLC will be discussed first by means of introduction to the scope of the 1996 HNS Convention.

3.1.1 The CLC Convention

The CLC, a Convention that established a civil compensation scheme for oil pollution damage resulting from maritime casualties involving oil-carrying vessels, consist of a three-tier liability system.⁴⁴ The liability under the first tier is channeled to the shipowner who is strictly liable for pollution damage⁴⁵. According to article III (5), the claim can only be made against the registered shipowner.⁴⁶ The shipowner is entitled to limit his liability in accordance with article III (1). The shipowner will not be entitled to limit his liability when the damage resulted from "his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage

⁴⁴ MARTINEZ GUTIERREZ, N., *Limitation of Liability in International Maritime Conventions*, 2011, p 145.

⁴⁵ See 1992 CLC, Article III (I). For exceptions to this rule see Article III (2).

⁴⁶ Victims can therefore not claim against (1) the servants or agents of the owner or the 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 (incl. bareboat charterer), manager or operator of the ship. (d) any person performing salvage operation with the consent of the owner or on the instructions of a competent public authority; (e) any person taking preventive measures; (f) all servants or agents of persons mentioned in the subparagraph (c), (d) and (e); unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result." See article III(4)

would probably result”.⁴⁷ In order to assure victims that they will be compensated for the suffered damage, registered owners are required to have insurance or another financial security.⁴⁸

The liability under the second tier comes into play when the first tier cannot fully compensate the victims. The second tier provides compensation by the International Oil pollution Compensation Fund 1992, which collects contributions from companies in Fund Convention states that received crude oil and heavy fuel oil after sea transportation.⁴⁹ In 2005, a third tier was established by the 2003 Protocol to the 1992 Fund Convention after the sinking of the Erika and the Prestige. The perception that the limits of the second tier were still too low can be seen as a direct cause for the establishment of this Fund Convention.⁵⁰ Oil receivers in states that opt to ratify the Protocol will finance the Fund Convention.⁵¹ Many countries ratified the 1992 CLC Convention together with its Fund Convention, which gives it therefore an important role in the international community.⁵² Only 27 states are however party to the 2003 Supplementary Fund.⁵³ Because of the success of the CLC Convention in general, it is used as an example of other civil liability Convention such as the HNS Convention as will be elaborated in this chapter.

3.1.2 Definition of “HNS”

The HNS are defined in the Conventions’ article 1.5. as “substances, materials and articles carried on board a ships as cargo”⁵⁴ denoted in various international instruments that were concluded to assure maritime safety and prevent pollution.⁵⁵ The definition

⁴⁷ Article V(2)

⁴⁸ 1992 CLC, Article VII(1)

⁴⁹ 1992 Fund Convention, article 10.

⁵⁰ MARTINEZ GUTIERREZ, N., *Limitation of Liability in International Maritime Conventions*, 2011, p 146.

⁵¹ 2003 Protocol to the International Convention on the Establishment of an International Fund For Compensation for Oil Pollution Damage, article 10.

⁵² See <http://www.itopf.com/spill-compensation/clc-fund-Convention/> last accessed 28/08/2011

⁵³ Ibid.

⁵⁴ 1996 HNS, article 5(a).

⁵⁵ Appendix I of Annex I, The international Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto; The International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983 (IBC Code); The International Maritime Dangerous Goods Code (IMDG code); The International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983 (IGC code); The Code of Safe practice for Solid Bulk Cargoes (BC) code.

mentioned in article 1.5 also includes “residues from the previous carriage in bulk [...]”.⁵⁶ The reference made in article 1.5 to the various international codes facilitates consequently that amendments made to these codes will automatically apply to the HNS Convention. The definition also includes solids and liquids including oils⁵⁷ or liquefied gases.⁵⁸ HNS according to the 1992 Convention only includes package goods if they are listed in the IMDG Code.⁵⁹

The drafters excluded solid bulk materials such as coal and also fishmeal and waste from the scope of the Convention. Among the excluded cargo is also that kind of oil that is causing pollution damage as defined by the 1969/1992 CLC.⁶⁰ This means for example that fire and explosion caused by persistent oil falls under the HNS definition in the Convention. On the contrary, the drafters did not include damage caused by bunker oil in the Convention’s scope.⁶¹ Article 4(3)(b) also excludes damage that is caused by radioactive materials mentioned in class 7 IMDG code or appendix B of the Code for Safe Practice of Solid Bulk Cargoes.

3.1.3 Definition of “ship”

Article 1(1) of the HNS Convention gives a very wide definition to which ships the Convention applies. It states that a ship includes “any seagoing vessel and seaborne craft, of any type whatsoever”. Further in the Convention however, one states that warships and other state-used vessels in non-commercial service are excluded from the scope of the Convention.⁶² This is not the only International Convention where the scope of the Convention excludes state-owned vessels. The author of this thesis is therefore of the opinion that the exclusion of warships out of every international maritime Convention deserves further academic reflection. It seems however not appropriate to discuss this issue

⁵⁶ 1996 HNS, article 5(b), again this article refers to the various codes mentioned supra note 46.

⁵⁷ Both persistent and non-persistent.

⁵⁸ Such as LPG and LNG.

⁵⁹ 1996 HNS, article 5 (a) (IV).

⁶⁰ 1996 HNS, article 4 (3)(a)

⁶¹ SASAMURA, Y., “Development of the HNS Convention”, 13th international symposium on the Transport of Dangerous Goods by Sea and Inland Waterways, 1998, p 497.

⁶² 1996 HNS, article 4 (4).

here as this thesis only concerns the set up and evaluation of a liability system for damages that are caused by HNS accidents.

3.1.4 Geographical scope

The Conventions' geographical scope is complex as the application of the Convention depends on the type of damage suffered, the jurisdictional zone in which this damage occurs and whether the ship is registered in a contracting state or not.⁶³ Only if a *pollution accident*, caused by any ship, occurs in the TS (Territorial Sea) and EEZ (Exclusive Economic Zone) of a contracting state, the HNS Convention is applicable. On the contrary, the Convention is not applicable if pollution damage takes place in the TS or EEZ of a non-contracting state. If *damage to property* outside the ship occurs in the TS of a contracting state, then the Convention is applicable. But if the same happens in the EEZ or HS (High Seas) of any state, the Convention is only applicable if a ship of a contracting state causes the damage. The same rules are respectively applicable to damage to property outside the ship which are pertinent to *loss of life on board or outside the ship*. The Convention always applies to costs and damages of preventive measure, regardless of wherever they are taken.⁶⁴

3.1.5 Definition of "damage"

The Convention defines in its article 1(6) which damage the Convention covers. Much debate went on about this important concept of damage.⁶⁵ The HNS Convention's definition for damage is similar to the one that the CLC Convention uses. The definition in the former Convention is broader though.⁶⁶ Firstly, the Convention covers "loss of life or personal injury on board or outside the ship carrying the HNS".⁶⁷ Secondly, the Convention's scope includes loss of or damage to property outside the ship carrying the

⁶³ See further 1996 HNS, article 3.

