

# ARCOPOL

Claims and compensation for HNS pollution damage and changes expected from the entry into force of the HNS Fund

## Activity 6

### Task 6.1.2

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## ARCOPOL PROJECT

### Task 6.1: Review of lessons from previous incidents and actual practice in terms of claims and compensation

#### 6.1.2 “Claims and compensation for HNS pollution damage and changes expected from the entry into force of the HNS Fund”

##### **Report 6.1.2: Claims and compensation for HNS pollution damage and changes expected from the entry into force of the HNS Fund.**

This report is a part of the Task 6 of ARCOPOL project and is dedicated to the study of HNS Convention. It aims keys questions regarding claims and compensation even if this Convention is still not entered into force.

To organize this study of HNS system, it is necessary to present the specifics of HNS pollution and their compensation today (i.e. without application of the Convention) (I). Then we will examine compensation for pollution damage under the HNS Convention itself (II).

Finally, it will be possible to make basic recommendations on claims for pollution damages following HNS spill (III).

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## I. Feedback analysis from past HNS spills:

To begin this report it is important to underline two points: the specificity of HNS pollution (to conduct feedback analysis), on the one hand (A), and the role of insurance and other actors of compensation on the other. (B).

### I.1. Specificity of HNS Convention and HNS pollution:

It's a very difficult work to conduct a feedback analyze and legal study of HNS pollution, for two main reasons.

First, as it will be describe in second part of the report, HNS Convention and its rules of compensation and liability are not entered into force. Consequently after HNS pollution, claims for pollution damage aren't compensated with HNS rules yet. Most of the claims have to be compensated within the liability of the shipowner in application of the LLMC Convention regarding his civil liability. Most of the pollution damages are indeed compensated by his insurer and the amount of compensation is not efficient to cover all the damages (i.e. environmental damage)<sup>1</sup>.

Secondly, HNS pollution is often invisible and not similar to an oil spill regarding the cleanup operations or remediation. Consequently, the real cost of an HNS spill is very difficult to assess. For example in the ten past years, majors accidents involving HNS (spill or loss of containers) in European waters have been compensated by application of the civil liability of the shipowner with the LLMC rules, and paid by insurers as any other damages<sup>2</sup>.

In most cases of HNS pollution, insurers and P&I clubs remain the major actors of the compensation. So any feedback analysis must check how insurers manage such claims for pollution damage. As a result, recommendations to claimants after HNS pollution<sup>3</sup> must be based on the practice of insurers in this field... until HNS Convention enter into force.

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<sup>1</sup> Yet accidents involving ships carrying HNS goods are more common as oil spills in European waters.

<sup>2</sup> It can refer to the following accidents in 10 years:

2000: "Ievoli Sun" (spill), France, Brittany ;

2002 : "Lykes Liberator" (loss of containers), France, Finistère ; "Bow Eagle" (loss of containers), France, Finistère ;

2003: "Jambo" (spill), N-W Scotland ;

2004: "Ena 2", (spill), Deutschland ;

2006: "Ecé", (spill), Guernsey ; "Nedlloyd Mondriaan" (loss of containers), Holland ;

2007: "Napoli" (loss of containers and oil spill), France, Manche ;

2010: "Uranus" (no spill), France, Finistère.

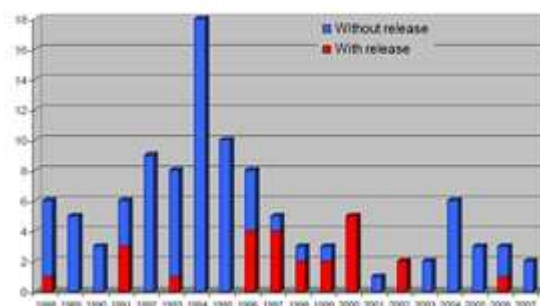
<sup>3</sup> Recommendations to claimants will be presented in part III of this report.

For more details related to HNS pollution, it could be very useful to refer to the following informations and data from the website of Cedre<sup>4</sup>, and reproduced with its permission for the use of this report.

