

# CMI NEWS LETTER

*Vigilandum est semper; multae insidiae sunt bonis.*

COMITE MARITIME INTERNATIONAL

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## **NEWS FROM THE CMI**

### **FUTURE CMI EVENTS**

#### *CMI Symposium in Bordeaux*

At the invitation of the French Maritime Law Association a Symposium will be held in Bordeaux on or about middle June 2003. The program and the agenda of the Symposium and the precise date will be made known later. The first day of the Symposium will be devoted to an examination of Trade and Transport Law in the Electronic Age. On the second day the Symposium will consider the main issues which have arisen from the on-going study of Transport Law Instrument drafted

by CMI and submitted to UNCITRAL in December 2001. The final session will be devoted to a review of topics in the current work programme of CMI and the UN Agencies. The 2003 CMI Assembly will follow the final session.

#### *Next CMI Conference*

The XXXVIII Conference of the CMI will be held in Vancouver at the end of May/beginning of June 2004.

## INFORMATION RELATING TO OWNERSHIP AND CONTROL OF VESSELS ENTERING A PORT

*The following submission (Document LEG/84/13 of 22 March 2002) has been sent to the IMO by the President of the CMI in connection with the definition of the terms “ownership” and “control” of ships in the context of maritime security.*

### ***Maritime Security: definition of the terms “ownership” and “control” of ships***

This issue comes to the Legal Committee in the form of a “notional regulation for inclusion in Chapter XI of SOLAS”. This regulation would provide that:

1. “Contracting governments may require vessels proposing to enter their ports to provide information for security purposes which can include information relating to the ownership and control of the vessel.”
2. “Contracting governments shall ensure that information regarding the ownership and control of their flag vessels is available in a form which is capable of being transmitted in response to a request made under paragraph (1).”

The Legal Committee is asked to consider how “ownership” and “control” should be defined. The purpose of this notional regulation is to assist port states to detect or deter unlawful acts involving the use of ships. Four examples are suggested of how ships might be used for purposes which would represent a security risk:

1. Transportation of equipment or personnel prior to the committing of an unlawful act ashore.
2. Use in lawful trade to help finance unlawful acts or
3. Use of the ship itself as a weapon; and
4. The hijacking of a ship for coercive purposes.

The CMI, IMO and other UN Agencies have, since the concept of harmonisation of International Maritime Law got in to its stride at the beginning of last century, frequently grappled with the concepts of ownership, operation and management of ships. In this context some examples may give a useful guide. It is worth

pointing out at the outset that it is generally only necessary to explore ownership or management where the Convention deals with third party liability or limitation. It is not, for example, an issue in the various Conventions relating to the carriage of goods and passengers where the goods owner or passenger only needs to know who the carrier is with whom he is making the contract.

There is a group of Conventions including the Collision and Salvage Conventions of 1910 where, again, it is not necessary to define ownership or management on the basis that the claims are claims against the ship itself and only incidentally against the owner or operator.

In the Limitation Convention of 1924 it was evidently not thought necessary to investigate questions of ownership. The Convention refers to owners and part owners without mentioning any rights of limitation which might accrue to charterers, managers or operators.

In the 1957 Limitation Convention there is again no definition of owner and it is not until the 1976 Limitation Convention that we find “shipowner” defined as the owner, charterer, manager and operator of a sea-going ship. This reflects the development in shipping practice which took responsibility for operating a ship away from the person who owned the ship and placed it with a charterer, manager or operator. The purpose of the Convention was to give those actually responsible for the running of the ship the right to limit their liability in the event that some accident occurs. Although charterers, managers and operators are not owners in the strict sense, they were included in an extended definition of “owner” as a drafting technique which simplifies the language of the Convention.

In the CLC of 1969 we find owner defined as:

“... the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship”.

A similar strict definition of “owner” is to be found in the HNS Convention. On the other hand the Bunker Convention of 2001 echoes the extended definition of the 1976 Convention by providing that “shipowner” means “...the owner, including the registered owner, bareboat charterer, manager and operator of the ship”. We thus have three

pollution Conventions two of which have a strict definition of owner and one of which has an extended definition. The explanation for this is that both the CLC and the HNS Convention contain a compulsory insurance requirement coupled with a right of direct action against the insurer. This makes it unnecessary (and indeed undesirable) to extend the definition of owner to include charterers, managers or operators. This has become known as “channelling” whereby all claims are focused on the registered owner and his insurer as a matter of convenience.

