



**2014 WORLD MARITIME DAY PARALLEL EVENT**  
*Tangier 27-29 October 2014-10-16*

## **IMO CONVENTIONS: EFFECTIVE IMPLEMENTATION**

### **LIABILITY AND COMPENSATION, HNS PROTOCOL AND WRECK REMOVAL CONVENTION**

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#### **I.**

#### **The International Convention on liability and compensation for damage in connection with carriage of hazardous and noxious substances by sea, 1996 and the 2010 Protocol – The 2010 HNS Convention**

##### ***1. The history of the Convention***

*1.1.* Three were the fundamental questions that required consideration in order to establish the scope of application of this new convention:

- a) which should be the substances, other than oil within the meaning given to it in the CLC;
- b) which should be the damages to which the future convention should apply;
- c) who should provide the funds for the settlement of claims arising out of such damages.

*1.2.* In respect of the first issue it was decided that, as it was done with the CLC, the method to be adopted should be that of a definition of such substances: a task much more difficult than that of the definition of “oil”, given the great variety of substances that, in addition to oil, could cause damages.

In respect of the second issue, it was decided that the damages should include not only damage to the environment, but also loss of life and personal injuries.

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In respect of the third issue, the same two tiers solution adopted by the CLC, accompanied by the owner's compulsory insurance, and the Fund Convention, was chosen; but more difficulties had arisen in respect of whether contributions to the fund should be provided by the shippers or the receivers of the hazardous and noxious substances.

*1.3.* The Convention was adopted on 3 May 1996, but at the end of 2008, after over twelve years from its adoption, it had been acceded to by only 14 States<sup>1</sup>, out of which only three<sup>2</sup> had a tonnage in excess of 2 million tons, the required number of States with tonnage in excess of 2 million tons being, pursuant to art. 46 of the Convention, four.

*1.4.* An enquiry on the underlying causes that had inhibited the entry into force of the Convention was carried out by the IMO Secretariat and it appeared that such causes had been the heavy burden on States having to report the vast range of packaged substances received by them pursuant to art. 21(3) of the Convention, the fact that in the case of LNG cargoes, the title holder, who would be the person responsible for making contributions, may not be subject to the jurisdiction of a State Party and the possible non submission of contributing cargo reports on ratification of the Convention and annually thereafter.

*1.5.* With a view to curing those difficulties a Protocol to the Convention was adopted on 30 April 2010 with amendments, inter alia, to the definition of hazardous and noxious substances in art. 1(5), including the new definitions of "Bulk HNS" and "Packaged HNS" required for the amendment of art.9 in which distinct limits were adopted in respects such two categories of hazardous and noxious substances.

*1.6.* Four Resolutions were also adopted by the Conference:

- with the first the Assembly of the IOPC Fund was requested to set up the HNS Fund;
- with the second States Parties to the 2010 HNS Protocol, Member States of IMO and other appropriate organizations as well as the maritime industry were requested to provide assistance to those States which required support in the consideration of adoption and implementation of the Protocol;
- with the third States were invited to give early and urgent consideration to acceptance of the Protocol, in order to avoid the contemporary existence of two different regimes, that of the HNS 1996 and that created by the Protocol;

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<sup>1</sup> Angola, Cyprus, Ethiopia, Hungary, Liberia, Lithuania, Morocco, Russian Federation, Saint Kitts and Nevis, Samoa, Sierra Leone, Slovenia, Syrian Arab Republic, Tonga.

<sup>2</sup> Cyprus, Liberia and Russian Federation.

- with the fourth the Legal Committee of IMO was invited to reconsider its overview of the 1996 HNS Convention in light of the adoption of the Protocol.

1.7. The efforts to encourage the adoption of the HNS Convention, as amended by the 2010 Protocol (reference to which was made as the “2010 HNS Convention”) continued in the following years.

1.8. On 28 January 2011 an Overview of the 2010 HNS Convention was prepared by the IMO Secretariat and submitted to the Legal Committee for its comments and decisions as appropriate. During the HNS Workshop held at IMO Headquarters on 12 and 13 November 2012 Guidelines on reporting of HNS contributing cargo were prepared and endorsed by the IMO Legal Committee at its 100<sup>th</sup> session on 19 April 2013. At the time of endorsing the Guidelines it was agreed that States should continue to monitor and coordinate ratification and accession timelines and that IMO and the IOPC Funds should continue their work to promote the entry into force of the HNS Protocol.