⁶⁴ 1996 HNS, article 3(d)

⁶⁵ WETTERSTEIN, P., "Carriage of hazardous cargoes by sea – The HNS Convention", *Georgia Journal of International & Comparative Law*, 1997, p 599.

⁶⁶ JACOBSSON, M., "HNS Convention: Prospects for its entry into force", *part II – CMI Yearbook 2009*, 2009, p 418.

⁶⁷ 1996 HNS, article 1(6) (a)

hazardous and noxious substances caused by those substances.”⁶⁸ Furthermore, the regime covers economic loss resulting from contamination of the environment.⁶⁹ The Convention covers costs of preventive measures and reasonable measures of reinstatement of the environment as well.⁷⁰ Evidently, one often asks the question what exactly “reasonable measures” are and to what extent “economic losses” should be covered. Case law will decide on this issue. If the “inseparable damage”⁷¹ occurs by a mix of both HNS substances and other goods, the HNS Convention will be applicable unless there is proof that a non-HNS good caused a certain part of the damage.⁷² This, again, shows that the HNS Convention’s definition of “damage” is broader than the one that is used in the CLC Convention. As already stated above, the HNS Convention does not cover claims that result from pollution damage by persistent oil. The aforementioned CLC Convention covers this kind of pollution.

3.2 First Tier: Liability of the shipowner

Modeled after the CLC Convention, the HNS Convention’s liability system consists also of two tiers. The first tier will be discussed in chapter 3.2. Firstly, this thesis will give an overview of the content of the first tier. More in particular, it will discuss the concept of strict liability that rests on the shipowner and the exceptions that go hand in hand with the concept. Furthermore, it will highlight the duty of the shipowner to conclude insurance and to what extent the shipowner can limit his liability.

3.2.1 Strict and vicarious liability of the shipowner

As already mentioned, the first tier of the Convention runs parallel with the CLC Convention. Firstly, the shipowner is held *strictly liable* for damage caused by an HNS incident. Strict liability is an old concept that was introduced in English law with the case of *Rylands vs Fletcher*. The court decided in this case on the issue of a reservoir; the

⁶⁸ 1996 HNS, article 1(6) (b)

⁶⁹ Which occurs for example often in the fishing industry 1996 HNS, article 1 (6) (c)

⁷⁰ 1996 HNS, article 1(6) (d)

⁷¹ For example in case of fire or explosion on board, when the cause of the damage cannot be proved to be solely caused by other substances but HNS.

⁷² 1996 HNS, article 1.6. Exception to this rule is nuclear damage, see article 4.3.

defendant had contracted the company that built it. The reservoir leaked water into the coalmines of the neighbor, who went to court to receive compensation from the defendant. The court held the following:

*“We think that the true rule of law is, that the person who for his own purposes brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape ... It seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor’s, should be obliged to make good the damage [...]”*⁷³

The concept of strict liability was herewith born and other countries apply it frequently, not only in the shipping business but also in daily life.⁷⁴ There are several reasons for the introduction of strict liability in the Liability Conventions such as the HNS Convention. The first reason is of course to secure the payment to the victims.⁷⁵ Another reason is that the shipping industry is in a better position to cover often a considerable amount of damages caused by HNS.⁷⁶ The shipping industry has namely the operation in hands and knows perfectly to what risks the environment is exposed during HNS transport, which cannot be said of the possible victims of HNS damage. The shipping industry is thus closer to the insurance market and has the full possibility to purchase insurance. Finally, the strict liability regime stimulates shipowners to avoid environmental pollution and to operate taking into consideration the principle of due diligence.⁷⁷ For all these reasons, strict liability is a secure system that aims to achieve the goal of the HNS Convention:

⁷³ Fletcher vs. Rylands, 1866, L.R. Ex. 265,279f. see also ZWEIGERT, K., KöTS, H., *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 1996, p 673.

⁷⁴ For example strict liability for motor vehicles’ owners.

⁷⁵ ZHU, L., *Compulsory Insurance for Bunker Oil Pollution Damage*, 2007, p 90.

⁷⁶ *Ibid*, p 91.

⁷⁷ *Ibid*, p 92.

“[...] to ensure that prompt and effective compensation is available to persons who suffer damage caused by incidents in connection with the carriage by sea of such substances.”⁷⁸

Exceptions to the liability of the shipowner can be found in article. 7.2.⁷⁹ Besides the fact that the liability is strict, it is also channeled to the registered shipowner.⁸⁰ In other words, the shipowner is liable for damage that is caused by persons that are involved in the operation of the ship such as the servants, pilots, charterers, managers, salvors, etc..., “ [...] unless the damage resulted from their personal act or omission with the intent to cause damage, or recklessly and with knowledge that such damage would probably result [...]”.⁸¹

3.2.2 Exceptions to the liability of the shipowner

There are some limited exceptions the shipowner may invoke in order to avoid liability. When “[...] neither the owner nor its servants or agents knew or ought to reasonable known of the hazardous and noxious nature of the substances”, the owner can avoid liability when he proves the damage resulted from different forms of war or a “nature phenomenon of an exceptional, inevitable and irresistible character.”⁸² Secondly, the owner can avoid liability when he can prove that “an act or omission was done with the intent to cause damage by a third party”⁸³ or that “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” wholly caused the damage.⁸⁴ According to this article, acts of terrorism and piracy are included. When pirates, for instance, capture a ship and release HNS in the sea on purpose, the shipowner cannot be held liable.

Finally, the owner can be freed from liability if he proves that the there was “a failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped”⁸⁵ and that this failure “caused the damage,

⁷⁸ 1996 HNS, Preamble.

⁷⁹ Ibid, article 7(1)(2), this is further discussed in chapter 3.2.2

⁸⁰ Ibid, article 7 (5).

⁸¹ Ibid, article 7 last paragraph.