There is a similar compulsory insurance requirement in the Bunker Convention but it was decided that because bunker pollution claims have neither their own limitation fund nor a second tier industry fund, and bunker spill claims must prove along with other claims against the general limitation fund, it would be desirable for a broader based group of organisations associated with the operation of the ship to be included as possible defendants.

The 1952 Arrest Convention contains no definition of owner as such but Article 3 permits the arrest of a “sister” ship which is defined as a ship which is owned as regards “all the shares therein” by the same person or company as the ship against which a maritime claim arises.

Generally, therefore, there is not a great deal of help to be obtained from existing Conventions when it comes to defining “ownership”. “Control” seems to be a concept unknown to conventional law.

The basic premise of the proposed regulation is that it would be easier to detect and pre-empt unlawful acts if more information was available regarding the true owners of the ship or regarding those who control its operations. Currently available data will enable States to identify the registered owners and, usually, the company or individuals responsible for the day-to-day operation of the ship. Whilst the registered owner may be an anonymous corporate body it would not necessarily help States to suppress unlawful acts if it were known who the shareholders were. With nominee shareholders, shares held by trusts and, indeed, bearer shares there are many well-established and legitimate reasons why the identity of individual beneficial owners may sometimes be impossible to discover. No amount of regulation or flag state demand for information

would ensure that details of beneficial ownership are always available.

To impose on States the obligation to investigate beneficial ownership of every company owning a vessel flying its flag would be extremely burdensome and would not prevent a terrorist network or similar organisation concealing its interest in a ship.

Of more immediate significance is the identity of the company or person responsible for the operation of a ship. The company or individual responsible for the day to day operation of the ship should be more readily ascertainable, and a requirement to nominate such a person would be considerably more practicable.

In this connection some assistance may be gained from the UNCTAD (United Nations) Convention on Ship Registration of 1986. This refers in its preamble to the need for a flag state to ensure that those who are responsible for the management and operation of a ship on its register are readily identifiable and accountable. Article 6(2) goes on to provide that:

“The State of Registration will take such measures as are necessary to ensure that the owner or owners, the operator or operators, or any other person or persons who can be held accountable for the management and operation of ships flying its flag can easily be identified by persons having a legitimate interest in obtaining such information.”

The 1986 Convention has not received significant support from the world’s maritime nations. However it is understood that in some jurisdictions (for example, Hong Kong) owners are required to nominate a “representative person”, who may be either an individual owning or part-owning the ship, or a person (individual or body corporate) responsible for its management.

It is for the Intersessional Working Group on Maritime Security to decide whether anything useful would be achieved by imposing on Flag States a burdensome obligation to investigate the beneficial ownership of ships flying the flag of the State. This will presumably involve considering whether it is realistic to believe that such a regulation would actually produce data which would improve security, and whether it would be more appropriate to focus instead on a representative manager.

## NEWS FROM THE NATIONAL ASSOCIATIONS

### NEWS FROM THE MARITIME LAW ASSOCIATION OF SLOVENIA

#### TENTH ANNIVERSARY

##### 1. *Brief History*

The roots of the Maritime Law Association of Slovenia (MLAS) go back to the time prior to Slovenia's achievement of independence in 1991, when our present members were active in the Koper and Ljubljana sections of the Yugoslav Maritime Law Association. The "independent" Maritime Law Association of Slovenia (MLAS) was founded on the 16<sup>th</sup> January 1992, only one day after the official recognition of the Republic of Slovenia from the international community. At the end of the year 1993, the MLAS became a member of the CMI.

MLAS representatives regularly participate in meetings and conferences of CMI, they fill in questionnaires of various fields and actively co-operate in other forms in the work of CMI.

##### 2. *Membership*

At the time of its establishment, the Association had 20 regular members. To date the number of members has reached nearly 90. The Association includes members of different professions, while it is increasingly attracting young members.