1.9. At a subsequent informal meeting that took place on 24 October 2013, during the subsequent meeting of the IOPC Funds, it was agreed that an Informal Correspondence Group be constituted to continue the dialogue amongst States aiming at resolving implementation issues and in the occasion of the 101<sup>st</sup> Session of the Legal Committee the following Terms of Reference for such Correspondence Group were submitted by Canada, Denmark, France, Germany, the Netherlands and Norway:

*“1 to provide a forum for an exchange of views concerning HNS implementation issues and to monitor and inform the implementation process in States;*

*2 to provide, with a view to encouraging early entry into force of the 2010 HNS Convention at a global level, and for the benefit of both potential States Parties and affected industries seeking a coordinated approach to ratification, accession or acceptance, guidance and assistance on issues regarding the implementation and operation of the Convention such as, but not limited, to:*

*(a) the collection of information on contributing cargo, the development of appropriate reporting and verification systems, and the contribution system in accordance with the Guidelines on reporting of HNS contributing cargo;*

*(b) the acceptability of insurance or other financial security for the purpose of article 12 of the 2010 HNS Convention;*

*(c) assisting the IOPC Fund 1992 with the development of the various documents and decisions required for the first sessions of the HNS Assembly, in accordance with resolution 1 on setting up the HNS Fund agreed to at the international conference which adopted the 2010 HNS Protocol; and*

*3 to report to the Legal Committee on a regular basis.”*

1.10. However no success had so far been achieved towards the entry into force of the HNS Convention 2010. As at 30 September 2014 no State had deposited an instrument of ratification or accession to the Convention as amended by the Protocol.

1.11. One of the difficulties with which States are confronted has been indicated as follows in para. 1 of the “Guidelines on reporting of HNS contributing cargo” previously referred to:

*“The HNS Protocol requires, under article 20, paragraph 4, that an expression of consent to be bound by this Protocol must be accompanied by the submission of data on the total quantity of contributing cargo received during the preceding calendar year.*

*This poses a challenge, since the procedure for reporting contributing cargo requires a number of decisions from the first HNS Fund Assembly to ensure uniform application. Since the Assembly cannot be convened until the treaty enters into force, there is a need to put reporting regulations in place prior to ratification.”*

1.12. The provision referred to in the above statement has become art. 45 of HNS 2010, paras. 4 and 5.

## **2. The structure of the Convention**

2.1. While in respect of oil pollution damage there are, owing to their history, two separate conventions, the CLC Convention that regulates the liability of the owners of ships carrying oil and the Fund Convention that regulates the contribution of the cargo, in respect of damage in connection with the carriage of hazardous and noxious substances both aspects are regulated in the same convention.

2.2. Its structure is consequently different: the Convention is divided in six Chapters, the first containing general provisions applicable to the whole convention, the second containing rules on the liability of the owner as the CLC does for oil, the third containing rules on the establishment and the administration of the International Fund, the fourth, again of a general nature, containing rules on claims and actions, the fifth on transitional provisions and the sixth on final clauses.

## **3. Signature, ratification, acceptance, approval and accession**

3.1. Art. 45 of the Protocol provides that:

*“1. Protocol shall be open for signature at the Headquarters of the Organization from 1 November 2010 to 31 October 2011 and shall thereafter remain open for accession.*

2. *Subject to the provisions in paragraphs 4 and 5, States may express their consent to be bound by this Protocol by:*

- (a) signature without reservation as to ratification, acceptance or approval; or*
- (b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or*
- (c) accession.*

3. *Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General."*

3.2. Prior to 31 October 2011 the Protocol has been signed, subject to ratification, by Canada, Denmark, France, Germany, Greece, the Netherlands, Norway and Turkey and no State deposited an instrument of ratification or accession subsequently.

3.3. Art. 45(4) and(5) provide that:

*"4. An expression of consent to be bound by this Protocol shall be accompanied by the submission to the Secretary-General of data on the total quantities of contributing cargo liable for contributions received in that State during the preceding calendar year in respect of the general account and each separate account.*

*5. An expression of consent which is not accompanied by the data referred to in paragraph 4 shall not be accepted by the Secretary-General."*

3.4. It appears, therefore, that the consent by a State to be bound, if not accompanied by the data on the total quantities of contributing cargo received is ineffective. The consequence would be that it is irrelevant in order to establish the number of States Parties for the purpose of the entry into force of the Convention.