⁸² Ibid, article 7.2 (a)

⁸³ Ibid, article 7.2 (b)

⁸⁴ Ibid, article 7.2 (c)

⁸⁵ Ibid , article 7.2 (d)

wholly or partly, or has led the owner not to obtain [compulsory]⁸⁶ insurance”. This final defense, the shippers’ failure to provide information, caused much debate as the channeling of liability is partly jeopardized.⁸⁷ This article should thus be interpreted in a narrow way. It is worth noting that the second tier still protects the victim when the shipowner is not held liable because of the aforementioned defenses of the shipowner.⁸⁸

3.2.3 Limitation of liability

The shipowner and his insurer are liable to a limited extent.⁸⁹ The limitation of liability is exercised on the basis of the tonnage of the vessel and not on how many HNS the vessel is carrying.⁹⁰ After a long discussion, the Diplomatic Conference decided the level of liability of the shipowner as follows:

*“(a) 10 million units of account⁹¹ for a ship not exceeding 2,000 units of tonnage; and
(b) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (a):
(i) For each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 units of account;
(ii) 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.”*

It is clear from the Convention that one opted for a rather high limit of SDR for small vessels. The reason for this is that these kinds of vessels are quite numerous and this consequently would lead to many claims against the HNS Fund if the SDR limit would be set lower.⁹²

The shipowner will be denied the right to limit his liability when there is proof that the damage “resulted from his personal act or omission [...] committed with the intent to

⁸⁶ See later, *Ibid*, article 12.

⁸⁷ GUNER-OZBEK, M., *The carriage of dangerous goods by sea*, 2008, p 251.

⁸⁸ *Ibid.*, p 251. This will be further discussed in the next part of this chapter.

⁸⁹ 1996 HNS, article 9.

⁹⁰ *Ibid.*

⁹¹ Refers to Special Drawing Rights (SDR). The SDR values are calculated every day by the international monetary fund (IMF) on the basis of

⁹² GUNER-OZBEK, M., *The carriage of dangerous goods by sea*, 2008, p 268.

cause such damage, or recklessly and with knowledge that such damage would probably result”⁹³.

3.2.4 Compulsory insurance

The *Torrey Canyon* incident initiated the concept of compulsory insurance into shipping law. After the incident namely, the IMO discussed solutions to the problems those massive accidents were posing. After a long discussion⁹⁴ of the contras arguments in favor of and against such a compulsory insurance⁹⁵, the system was for the first time adopted in the 1969 CLC Convention and later on to other Liability Conventions such as Bunkers Convention, the Athens Convention & EU Passenger Liability Regulation⁹⁶, the Wreck removal Convention⁹⁷ and the present HNS Convention.⁹⁸ There will be similar requirements in the International Labor Convention, however it is not yet known in what form this will be.⁹⁹

Modeled after the CLC Convention’s article 7, the HNS Convention also includes in its article 12 a requirement to have insurance or another financial security such as a bank guarantee in order to ensure that the Convention covers shipowners’ liabilities. Most of the time, Protection and Indemnity insurance clubs (P&I clubs) provide this insurance. These P&I clubs give out blue cards¹⁰⁰, which functions as a proof of insurance for the state party that registers the ship. The state party however should evaluate whether the blue card in question forms a basis for giving out a compulsory insurance certificate. States on their turn

⁹³ 1996 HNS, article 9.2.

⁹⁴ ROSAEG, E., “Compulsory maritime insurance”, Yearbook 2010 of the Scandinavian Institute for maritime law, available at <http://folk.uio.no/erikro/WWW/corrgr/insurance/simply.pdf> last accessed 09/09/2011.

⁹⁵ For example the Danish, German and British maritime law associations were not in favor of such a compulsory insurance system.

⁹⁶ This Convention and Regulation will probably enter into force in 2012.

⁹⁷ It is not yet clear when they will enter into force.

⁹⁸ Ibid.

⁹⁹ Email- Interview with J. Hare, Senior Vice President and council of Assuranceforenigen SKULD. 14 July 2011, 10u38. Mr. Hare added however that compulsory insurance regulated in international law has many negative consequences for the insurer. He mentioned that the insurers’ liability is often determined by the relevant Convention rather than by the terms of the policy of the insurance contract. It was in his opinion that these requirements put forward by Conventions are far in excess than regulations applicable to other modes of transport, such as transport by air.

¹⁰⁰ ZHU, L., *International Convention on Civil Liability of Bunker Oil Pollution Damage; Liability and insurance aspects*, 2001, p 7.

need to provide these certificates when ships, whether or not flying the flag of a member state, call a port of a state that is party to the HNS Convention.¹⁰¹ State parties to the Convention have namely a duty to ensure that every ship entering or leaving port has a valid insurance or other financial security.¹⁰² Together with the system of compulsory insurance, this regulation of compulsory insurance is, as already stated before, established “to ensure that prompt and effective compensation is available to persons who suffer damage caused by incidents in connection with the carriage by sea of such substances”¹⁰³, which is the main purpose of the Convention.

3.3 Second Tier: The HNS Fund

This part of the chapter will discuss the second tier, as established by the HNS Convention. This thesis will first explain when this second tier will be operational and will thereafter shed some light over the organizational structure. Furthermore, a discussion will take place about who will contribute to this second tier and what the amount of the contribution is. Additionally, this part will shortly touch upon the reporting requirement, time limitation to file claims and the entry into force of the Convention. Finally, this chapter will touch upon the EU regulation 44/2001 and how it interfered with the HNS Convention.

3.3.1 Structure

In order to assure adequate compensation for the victims of HNS accidents, a second tier was established. The second tier will be in function in the following situations: “

- (a) *Because no liability for the damage arises under chapter II*
- (b) *Because the owner liable for the damage under chapter II is financially incapable of meeting the obligation under this Convention in full and any financial security that may be provided under chapter II does not cover or is insufficient to satisfy the claims for compensation for damage; an owner being treated as financially incapable of meeting this obligation and a financial security being treated as*

¹⁰¹ 1996 HNS, article 9.1 and further.

¹⁰² Ibid.

¹⁰³ Ibid, Preamble.

insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under chapter II after having taken all reasonable steps to pursue the available legal remedies;

(c) Because the damage exceeds the owner's liability under the terms of chapter II."¹⁰⁴

The HNS Fund will not be applied though in the case of an "act of war, hostilities, civil war or insurrection"¹⁰⁵ or when "hazardous and noxious substances which had escaped or been discharged from a warship or other ships owned or operated by a state and used, at the time of the incident, only on Government non-commercial service" caused the damages.¹⁰⁶ In addition, the victim cannot claim from the HNS Fund when he "cannot prove that there is a reasonable probability that the damage resulted from an incident involving one or more ships".¹⁰⁷ Naturally, the HNS Fund is not liable when it can be proved that the damage was caused with intent or due to negligence of the victim.¹⁰⁸ The exceptions put forward by article 14(3)(a) and (b) and 14(4) are similar as those used in the International Oil Pollution Compensation Funds (IOPC Funds).