In the General Meetings of the Association, some internationally reputed experts in the field of maritime affairs and maritime law were awarded with the title of honorary member of MLAS. Those experts are (so far): Prof. William Tetley, Q.C. (McGill), Geoffrey A. Topp (EMPA), Đorđe Ivković, Prof. Dr. Predrag Stanković (deceased) and Prof. Dr. David J. Attard (IMO IMLI).

In addition, on the proposal of the MLAS General Meeting, CMI appointed the following Slovenian Titulary Members: Prof. Dr. Marko Ilesič, Đorđe Ivković, Anton Kariž, Prof. Dr. Marko Pavliha, Andrej Pirš and Josip Rugelj.

##### 3. *Main objectives*

The main goals of MLAS are to study maritime law, to promote its development and reputation, to co-operate with government bodies in preparing and adopting marine-related legislation, to facilitate international unification of law, to promote the harmonisation of Slovenian legislation with *acquis communautaire* (the EU law) as well as to offer assistance and consulting services on maritime law to individuals and companies (Article 5 of the Articles of MLAS).

The Association advances its objectives by organising conferences and (round-table) discussions by participating in meetings of CMI as well as by investigating and drafting proposals for

international agreements and domestic regulations (Article 6 of the Articles of Association). In its first "independent" period, the Association addressed an open letter to the government, drawing attention to the government's careless attitude towards the role of maritime affairs in Slovenia; it organised a round-table discussion on the Hamburg Rules and actively co-operated in the preparation of the new Maritime Code. In addition, it was admitted to the Federation of Lawyers' Associations of Slovenia.

##### 4. *Round-table discussions and other important meetings*

The Association organised the following round-table discussions:

- the Hamburg Rules;
- the new Slovenian Maritime Code;
- marine claims and arrest of ships;
- ship register;
- maritime pilotage (visit of Mr Topp, Chairman of the European Maritime Pilot Association);
- stevedoring services;
- maritime liens and conflict of laws (visit of Prof. Tetley);
- novelties in transport insurance;
- presentation of Andrej Pirš's book on transport insurance;
- experience of Croatian colleagues on the modification of their Maritime Code;
- presentation of two books written by Prof. Dr. Marko Pavliha on transport law and insurance law;
- lecture on the maritime boundary dividing the Bay of Piran, and Slovenia's access to the high sea;
- Special General Meeting called at the occasion of the visit of Prof. Dr. Attard to Slovenia.

##### 5. *Professional training of sponsors and donors*

The Association acquired some financial means through organising the following round-table discussions and conferences:

- round-table discussion on bills of lading for the Union of Maritime Transport Agencies of Slovenia;
- lecture on the stevedoring contract for the Union of Maritime Transport Agencies of Slovenia;
- one-day course on the new Maritime Code organised for the Port of Koper;
- one-day course on the EU maritime law organised for the Port of Koper.

## 6. Other projects

Especially the following should be mentioned:

- drawing the attention of the Slovenian Government to the neglected role of maritime affairs in Slovenia;
- participating in drafting of the Maritime Code;
- co-operating with the Department of Maritime and Transport Law at the Faculty of Maritime Studies and Transport (all members of the Department are active members of the Association);
- co-operation with the Federation of Lawyers' Association of Slovenia (the President of the MLAS has been re-elected as member of the Executive Council);
- co-operation with the Ljubljana Lawyers' Association;
- co-operation with the Lawyers' Association of the Coastal region and Karst region;
- co-operation with the Croatian Maritime Law Association (the President is member of the association);
- designing of the Association's website.

It also needs to be mentioned that the Association

does not neglect social life. This is demonstrated by the traditional fish picnic and other entertaining (mostly culinary) events.

## 7. Plans for the future

MLAS will continue to organise round-table discussions on various current maritime law issues and actively co-operate with the CMI. We shall continue to be watchful that the government, which to our mind has a too centralistic and continental orientation, follows the *Resolution on the Maritime Orientation of the Republic of Slovenia* adopted in 1991, which has often been just a dead letter. Among other things, we wish to strengthen our co-operation with other related associations, especially with Croatian and Italian ones. We would also like to assist in establishing associations in developing countries. We need to broaden our membership base and acquire more financial means, which are vital for the successful operation of the Association. Finally, we hope that more and more members will be willing to actively participate in our maritime law ventures.