3.5. Initially no express condition was required for the entry into force of the maritime conventions; subsequently the condition required became the ratification or acceptance of or accession to a given convention by a minimum number of States, such number varying from a minimum of 2 to a maximum of 20; more recently there was added also the condition of a minimum global tonnage and then, in the HNS Convention, the requirement of a minimum quantity of contributing cargo.

Art. 46(1) in fact provides that:

*"1. Protocol shall enter into force 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 45, paragraphs 4 and 6, that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 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.*

## II.

### **The Nairobi International Convention on removal of wrecks 18 May 2007**

#### ***1. Introduction***

Wrecks of sunken ships and parts thereof may not only be dangerous for navigation, but also to the marine environment. Oil and other hazardous and noxious substances may be released from a sunken ship even years after the casualty. Whilst their removal within the territorial waters of a State belongs to the jurisdiction of such State, if wrecks lay beyond territorial waters their removal is not and its law is not applicable. Nor has that State any specific obligations to care for the marking and removal of such wrecks or right of action against their owners. The Nairobi Convention was adopted with a view to filling this gap in international public maritime law. Although the majority of wrecks lays within territorial waters, there are in fact also wrecks beyond them that may constitute a hazard to navigation as well as a threat to the marine environment as would certainly be the case for sunken tankers and, generally, for the bunker oil of any ship. As of July 2014 the Convention has been ratified by 11<sup>3</sup> States (the last one being Congo on 19 May 2014) and, the instrument of ratification of the tenth State (Denmark) having been deposited on 14 April 2014, the Convention will enter into force on 14 April 2015.

#### ***2. The subject matter of the Convention***

The subject matter of the Convention is the removal of wrecks. Art. 2(1) in fact provides that: “*A State Party may take measures in accordance with this Convention in relation to the removal of a wreck which poses a hazard in the Convention area.*”

And art. 3(1) provides that: “*Except as otherwise provided in this Convention, this Convention shall apply to wrecks in the Convention area.*”

The three basic conditions for the Convention to apply are, therefore, a) that there is a wreck, b) that such wreck poses a hazard to navigation and c) that the hazard is located in the Convention area.

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<sup>3</sup> Bulgaria, Congo, Denmark, Germany, India, Iran, Malaysia, Morocco, Nigeria, Palau, United Kingdom.

### 3. *The notion of “wreck”*

Pursuant to art 1(4) the definition of “wreck” is linked to the nature of the event from which it has resulted. Art.1(4) so in fact provides: “*Wreck*, following upon a maritime casualty, means:”

Therefore a wreck may be so qualified only if it is the consequence of a maritime casualty, which is so defined in art. 1(3): “*Maritime casualty* means a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or its cargo.”

### 4. *The notion of “hazard”*

Although certain provisions of the Convention apply to wrecks generally, whether or not they pose a hazard, the core of the Convention is the protection against wrecks that pose a hazard. That is stated in art. 2, in which the objectives and general principles are set out. Paras. 1, 2 and 3 provide:

*1 A State Party may take measures in accordance with this Convention in relation to the removal of a wreck which poses a hazard in the Convention area.*

*2 Measures taken by the Affected State in accordance with paragraph 1 shall be proportionate to the hazard.*

*3 Such measures shall not go beyond what is reasonably necessary to remove a wreck which poses a hazard and shall cease as soon as the wreck has been removed; they shall not unnecessarily interfere with the rights and interests of other States including the State of the ship’s registry, and of any person, physical or corporate, concerned.*

The definition of hazard is then given in art.1(5):

*5. “Hazard” means any condition or threat that:*

*(a) poses a danger or impediment to navigation; or*

*(b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.”*

### 5. *The notion of “Convention area”*

“Convention area” is defined in art. 1(1) as:

*“Convention area’ means the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending*

*not more than 200 nautical miles from the baseline from which the breadth of its territorial sea is measured.”*

## **6. Obligations of States Parties in case of a casualty resulting in a wreck**

6.1. As to the obligation of the State in respect of a ship flying its flag that has become a wreck, art. 5(1) so provides:

*“1. A State Party shall require the master and the operator of a ship flying its flag to report to the Affected State without delay when that ship has been involved in a maritime casualty resulting in a wreck. To the extent that the reporting obligation under this article has been fulfilled either by the master or the operator of the ship, the other shall not be obliged to report.”*

6.2. With regard to obligations of the State in whose Convention area the wreck is located, according to circumstances the obligations of the Affected State are to locate the wreck, warn mariners and States, mark the wreck and, where necessary, take appropriate action for its removal.