These are not the only similarities with the IOPC Fund nonetheless. The organizational structure of the Fund is based on the IOPC Fund as well and the HNS Fund consists of an Assembly and a Secretariat too.¹⁰⁹ On the one hand, the main function of the Assembly is that it approves settlements of claims against the HNS Fund.¹¹⁰ At the other hand, the secretariat and its director's main task is to take all appropriate measures for dealing with claims against the HNS Fund.¹¹¹

3.3.2 The contributions to the Fund.

For a long time there was a discussion about *how many* accounts the Fund should have and *who* will pay the contributions to the Fund and its accounts.

¹⁰⁴ Ibid, article 14 (a) (b) (c).

¹⁰⁵ Ibid, article 14 (3) (a)

¹⁰⁶ Ibid, article 14 (3) (a)

¹⁰⁷ Ibid, article 14 (3) (b)

¹⁰⁸ Ibid, article 14 (4)

¹⁰⁹ Ibid, article 24.

¹¹⁰ Ibid, article 26 (h). For further function see article 26

¹¹¹ Ibid, article 30 (2) (e).

The 1996 HNS Convention creates four separate accounts that cover damages within the same account. The drafters divided the general account into two sectors, namely the solid bulk materials and the other substances.¹¹² The other three accounts are the oil, LPG and LNG account.¹¹³ Naturally, the relatively safe sector of LNG lobbied here to have a separate account.

The “receiver” of the cargo pays the annual contributions to the general account. The general account includes all HNS as defined in the Convention, except for oil, LNG and LPG, which constitute a separate account. The “receiver” is defined in the Conventions’ article 1 (4). This article includes “persons who physically receives the cargo at the port of the contracting state.”¹¹⁴ According to article 1(4) (a), it can be contracted that the principal of the agent who physically receives the cargo is held to contribute to the Fund¹¹⁵. The principle must be nevertheless subject to the jurisdiction of a contracting state. Furthermore, the Convention includes also those persons that fulfill the requirements of being a “receiver” under national law.¹¹⁶ While the importers of HNS substances normally pay the contributions, every person that holds title to LNG cargo that is discharged in a port or terminal of a contracting State pays the contributions.¹¹⁷ Eventually, the latter regulation caused problems in the ratification of the Convention, which will be discussed in the next chapter.

Liability to contribute to the Fund will only exist if the receiver, or - in the case of LNG - those who holds title to the LNG cargo, exceeds the limits put forward in article 19 (1) of the Convention. Firstly, for persistent oil, those persons exceeding the annual receipts level of 150 000 tonnes have to contribute to the Fund.¹¹⁸ Secondly, contribution is also required for receivers of non-persistent oil exceeding the level of 20 000 tonnes.¹¹⁹ LPG and Bulk solids have both a level of 20000 tonnes.¹²⁰ Those holding title of LNG

¹¹² Ibid, article 16 (1)

¹¹³ Ibid, article 16 (2)

¹¹⁴ Ibid, article 1 (4) (a)

¹¹⁵ This is to avoid that operators of storage facilities at the port are required to contribute.

¹¹⁶ 1996 HNS, article 1 (4) (b)

¹¹⁷ Ibid, article 19 (b)

¹¹⁸ Ibid, article 19 (1) (I)

¹¹⁹ Ibid, article 19 (2)

¹²⁰ Ibid, article 19 (c)

cargo do not have any annual minimum quantity of receipts before contribution is required.¹²¹ The maximum compensation the Fund can give is 250 million SDR, which includes the amount paid by the insurer of the shipowner.¹²²

3.3.3 Reporting requirement

Member states have an important procedural requirement when ratifying the Convention to “submit to the Secretary-General data on the relevant quantities of contributing cargo received or in the case of LNG discharged in that State during the preceding calendar year in respect of the general account and each separate account”.¹²³ This procedural requirement is necessary in order to have the Convention ratified, which caused again problems to make the HNS Convention a success. The next chapter will address this issue again.

3.3.4 Time limitation

The possibility to claim from the Fund has to happen “within three years from the date when the person suffering damages knew or ought reasonably to have known of the damage”.¹²⁴ The victim cannot bring any claims though later than 10 years from the date on which the accident that triggered the damage occurred, regardless of the fact the damage was known or not.¹²⁵

3.4 Entry into force

The requirements for the entry into force are mentioned in article 46 of the Convention and state that the Convention will enter into force when: “

*(a) At least 12 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***

¹²¹ Ibid, article 19 (b)

¹²² Ibid, article 19.

¹²³ Ibid, article 43.

¹²⁴ Ibid, article 37 (2)

¹²⁵ Ibid, article 37 (4)

*(b) The Secretary General has received information in accordance with article 43 that those persons in such States who would be liable to contribute pursuant to article 18 paragraph (1) (a) and (c), have received during the preceding calendar year a total quantity of at least **40 million tonnes** of cargo contributing to the general account.*¹²⁶

As already states above, this article caused some trouble with the ratification of the HNS Convention because the requirements mentioned were not met.

3.4.1 Domestic Voyages

The Convention generally applies to all seagoing vessels. States can nevertheless make an explicit reservation for ships which do not exceed 200 gross tonnage and which carry package HNS during a domestic voyage.¹²⁷ Furthermore, states can agree not to apply the Convention when it comes to voyages between ports or other facilities of those states.¹²⁸

3.4.2 EU legislation

The EU, when implementing the Treaty of Amsterdam¹²⁹, established a new regulation to have judgments decided within the EU recognized within the EU Community without special proceedings. This regulation is named the Brussels I regulation of 20 December 2000 or the regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments on civil or commercial matters. It includes all areas of civil and commercial law except for cases that deal with bankruptcy, insolvency, social security and legal status and capacity of natural persons.¹³⁰ The regulation had a serious impact on other Conventions as it states that the jurisdiction and enforcement belong to the exclusive EU competence.¹³¹ This contradicts to the regime set forth in most of the Liability Conventions such as the HNS Convention. The latter regulates that the competence of jurisdiction lies only with the

¹²⁶ Ibid, article 46 (1), emphasis added.

¹²⁷ Ibid, article 5.1.

¹²⁸ Ibid, article 5.2.