PROF. MARKO PAVLIHA & MITJA GRBEC

# NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

## NEWS FROM IMO

### MONITORING IMPLEMENTATION ON THE HAZARDOUS AND NOXIOUS SUBSTANCE CONVENTION

LEGAL COMMITTEE  
84th session  
Agenda item 9

LEG 84\9  
20 February 2002  
Original: ENGLISH

Draft Overview to the HNS Convention Submitted by the United Kingdom

#### SUMMARY

*Executive summary:* This paper introduces a draft IMO Overview for Interested Parties on the Workings of the Hazardous and Noxious Substances Convention 1996 (HNS Convention)

*Action to be taken:* The Committee is invited to consider, and adopt, the text of the draft HNS overview annexed to this document

*Related documents:* LEG 82/8 and LEG 83/INF.3

#### Introduction

1. At its eighty-first session, the Legal Committee agreed that the United Kingdom would initiate work within the Correspondence Group to develop a draft explanatory guide on the HNS Convention.

2. The Committee agreed at its eighty-second session that the Correspondence Group should continue the development of a guide as a single document containing all the necessary information for interested parties, and noted the intention of

the Correspondence Group to produce a substantive draft document, with a target date for publication after the eighty-third session of the Legal Committee. At that session, there was a general consensus in the Committee that the development of a short overview of the HNS Convention, that would provide a simple tool of 'reference', should be undertaken in time for consideration at the eighty-fourth session of the Legal Committee.

3. During the intersessional period after the eighty-third session, the United Kingdom drafted a

short overview of the HNS Convention for consideration by the Correspondence Group. Subsequently, there was considerable support from members of the Correspondence Group for the development of a short overview as contained in the annex to this document. The United Kingdom would like to express its gratitude to all members of the Correspondence Group for their help in developing the draft overview of the HNS Convention.

4. The enclosed draft overview offers straightforward but fundamental information on the key issues that fall within the scope of the Convention e.g. channelling of liability, compulsory insurance, the HNS Fund, limits of compensation, financing of the HNS Fund, HNS Fund accounts etc. The draft overview should also provide a useful basis from which to answer any queries from interested parties while explaining the broad effects of the Convention, as well as its purpose.

5. If formal agreement can be reached on the draft overview, the UK envisages that it will then become available to Member States and other interested parties, and be posted on the IMO web-site in a suitable form. This can either supplement

the information already contained on the IMO web-site ([www.imo.org](http://www.imo.org)>Conventions>Liability and Compensation Conventions), or replace this information with a broader description of the main issues covered by the Convention. IMO Member States may also wish to post the overview on their web-sites as a reference point.

6. This approach is consistent with the IMO Assembly resolution on implementation of the HNS Convention, approved at the twenty-second session of the Assembly, which encourages States to participate in the ongoing work of the HNS Correspondence Group on the monitoring and implementation of the Convention, and urges them to place a high priority on working towards the Convention's implementation.

#### *Action requested of the Legal Committee*

7. The draft overview is annexed to this document for the consideration of the Committee. The United Kingdom invites the Committee to adopt the draft overview and agree that it be posted on the IMO web-site in a suitable format and made available for use by IMO Member States and interested parties.

## ANNEX

### **THE INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR POLLUTION DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA, 1996**

#### *Introduction*

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

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

3. The HNS regime is governed by one Convention, the purpose of which is to provide adequate, prompt and effective compensation for loss or damage to persons, property and the

environment arising from the carriage of HNS by sea. The HNS Convention covers both pollution damage and damage caused by other risks, e.g. fire and explosion.

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

#### *Scope of application*

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

fly the flag of, a State Party outside the territory or territorial sea of any State. Costs of preventive measures, i.e. measures to prevent or minimise damage, are also covered wherever taken.