### **“Context**

*The high level of media attention attracted by oil spills completely overshadows the existence of marine chemical pollution in citizens' minds. Although most of the time this type of pollution is invisible, it nevertheless represents a significant pollution risk which is becoming increasingly present each day. Today, an estimated 37 million chemicals are used by man and 2,000 are regularly transported by sea. This transport method is currently on the rise: in 20 years, shipping of chemicals has been multiplied by 3.5. Predictions forecast that sea transport will reach 215 million tonnes of chemicals each year by 2015.*

**Number of accidents** Generally speaking, even although shipping is on the rise, the number of accidents involving hazardous and noxious substances (HNS) is falling. A statistical study conducted by REMPEC (Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea) on 106 accidents in the Mediterranean shows that between 1994 and 2007 the number of cases dropped from 18 to 2 per year. This can be partly explained by the average ship age which has considerably diminished over the past years. In the above-mentioned study, 60% of boats involved in accidents were over 16 years old, while the world average in 2007 was 11.8 years old.



*Evolution of the number of accidents between 1998 and 2007  
in the Mediterranean involving hazardous and noxious substances  
(Source: REMPEC)*

**Accident characteristics and products involved** According to statistics published by EMSA (European Maritime Safety Agency) on one hundred accidents in European waters between 1987 and 2006, the most frequent causes are fire and explosion (24%), followed by capsizing which is often due to difficult weather conditions (22%).

<sup>4</sup> For more details see [www.cedre.fr](http://www.cedre.fr)

*In 50% of cases, accidents do not result in a spill of the cargo. Furthermore, the problem of ship propulsion fuel is added to that of the chemicals. In this case, two distinct response efforts are carried out, as the response strategies will be closely linked to the behaviour of the products involved.*

*An investigation carried out in 2010 by Cedre on 218 well documented events having occurred worldwide since the early 20th century showed that the substances spilt in the greatest quantities are: iron ore (590,500 t), coal (107,200 t), phosphates (56,894 t), sulphuric acid (50,549 t), caustic soda (43,910 t), naphtha, (40,941 t), fertilisers (26,695 t) and methanol (25,000 t). In terms of containers, listing lost containers would be a long and painstaking task. Moreover, noody has worldwide data on this subject.*

***Impressive yet temporary pollution*** *In the open sea, the effect of dilution plays a major role, minimising the impact of chemicals on the marine environment. Accidents occurring in relatively confined areas, such as harbours, bays or estuaries, result in greater pollution if they are not rapidly controlled. Most of the time, contamination resulting from such accidents is temporary (...).*

***Increasingly well controlled yet costly accidents”***

*Response to chemical spills long remained rudimentary, or even inexistent. Indeed, in many cases, it is materially impossible to take action (explosion, rapid dissolution in the open sea...). However, environmental aspects are now the focus of our society's concerns and response actions are strongly encouraged by politicians and public opinion. Spill response is evolving in the right direction, but can prove extremely costly according to strategies adopted and equipment required (...).*

[http://www.cedre.fr/en/spill/synopsis\\_chemical.php](http://www.cedre.fr/en/spill/synopsis_chemical.php)

**I.2. Maritime insurance, P&I Clubs and the judge: Mains actors of the compensation outside HNS Convention:**

Unable to make references to the HNS Convention, which is not yet in force, or to the Directive 2004/35/EC which has created an administrative liability and excluded the HNS pollution, we have to search in maritime law and national law how to compensate damages following HNS pollution. Outside HNS convention, we have first to look for the shipowner liability. We already know that it will be his liability but the cost of measures will be taken in charge by his insurance. Before the compensation claim made to his insurance, it is necessary to know who will be considered as liable for the pollution and consequently who pay compensations and repair.

Amounts that may be claimed as compensation for damages, caused by pollution, may be very

important. That is why insurance is a mandatory mechanism. Indeed, often, those responsible cannot provide the funding needed for these compensation measures. That's why they have taken out, in advance, insurance.