¹²⁹ 1997 Treaty of Amsterdam, Title IV

¹³⁰ Regulation 44/2001, Article 1 (2) (b)

¹³¹ RINGBOM, H., "EU regulation 44/2001 and its implications for the International Maritime Liability Conventions", *Journal of Maritime Law & Commerce*, 2004, p 2.

state party where the pollution damage took place.¹³² Furthermore, article 39 of the Convention states that the Court of the state where the shipowner or his guarantor (e.g. a P&I Club) has organized a Fund to limit their liability, has exclusive competence. This is of course in contradiction with the concept of Community Competence that the EU Regulation established. Besides this contradicting matter, the regulation additionally excludes from its application those Conventions to which the state parties are member to at the time of the adoption of the Regulation (2000).¹³³ This caused problems to the ratification of the 1996 Convention. In order to solve these issues, the EU Council's decision in 2002/971/EC advised European member states to make a reservation to the provisions that overlap with the Resolution in order to give the latter precedence over the HNS Conventions' provisions regarding this issue.¹³⁴

3.5 Conclusion

This chapter 3 discussed the *modus operandi* of the 1996 HNS Convention. This chapter is important in that way that it enables the reader to assess the Convention as it was in 1996 and to better understand the need for a protocol. The scope of the 1996 HNS Convention is dealt with in this chapter, together with the two tiers established by the Convention. Notwithstanding the Convention is modeled after the successful CLC Convention, it is unfortunate that the 1996 HNS Convention was rather unsuccessful, as will be discussed in the next chapter.

¹³² 1996 HNS, article 38, 39 and 40.

¹³³ Regulation 44/2001, Article 71.

¹³⁴ European Council document, 2002/971/EC.

4 Protocol to the 1996 HNS

This chapter 4 of this thesis will discuss firstly the need of a new protocol to the 1996 HNS Convention. Is this need due to the problems relating to the procedural or more substantive rules? It will secondly touch upon the process of adoption of the HNS Protocol. The new features that the drafters of the 2010 HNS introduced are discussed in part 4.3, which is one of the important issues in the thesis as it points out the problems the 1996 HNS Convention encountered. Also those proposals made in the Diplomatic Conference that were not adopted, are shortly discussed. Finally, this thesis will comment on the process of the entry into force of the 2010 HNS Convention together with the future perspective the Protocol has.

4.1 The necessity of the 2010 HNS Protocol

Soon after the adoption of the HNS Convention, it became clear that there were some problems with the entry into force of the Convention. In the period going from the 1st of October 1996 until the 30th of September 1997, the Convention was open for signature. Only 8 states signed the Convention: Canada, Denmark, Finland, Germany, Netherlands, Norway, Sweden and United Kingdom.¹³⁵ In 2005, there were only 8 states that also ratified the Convention: Angola, Cyprus, Morocco, Russian Federation, Saint Kitts and Nevis, Samoa and Tonga.¹³⁶ Only two states have more than 2 million gross tonnage which is not sufficient according to the requirements put forward by article 46 (1) of the 1996 HNS Convention. In order for the Convention to become binding, states need to implement the Convention in their national legislation.¹³⁷ The other procedural requirement put forward by that same article 46, referring to article 43, is that the states ratifying the Convention should “[...] submit to the Secretary-General data on the relevant quantities of contributing cargo received or, in the case of LNG, discharged in that State during the

¹³⁵ For more information about the signatures see www.hnsconvention.org

¹³⁶ Secretariat of the International Oil Pollution Compensation Fund 1992, Draft Guide to the Implementation of the HNS Convention, June 2005, p 23.

¹³⁷ In some states however international treaties are ratified automatically into national law or that the treaty should just be published into an officially recognized state publication.

preceding calendar year in respect of the general account and each separate account.”¹³⁸ Of the aforementioned eight states that ratified the Convention, none deposited data that are referred to in article 23 of the HNS Convention.¹³⁹ It is here concluded that the aforementioned procedural requirements were a burden for the entry into force of the Convention. There was thus a necessity to have a tool to give rebirth to the HNS Convention and to solve the controversies that came with it.

4.2 The adoption of the HNS Protocol

Many organizations and institutions carried on encouragements to ratify the Convention. The Oil Pollution Compensation Fund (hereinafter IOPC) Assembly asked the EU to encourage their states to ratify the Convention. The IOPC stated namely that the “Secretary General of IMO might take advantage of his regular contacts with high-level European Union officials to draw attention to the problem and to encourage the European Commission to put pressure, to the extent possible, on states that have ratified the Convention to submit the required reports [...]” Additionally it was stated that there is a “need for EU member States to show leadership in this regard and [...] that he would make every effort to assist in this endeavor”.¹⁴⁰ The EU took already action in its decision 2002/971/EC saying that all states should take steps in order to ratify the HNS Convention.¹⁴¹ This decision was taken in the light of the jurisdictional problems put forward earlier in this thesis. The EC stressed therefore its following ideas:

“(6) The substantive rules of the system established by the HNS Convention fall under the national competence of Member States and only the provisions of jurisdiction and the recognition and enforcement of the judgments are matters covered by exclusive Community competence. Given the subject matters and the aim of the HNS Convention, acceptance of the provisions of that Convention which come under

¹³⁸ 1996 HNS, article 43.

¹³⁹ IMO document LEG/90/9, Agenda item I, paragraph 396, p 49.

¹⁴⁰ Statement by Mr Dimas, Ibid, Para 3.8, p 3

¹⁴¹ EU decision 2002/971/EC., decision authorizing the Member States, in the interest of the Community, to ratify or accede to the HNS.

Community competence cannot be dissociated from the provisions which come under the competence of the Member States.

(7) The Council should therefore authorize the Member States to ratify or accede to the HNS Convention in the interest of the Community, under the conditions set out in this Decision.¹⁴²”

As a considerable amount of states that have a gross tonnage of at least 2 million units are located within the EU, the support of the EU for the Convention was indispensable. With stating the aforementioned, the EU wanted to avoid misinterpretation and set clear its support for the Convention.

The IOPC’ Fund and its Assembly strived furthermore to promote the implementation, not only within the EU, but also globally by establishing a working group (“focus group”) on the HNS Convention.¹⁴³ In order to overcome the procedural problem of reporting data on quantities of contributing cargo, the 1992 Assembly of the IOPC agreed with the working group’s idea to set up a Contributing Cargo Calculator (hereinafter CCC).¹⁴⁴ This CCC is seen as a useful tool and the states concerned supported it.¹⁴⁵ The Working Group further addressed problems relating to the contribution of the titleholders of LNG and the reporting of receipts of packaged HNS goods.¹⁴⁶ There was considerable support in the Focus Group to develop a new Protocol out of the discussion concerning these obstacles of the entry into force of the HNS Convention.¹⁴⁷ There was no going back to the 1996 version of the HNS when in June 2008 the 1992 Fund Administrative Council, on behalf of the Assembly, endorsed the draft Protocol made by the Focus Group.¹⁴⁸ Following on this, the administrative Council submitted the draft Protocol to the Secretary General of the IMO in order to have it referred to the Legal Committee of the IMO, which will on its turn

¹⁴² Ibid, Para (6) and (7).