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

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

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

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

#### *Damage*

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

11. The HNS Convention does not cover pollution damage caused by persistent oil, since such damage is already covered under the existing international regime established by the 1992 CLC and Fund Convention. However, non-pollution

damage caused by persistent oil, e.g. damage caused by fire or explosion, is covered by the HNS Convention. The HNS Convention does not apply to damage caused by radioactive material.

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

#### *1st Tier - Liability of the Shipowner*

##### *(a) Strict liability of the shipowner*

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

14. The shipowner is exempt from liability under the HNS Convention only if he proves that:

- (a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or
- (c) the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function; or
- (d) the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped either:
  - (i) has caused the damage, wholly or partly; or
  - (ii) has led the owner not to obtain insurance; provided that neither the shipowner, nor his servants or agents knew or ought reasonably to have known of the hazardous and noxious nature of the substances shipped.

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

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

*(b) Limitation of liability*

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

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

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

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

*(c) Channelling of Liability*

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

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

*(d) Compulsory insurance*

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

21. The HNS Convention requires shipowners to provide evidence of insurance cover upon the

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

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

*2nd Tier - HNS Fund*

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

24. The HNS Fund also pays compensation in the following cases:

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

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

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

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

*(a) Limit of compensation by the HNS Fund*

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

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



compensation payable under the Convention in the future.

29. If the total amount of the admissible claims does not exceed the maximum amount available

for compensation, then all claims will be paid in full. Otherwise the payments will have to be prorated i.e. all claimants will receive an equal proportion of their admissible claims.

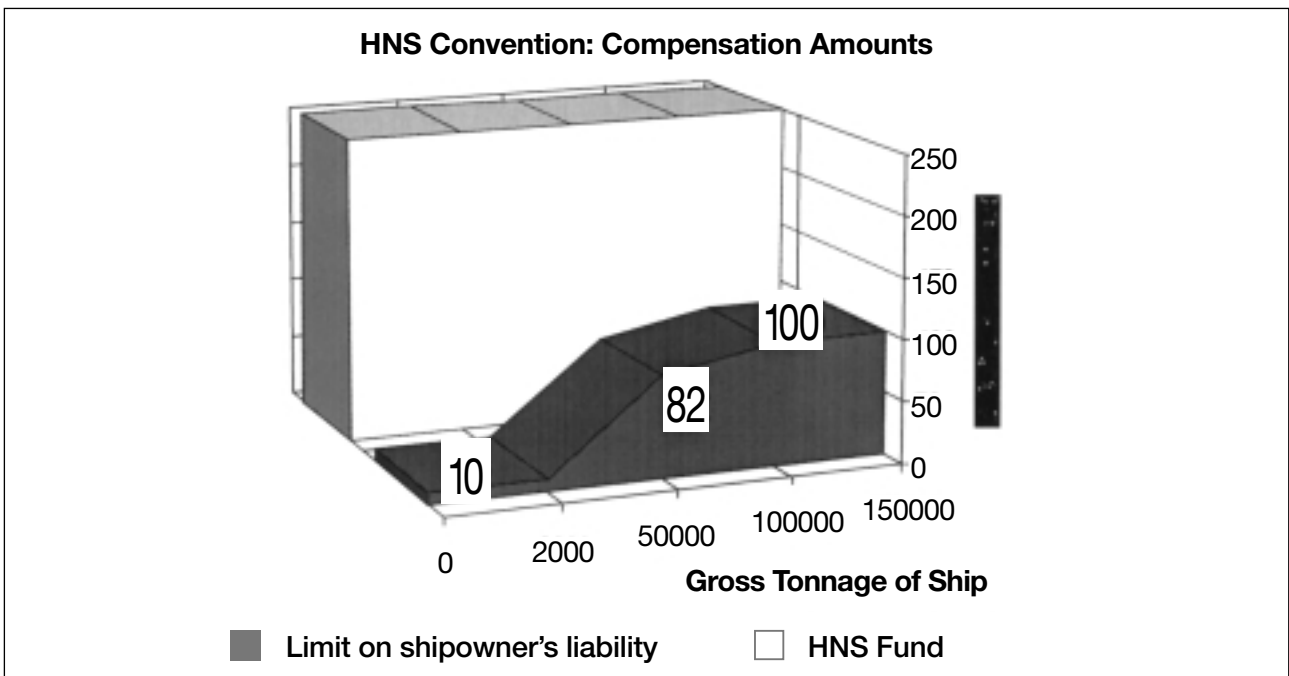


Figure 1. Compensation amounts under the HNS Convention, 1996.