6.3. In respect of locating wrecks Art. 7 provides that:

*“1 Upon becoming aware of a wreck, the Affected State shall use all practicable means, including the good offices of States and organizations, to warn mariners and the States concerned of the nature and location of the wreck as a matter of urgency.*

*2 If the Affected State has reason to believe that a wreck poses a hazard, it shall ensure that all practicable steps are taken to establish the precise location of the wreck.”*

6.4. Although the Affected State has no liability in connection with the wreck, nevertheless it has two obligations, that arise out of the fact that the wreck is within its economic zone or the area adjacent to its territorial sea: to warn mariners and “States concerned”.

6.5. There are also provisions regarding the marking wrecks. Art. 8 so provides:

*“1 If the Affected State determines that a wreck constitutes a hazard, that State shall ensure that all reasonable steps are taken to mark the wreck.*

*2 In marking the wreck, all practicable steps shall be taken to ensure that the markings conform to the internationally accepted system of buoyage in use in the area where the wreck is located.*

*3 The Affected State shall promulgate the particulars of the marking of the wreck by use of all appropriate means, including the appropriate nautical publications.”*

6.6. The obligation of the Affected State to mark the wreck arises only if, in the judgment of that State, the wreck constitutes a hazard. In this connection out of the two



notions of “hazard” given in art. 1(5) the relevant one is the first: “a condition or threat that poses a danger or impediment to navigation”.

6.7. The removal of the wreck is required if the wreck constitutes a hazard. Art. 9 so provides:

*1 If the Affected State determines that a wreck constitutes a hazard, that State shall immediately:*

- (a) inform the State of the ship’s registry and the registered owner; and*
- (b) proceed to consult the State of the ship’s registry and other States affected by the wreck regarding measures to be taken in relation to the wreck.*

6.8. The sequence of the actions appears to be the following:

- first the master or the operator of the ship involved in a maritime casualty resulting in a wreck must report to the Affected State and provide the information specified in art. 5(2);
- secondly the Affected State must, pursuant to art. 7, warn mariners and if it determines that the wreck constitutes a hazard, pursuant to art. 8 must ensure that all reasonable steps are taken to mark the wreck;
- thirdly pursuant to art. 9(1) must inform the State of the ship’s registry and the registered owner, whereupon pursuant to art. 9(3) the registered owner (or other interested party) must provide the competent authority of the Affected State with evidence of insurance or other financial security and pursuant to art. 9(2) must remove the wreck.

6.9. There are also provisions regarding obligations and liabilities of the owner of the wreck. In respect of obligations, Art. 9 so provides in paras. 2-4:

*“2 The registered owner shall remove a wreck determined to constitute a hazard.*

*3 When a wreck has been determined to constitute a hazard, the registered owner, or other interested party, shall provide the competent authority of the Affected State with evidence of insurance or other financial security as required by article 12.*

*4 The registered owner may contract with any salvor or other person to remove the wreck determined to constitute a hazard on behalf of the owner. Before such removal commences, the Affected State may lay down conditions for such removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment.”*

6.10. As to liabilities Art. 10(1) so provides:

*“1 Subject to article 11, the registered owner shall be liable for the costs of locating, marking and removing the wreck under articles 7, 8 and 9, respectively,*

*unless the registered owner proves that the maritime casualty that caused the wreck:*

*(a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;*

*(b) was wholly caused by an act or omission done with intent to cause damage by a third party; or*

*(c) 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.”*

Except for the different drafting, since the term “exceptions to liability” is used only in respect of conflict with other conventions, this provision adopts the same allocation of the burden of proof and the same exonerations from liability already adopted in art. III (2) of the CLC 1992.