¹⁴³ JACOBSSON, M., The HNS Convention – Prospects for its entry into force, Yearbook of the Committee Maritime International (CMI), 2009, p 417. See 92 FUND/A.12/28 Para 27.16, p 22 for the establishment of the “Focus Group” in its October session in 2007.

¹⁴⁴ 1992 IOPC Fund Documents 92FUND/A.10/37, Para. 15.6-15.13 and SUPPFUND/A/ES.1/21, Para 9.2-9.10. and 71FUND/AC.17/20, Para 11.5-11.12

¹⁴⁵ 1992 IOPC Fund Documents A.10/37, Para 32.4, p 28.

¹⁴⁶ 92 FUND/WGR.5/2 Para 1.3, p 3

¹⁴⁷ Ibid, p 3

¹⁴⁸ JACOBSSON, M., The HNS Convention – Prospects for its entry into force, Yearbook of the Committee Maritime International (CMI), 2009, p 427.

organize a Diplomatic Conference to have the Protocol signed by States' representatives.¹⁴⁹ The Diplomatic Conference adopted in 2010 the new Protocol to the HNS Convention: the International Convention on Liability and Compensation for Damage in Connection with the Carriage of hazardous and noxious substances by sea (hereinafter the 2010 HNS Convention) was herewith born.

4.3 New features of the 2010 HNS Protocol

In order to solve the problems, mainly related to procedural rules of the 1996 HNS Convention, the Protocol introduced some new features. This part will discuss these new features and the ratio behind them. Attention will also be given to some of the major discussions conducted within the Fund Working group, Legal Committee and/or Diplomatic Conference.

4.3.1 Contributions to the HNS Fund by package receivers

The Legal Committee of the IMO, which reviewed the draft of the Focus Group, found that one of the major problems of the initial 1996 HNS Convention was the fact that package HNS goods were difficult to report for the member states.¹⁵⁰ However, reporting has been found necessary in order to maintain the two-tier liability system as put forward by the HNS Convention. States proved that there would be a considerable administrative burden for tracking the small amount of HNS that comes in the form of several containers.¹⁵¹ The Focus Group came up with the proposal that package receivers should not contribute to the Fund. In the light of the purpose of the HNS Convention, it was important though to secure that victims damaged by HNS accidents can still claim compensation for their loss suffered. In order to resolve the problem, the Focus Group had to find a counterbalance for the deletion of the contribution obligation. It found the counterbalance in increasing the shipowners' limitation of liability for claims related to

¹⁴⁹ IMO LEG/94/4, Annex.

¹⁵⁰ IMO LEG/94/12, Para 4.10, p 7.

¹⁵¹ SHAW, R., "IMO diplomatic Conference Adopts HNS Protocol on 30 April 2010", *Il Diritto marittimo 2010*, p 295.

damages that are caused by package HNS goods. On the Diplomatic Conference, the parties present decided on the new limit of the shipowner's limitation in relation to ships carrying packaged HNS goods:

“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.¹⁵²”

It is clear from this new article that the shipowners' limitation of liability for damage that is caused wholly or partially by packaged HNS is increased with 15 % compared with the level put forward in the article 9 paragraph 1 of the original HNS Convention. This was decided contrary to the data that the International Group of P&I Clubs provided concerning compensation claims. This Group of P&I Clubs showed that the initial shipowner's limitation amount could cover the majority of victims' claims.¹⁵³ The Clubs, together with some other supportive states, proposed therefore to keep the liability limits as set in the first HNS Convention. Other states did not accept this one-sided proposal at the Diplomatic Conference, as shown in the aforementioned Protocol article. The final text is found to be a

¹⁵² 2010 Protocol to the 1996 HNS Convention, article 7.2.

¹⁵³ Focus Group Document 92 FUND/WBR 5/5

good solution to eliminate the heavy burden of reporting HNS package goods while maintaining the main focus on adequate compensation for victims of HNS accidents.¹⁵⁴

4.3.2 Contributions to the LNG account

LNG is the last decade increasingly transported by sea. Pipelines transporting gas belong more and more to history as trading of LNG happens on a global stage where shipping plays an important role.¹⁵⁵ The shipping industry takes over this business little by little by using tankers to trade the LNG. The situation of LNG transport compared to the one of 1996 has changed tremendously due to this evolution. When drafting the 1996 HNS Convention, governments and major energy companies dominated the LNG transporting business.¹⁵⁶ The gas industry itself suggested that it would be the easiest if contributions were done by “any person who in the preceding calendar year, or such other year as the Assembly may decide, *held title to* an LNG cargo discharged in a port or terminal of that state.”¹⁵⁷ One Decennium later, this did not seem to be a suggestion that would keeps up with the increasing LNG transport by sea. The informal correspondence group that the IOPC Funds meeting established found a solution for this issue¹⁵⁸ by adopting a new article 11 of the Protocol, which states that:

*“(a) In the case of the LNG account, subject to article 16, paragraph 5, annual contributions to the LNG account shall be made in respect of each State Party by any person who in the preceding calendar year, or such other year as the Assembly may decide, was **the receiver** in that State of any quantity of LNG¹⁵⁹.”*

This article shifts the obligation to contribute to the Fund from the “title holder” of the LNG cargo to the receiver to overcome the aforementioned problems. Nevertheless, the

¹⁵⁴ IMO LEG/94/12, Para 4.12, p 7.

¹⁵⁵ Research by the International Group of Liquefied and Natural Gas Importers, “Implementation of the HNS Convention in the LNG Industry”, 2007, p 3. available at <http://www.hnsConvention.org>.

¹⁵⁶ SHAW, R., “IMO diplomatic Conference Adopts HNS Protocol on 30 April 2010”, *Il Diritto marittimo* 2010, p 296.

¹⁵⁷ 1996 HNS Convention, article 19 (1) (b).

¹⁵⁸ IMO LEG/94/4/1.

¹⁵⁹ 2010 Protocol HNS Convention, article 11 (2) (a), emphasis added.

Protocol still leaves open the possibility that the title holder contributes to LNG Fund. The Protocol in this regard states the following:

(b) However, any contributions shall be made by the person who, immediately prior to its discharge, held title to an LNG cargo discharged in a port or terminal of that State (the titleholder) 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*¹⁶⁰

The Diplomatic Conference furthermore wanted to make sure that parties could not hide behind their contractual obligations in order to avoid compensation to the LNG Fund. This is reflected in the last two paragraphs of the new article 11 to the HNS Protocol:

“(c) If the titleholder referred to in subparagraph (b) above does not make the contributions or any part thereof; the receiver shall make the remaining contributions. The Assembly shall determine in the internal regulations the circumstances under which the titleholder shall be considered as not having made the contributions and the arrangements in accordance with which the receiver shall make any remaining contributions.