### Financing of the HNS Fund

#### (a) Contributions to the HNS Fund

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

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

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

33. The HNS Convention allows a person who physically receives HNS on behalf of a third party, e.g. a storage company, to designate that third party as the receiver for the purposes of the Convention. Both the person who physically receives the

contributing cargo in a port or terminal, and the designated third party must be subject to the jurisdiction of a State Party.

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

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

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

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

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

*(b) HNS Fund Accounts*

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

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

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

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

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

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

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

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

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

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

*Competence of courts*

45. Claimants can normally only take legal action in a court in the State Party in whose territory or waters the damage occurred. In this context waters means the territorial sea<sup>2</sup> or the Exclusive Economic Zone (EEZ)<sup>3</sup>, or an equivalent area, of a State Party. This also applies to legal actions against any provider of insurance or financial security for the owner's liability i.e. the shipowner's insurer.

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

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

*Administration*

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

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

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

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

### *Entry into force of the HNS Convention*

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

- (i) four States must each have a registered ship's tonnage of at least 2 million GT; and

- (ii) contributors in the States that have ratified the Convention must, between them, have received during the preceding calendar year a minimum of 40 million tonnes of cargo consisting of bulk solids and other HNS liable for contributions to the general account.

## NEWS FROM UNCITRAL

### CONSIDERATION BY WORKING GROUP III (TRANSPORT LAW) OF THE CMI DRAFT INSTRUMENT ON TRANSPORT LAW

The ninth session of the Working Group III (Transport Law) of UNCITRAL – the session convened for the consideration of the CMI Draft Instrument on Transport Law<sup>4</sup> – was held in New York from 15 to 26 April 2002. In fact the CMI Draft Instrument was circulated with some small, mainly verbal, changes under the amended title “Preliminary Draft Instrument on the Carriage of Goods by Sea” and annexed to a note by the UNCITRAL Secretariat (document A/CN.9/WG.III/WP.21 dated 8th January 2002). This Preliminary Draft Instrument, which substantially reproduces the CMI Draft Instrument, was adopted by the Working Group as the basis for its deliberations. The session was attended by delegates from 44 countries and observers from 10 Intergovernmental and International Organisations. Two documents, one, very critical, from UNCTAD and one, in which the criticisms were addressed particularly to the suggested extension of the scope of the Instrument to door-to-door transport, from the United Nations Economic Commission for Europe (Document A/CN.9/WG.III/WP.21) had been made available before the meeting. Prof. Rafael Illescas, one of the delegates from Spain, was elected chairman.

The Working Group was addressed by a representative of the UN Secretary-General on the political dimension of its work. He pointed out that the Working Group's activities went beyond pure legal issues. They fitted in the general UN duty to promote peace and security. Enhancing the rule of law, in particular in the field of international trade and transport, could contribute to improvement of the economic infrastructure of, in particular, developing countries and countries with economies in transition.

The Working Group commenced its work by a general exchange of views on the following issues:

- a) sphere of application;
- b) electronic communication;
- c) liability of the carrier;
- d) rights and obligations of the parties to the

- contract of carriage;
- e) right of control;
- f) transfer of contractual rights and judicial exercise of the rights emanating from the contract;
- g) freedom of contract.

Generally, the CMI draft was well accepted by the delegates. It was regarded as a useful basis for the forthcoming discussions. Also those subjects that are hardly or not dealt with in other transport conventions, such as the e-commerce provisions and those on freight, right of control and transfer of rights were welcomed by many delegates as possible enrichments of transport law. Several delegates, however, advised that they were not in a position to express explicit views yet, because the time between their receipt of the Draft Instrument and the date of the session of the Working Group was too short for accomplishment of the consultation process within their countries.

Special attention was devoted to the issue relating to the possible application of the Draft Instrument to door-to-door transport, as suggested in art. 4.2.1. It was pointed out that provisions should be made in the Draft Instrument for the relationship between such Instrument and other Conventions governing inland transport in view of the increasing number of contracts of carriage by sea, in particular in the liner trade, of containerised cargo, that included carriage by road or railway before and after the sea leg. After arguments in favour and against the application of the Draft Instrument to door-to-door transport were put forward the Working Group decided that it would be desirable to include within the scope of the discussion also door-to-door operations and to deal with these operations rather than developing a multimodal regime, by developing a regime that resolved any conflict between the Draft Instrument and mandatory provisions of Conventions governing land carriage in cases where the sea carriage was complemented by one or more land carriage.

<sup>4</sup> In CMI Yearbook 2001, p. 532 and CMI Website [www.comitemaritime.org](http://www.comitemaritime.org)

In connection with the issue relating to the freedom of contract it was pointed out that the exclusion of charter parties, contracts of affreightment, volume contracts and similar agreements from the scope of the application of the Instrument would affect art. 17 of the Draft which sets out the limits of contractual freedom. It was noted that art. 3.3 of the Draft went beyond the traditional approach of the exclusion of charter parties since it implied the exclusion also of contracts of affreightment and similar agreements; it was suggested that it would be appropriate for the parties negotiating such agreements to have freedom of contract and to agree to the terms that might apply and, in particular, on the liability provisions that would apply as between themselves. However, also concerns were expressed that, in view of the widespread use of these contracts of affreightment and similar agreement in the container liner trade, this freedom of contract might lead to a general evasion of the Draft Instrument and thus dilute the strength of a new regime.

After completion of the general discussion, a number of individual draft articles was considered. Amongst the definitions contained in art. 1, the definition of “performing party” in art. 1.17 received special attention; it was suggested

that it should be preferable to channel the liability on the contractual carrier and to provide for a right of recourse of the contractual carrier against the performing parties. It was also suggested to further restrict the notion of performing party by excluding entities that handled and stowed goods, such as the operators of transport terminals and to include in the definition only those who actually performed carriage operations. However wide support was expressed for the definition presently appearing in the Draft Instrument.

The Working Group then considered art. 5 of the Draft where the obligations of the carrier are set out. Consideration of art. 7, relating to the obligations of the shipper, followed.

The Working Group subsequently discussed art. 9 on freight, albeit not in full. Further discussion on that article will take place at the tenth session of the Working Group in September 2002 when also other articles of the Draft Instrument will be considered. It must be emphasised that this first reading of the Draft Instrument was used by the Working Group to have a general exchange of view only. No intention was made to agree on any concrete change in the Draft Instrument yet.

The report of the Working Group III is presently available on the UNCITRAL website [www.uncitral.org](http://www.uncitral.org).

## RATIFICATION AND DENUNCIATION OF INTERNATIONAL CONVENTIONS

### INSTRUMENTS OF RATIFICATION OF AND ACCESSION TO THE FOLLOWING CONVENTIONS HAVE BEEN DEPOSITED WITH THE DEPOSITARY:

- **International Convention for the unification of certain rules of law relating to bills of lading and Protocol of signature, done at Brussels on 25 August 1924**
- **Protocol, done at Brussels on 23 February 1968, to amend the International Convention for the unification of certain rules of law relating to bills of lading, signed at Brussels on 25 August 1924**
- **Protocol, done at Brussels on 21 December 1979, amending the International Convention for the unification of certain rules of law relating to bills of lading of 25 August 1924, as amended by the Protocol of 23 February 1968**  
*Latvia:* 4 April 2002
- **International Convention for the unification of certain rules relating to arrest of sea-going ship, 1952**  
*Lithuania:* 29 April 2002  
*Namibia:* 14 March 2002

### INSTRUMENTS OF DENUNCIATION OF THE FOLLOWING CONVENTIONS HAVE BEEN DEPOSITED WITH THE DEPOSITARY:\*

- **International Convention for the unification of certain rules of law relating to bills of lading and Protocol of signature, done at Brussels on 25 August 1924**  
*Romania:* 18 March 2002

\* The dates indicated are the dates when denunciation becomes effective.