*(d) Nothing in this paragraph shall prejudice any rights of recourse or reimbursement of the receiver that may arise between the receiver and the titleholder under the applicable law.”*¹⁶¹

This amendment to the Convention was successful in the Diplomatic Conference and solved one of the major problems that the 1996 encountered.

¹⁶⁰ 2010 Protocol HNS Convention, article 11 (2) (b), emphasis added.

¹⁶¹ Ibid, article 11 (2) (c) and (d)

4.3.3 Cargo reports submission

As stated in the previous chapter, the second tier is an indispensable tool to assure adequate compensation for victims of HNS accidents. In order to let this second tier function, a system of contributing cargo reports has been set up.¹⁶² In total, only two out of thirteen states complied with this requirement and submitted reports on contributing cargo. The IOPC Fund encountered the same problem of a few states being reluctant towards reporting. To solve this problem, the 2003 IOPC Supplementary Fund Protocol included a new article that blocks payment of compensation for oil pollution damage that occurred in a state that did not comply with its obligation to report their contributing cargo.¹⁶³ At the Diplomatic Conference of the 2010 Protocol to the HNS Convention, the state parties agreed to add an additional article, taking similar measures against states not complying with the reporting obligation. The new article includes three important measures against states being reluctant to report the contributing cargo. When states do not comply with this obligation and when: “

1. *[...] this results in a financial loss for the HNS Fund, that State Party shall be liable to compensate the HNS Fund for such loss. The Assembly shall, upon recommendation of the Director, decide whether such compensation shall be payable by state.*¹⁶⁴

The second measure introduced by the new article in the Protocol aims to set up a sanctioning system for states being evasive. The measure reads as followed: “

2. *No compensation for any incident shall be paid by the HNS Fund for damage in the territory, including the territorial sea, of a State Party in accordance with article 3(a), the exclusive economic zone or other area of a State Party in accordance with article 3 (b), or damage in accordance with article 3 (c) in respect of a given incident or for preventive measures, wherever taken, in accordance with article 3 (d), until the obligations under article 21, paragraphs 2 and 4 have been complied with in respect of that*

¹⁶² 1996 HNS, article 43 and 46 (1) (b).

¹⁶³ 2003 Supplementary Fund Protocol, article 15.

¹⁶⁴ 2010 HNS Protocol HNS Convention, article 21 bis.

*State Party for all years prior to the occurrence of an incident for which compensation is sought. The Assembly shall determine in the internal regulation of the HNS Fund the circumstances under which a State Party shall be considered as not having fulfilled these obligations.*¹⁶⁵

According to the same article, compensation will be furthermore denied permanently when the state in question does not fulfill its reporting obligation within one year after a notification of being reluctant is given to the state failing its obligations.¹⁶⁶ An important exception to this sanctioning system is that there will be still compensation for incidents having death or personal injury as a result.¹⁶⁷ However, the state party can still be held liable for financial loss if there is financial loss for the HNS Fund that results from a failure to fulfill the reporting obligations.¹⁶⁸

4.3.4 Other proposals on the Diplomatic Conference

Delegations proposed some other minor changes at the Diplomatic Conference. One of them is the changing of the definition of HNS that is put forward in article 1.5(a)(vii) 1996 HNS. It was proposed to include the current version of the IMDG Code rather than the old one in force when the 1996 Convention was signed. Concretely it was proposed to add the IMDG Code “as amended”. However, the Diplomatic Conference did not accept this proposal because most states were convinced that the definition of package goods as an HNS should not be extended.¹⁶⁹ Firstly, delegations found that the issue of this definition was brought up too late so due to time pressure, they were not able to consult their governments about this problem anymore.¹⁷⁰ Secondly, delegations found that experts should be consulted in order to see what the potential effect of this change is on the working mechanism of the HNS Convention.¹⁷¹ Thirdly, they considered the subject to be

¹⁶⁵ Ibid, article 21 bis (2).

¹⁶⁶ Ibid, article 21 bis (3).

¹⁶⁷ Ibid, article 21 (5).

¹⁶⁸ Ibid, article 21 (1) and (5)

¹⁶⁹ SHAW, R., “IMO diplomatic Conference Adopts HNS Protocol on 30 April 2010”, *Il Diritto marittimo* 2010, p 298.

¹⁷⁰ LEG. CONF. 17/CW/WP.4, Para 9.

¹⁷¹ Ibid.

very political as it caused some trouble during the 1996 HNS Conference.¹⁷² Therefore, the majority of the states were convinced to leave this part of the Convention unaltered.¹⁷³

Another proposal that the Diplomatic Conference did not accept is the “tacit acceptance procedure”.¹⁷⁴ This procedure, as issued by the 1992 Civil Liability Convention, enables that amendments can be made to the Convention through a simplified procedure.^{175 176}

4.4 The entry into Force of the 2010 HNS Convention

The 2010 HNS Protocol shall be “open for signature at the headquarters of the Origination from 1 November 2010 to 31 October 2011 and shall thereafter remain open for accession.”¹⁷⁷ Within this time period, states can sign with or without reservation and outside that period, states can always opt for accession.¹⁷⁸

The Protocol shall enter into force after “*eighteen months after the date on which the following conditions are fulfilled:*

- (a) *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*
- (b) *The Secretary General has received information in accordance with article 20, paragraph 4 and 6 that those persons in such States who would be liable to contribute pursuant to article 18, paragraph 1(a) and (c) of the Convention, as amended by this Protocol, have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account”*¹⁷⁹

¹⁷² Ibid.

¹⁷³ International Chamber of Shipping Report of the International Conference on the revision of the HNS Convention held at the IMO headquarters in London, 26-30 April 2010. Available at www.marisec.org last accessed 16/09/2011.

¹⁷⁴ Ibid.

¹⁷⁵ SHAW, R., “IMO diplomatic Conference Adopts HNS Protocol on 30 April 2010”, *Il Diritto marittimo* 2010, p 295. This procedure is described by IMO as being the following: “Instead of requiring that an amendment shall enter into force after being accepted by, for example, two thirds of the Parties, the “tacit acceptance procedure” provides that an amendment shall enter into force at a particular time unless before that date, objections to the amendment are received from a specified number of Parties.” See <http://www.imo.org/About/Conventions>, last accessed 16/09/2011.

¹⁷⁶ LEG/CONF.17/CD/RD/3, Para 3.

¹⁷⁷ 2010 HNS Protocol, article 20.

¹⁷⁸ Ibid., article 20 (2) (c).

¹⁷⁹ Ibid, article 21.

The delegations also discussed the requirements for entry into force at the time of the Diplomatic Conference. They proposed that the 40 millions tonnes that are mentioned in article would be increased up to 60 or 70 tonnes. Furthermore, the delegations proposed to reduce the time for the entry into force from 18 to 12 months. This was however not accepted.¹⁸⁰

At this very moment only one state - being Denmark - signed the Protocol in order to ratify the 2010 Protocol to the Convention. When a state becomes a party to the Protocol, it will automatically become a party to the whole Convention, as the Protocol and the Convention should be viewed upon as one single instrument. This is stated in article 18 of the HNS Convention. Furthermore, article 18 states that article 1 to 44 of the Convention and together with its amendments will constitute together the 2010 Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

The Assembly of the IOPC, set up by the 1992 Fund Convention, was furthermore requested to conduct some assignments among which the administrative tasks in order to set up the HNS Fund in accordance with the 2010 HNS Convention.¹⁸¹ Additionally, it will give the necessary assistance to set up the 2010 HNS Fund. Finally, the IOPC Assembly prepares the first session of the 2010 HNS Fund Assembly.¹⁸²

4.5 Conclusion and future development

This chapter discussed the main features of the Protocol to the HNS Convention. As concluded from chapter 3, some elements from the 1996 HNS Convention had to be eliminated and/or amended to stimulate ratification by states. Mainly, there was ongoing discussion about some major *procedural* issues. Firstly, there was the feeling among states that the reporting system of package HNS Goods had to be changed, as this caused an immense administrative burden for the little accidents that occurred with packaged HNS Goods. As a solution, states came up with the idea of excluding package HNS Goods from their duty to contribute to the Second Tier of the HNS Liability system and to put the level

¹⁸⁰ LEG/CONF.17/CW/RD/2/Rev.1, para 1 (1), 2010.

¹⁸¹ LEG/CONF.17/11, para 1 (a) (b).

¹⁸² Ibid, Para 1 (c). See further 2010 HNS Convention, article 43.

of limitation of shipowners, set forth in the First Tier of the HNS Liability system, higher. The second burden for the success of the HNS Convention was that the titleholder of the LNG cargo was the one who was obliged to contribute to the LNG account. Due to the emerging LNG industry, states considered it to be more appropriate to hold the LNG receiver instead of the titleholder responsible to contribute to the LNG Fund. This is similar to the other Funds that the 1996 HNS Convention established. Thirdly, states did not find enough incentives to report the contributing cargo. This requirement of submitting reports was indispensable to make the Convention work. It was rather clear from the beginning that a new system had to be set up to give countries enough incentive to comply with their obligation of reporting. Therefore, the 2003 IOPC Supplementary Fund Protocol introduced a system that frustrates payment of compensation for pollution damage that was caused by HNS other than oil, which occurred in a state which did not comply with its obligation to report their contributing cargo. By introducing this system, states feel induced to comply with the reporting.

It seems that the new Protocol strengthens an international legal framework for the liability of marine casualties involving hazardous and noxious substances. It is very likely that the Protocol helps to overcome resistance in some shipping countries by changing some procedural rules. Denmark already gave an important signal: the country, which refused to ratify the 1996 Convention, now signed the 2010 HNS Convention subject to ratification. The solutions that are found for the aforementioned problems give again hope to a global regulation of liability for maritime pollution caused by HNS other than oil.

5 Conclusion

The absolute character of the doctrine of the free uses of the sea as suggested by Hugo Grotius is without question not standing anymore. Over the years, the international community took many measures in order to restrict those freedoms on the sea. Those restrictions go from various safety measures, special cargo handling guidelines to preventive measures and the designation of duties of various parties in relation to dangerous goods. Together with these restrictions there was a need to assure that when an accident did occur victims are compensated adequately and should not be forgotten. Obligations to have compulsory insurance, to contribute to diverse Funds and to set up whole systems of liability, belong to the obligation that nowadays rest on the shipping industry. The freedom to do whatever is beneficial for the shipping industry itself is not part of today's thinking.

Shipping plays an important role in the world economy and is considered to be the most environmental friendly way to transport a considerable amount of goods over a significant distance. Still, if an accident occurs, it can have an enormous environmental impact where third parties can be seriously damaged. After the Torrey Canyon incident, the regulations concerning marine pollution in general and more in particular third party liability for oil pollution damage enhanced. The CLC Convention, which sets up a liability regime for oil pollution spills, was a step forward in the "laissez-faire et laissez-passer" attitude that the shipping industry had.

The international community felt increasingly that damage that was caused by HNS other than oil was something that had to be addressed in regulations. Accordingly, various international safety regimes were established. However, there was still a lack of an international liability regime for damage caused by HNS other than oil. This thesis dealt with the various aspects of the HNS Convention and the difficulties that states encountered to make this Convention internationally accepted.

There was a focus on the following research question: "To what extent does the 2010 Protocol to the 1996 HNS Convention strengthens the existing legal framework concerning the liability of marine casualties involving hazardous and noxious substances?"

Taking into consideration the discussed topics in this thesis, this question can be answered now.

By reviewing the initial 1996 HNS Convention, the international community came to the conclusion that there were diverse gaps in the liability system. These gaps are mainly of a procedural nature. Adjustment of the initial procedural matters by the 2010 Protocol was a prerequisite to make the Convention successful. As showed in the above discussed chapters, the 1996 HNS Convention and its contribution system is significantly more complicated than the 1969 CLC, where it is modeled after. However, the exclusion of the duty for receivers of package HNS Goods to contribute to the HNS Fund as proposed by the Protocol, simplified the whole system. Besides this, the Protocol also shifted the obligation to contribute to the LNG account from the titleholder to the receiver of the LNG. Finally, states worked on a sanctioning system to induce states to comply with their duty to report contributing cargo. These major topics were the main burdens why the 1996 HNS Convention did not enter into force. The 2010 Protocol, by sweeping away these burdens, clearly strengthens the existing legal framework concerning the liability of marine casualties involving hazardous and noxious substances other than oil. The international community is aware that it will be the last chance to conclude a global regime concerning liability and compensation for damage caused by HNS other than oil. A failure to have such a global regime would probably stimulate states to set up several regional regimes to cover the liability for HNS spills. It is only the question whether such a regime is adequate to ensure prompt and effective compensation for victims of HNS accidents.

This author believes that there is a good possibility that the Convention will finally enter into force as most of the pressing problems of the 1996 HNS Convention are eliminated by the new Protocol. The signature of Denmark, subject to ratification, gives again hope to the rebirth of the HNS Convention.

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