For the funding of rehabilitation measures of the environment, by insurance and P & I clubs, as we have previously reported, the judicial court must have, in advance, judged the liable persons (the shipowner and the charterer). The court may order compensation in kind or monetary compensation of the pollution damage.

In principle, the judge should be more inclined to compensation in kind when it comes to repair environmental damages. This kind of compensation is encouraged by the Directive 2004/35/CE in its article 6.1 that we introduced earlier. The aim is that nature comes back to its initial state. To reach it the judge may order any type of fight measures against pollution and reinstatement. These measures could be made to protect the environment and of course to clean up contaminated areas.

Compensation in kind should be encouraged by judges but it is sometimes inapplicable depending of the damage itself. While pollution has had an effect causing the death of protected species, compensation in kind seems impossible. After HNS pollution, compensation in kind is very difficult to assess mainly because of evidentiary problem of pollution damage. That is why the judge may also impose monetary compensations. This way of compensation also highlights many difficulties. Indeed, Marine and coastal environment is composed of *res nullius* and *res communes*. These elements don't have any market value which makes the appraisal by the court really complex. That's why compensation granted by the court judges varies widely. Many precedents illustrate courts which have granted a symbolic euro for the death of a raptor, while another has awarded 150 Euros for the capture of a bird part of a protected species. However, these differences should not exist because the French Supreme Court<sup>5</sup> stated that « *compensation is not provided by the allocation of a symbolic euro* ». It censors decisions that do not respect this principle. In addition, French Supreme Court ordered judiciaries courts to conduct a full compensation for damages<sup>6</sup>. Besides, judicial judges have difficulties to assess in money the damage and thus to evaluate the amount of money needed for the rehabilitation. This element is subject to many discussions of current doctrine. Compensation of pollution damage is often difficult after oil spills and even more after HNS pollution.

Usually insurances and P& I clubs bear the cost of compensations.

We know there are several types of insurance, main hull insurance, cargo insurance ... But the most important in our case is the *insurance of liability* of the shipowner<sup>7</sup>. Indeed, the standard

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5 La Cour de Cassation

6 Cass. Crim., January 15<sup>th</sup>, 1997, n°96/82264

7 This type of insurance, by the French Federation of Insurance Companies is new. It states that are guaranteed the right of action for acts of death, injury or illness and the right of action for damages, or losses exercised against the insured vessel by co-contractors or third parties. These risks are warranted

policy of civil liability reminds the ability of the shipowner to limit his liability. This possibility is managed by the International Convention of November 9, 1976, on the Limitation of Liability for Maritime Claims (LLMC Convention), which amended the International Convention of 1957<sup>8</sup>. The 1976 Convention provides that the shipowner, or any person operating on the ship or their principals can limit their liability. This right is also given to the insurer. In principle, this limitation of liability is available only in respect of liability claims arising from the operation of the ship. It cannot be put into action for claims, among others, relating to contracts of sale or purchase of equipment or contract to provide services. Moreover, this limitation of liability is working for any debt whether, in a contractual or extra-contractual liability as it is in connection with the operation of the ship<sup>9</sup>. LLMC Convention provides that a single fund will be created, even though there are several responsible benefiting from the limitation of liability. In addition, the limitation amount shall be calculated per event.

The method for setting the maximum limitation of liability is quite simple; it depends on the tonnage of the vessel. The 1976 Convention provides a particular limitation for claims for death or personal injuries and a general system for « *other claims* ».

The 1996 Protocol of the LLMC Convention provides that the limit will amount to two million Special Drawing Rights (SDR) for vessels of less than or equal to 2000 tons. 800 SDR are added per ton between 2 001 and 30 000 tons and 600 SDR for each ton between 30 001 and 70 000 tons, and finally 400 SDR for each ton higher.

To limit his liability, the shipowner must necessarily follow a strict procedure. Indeed, it must create a limitation fund. The establishment of this fund allows the owner to be free of his creditors, who are forced to act against the fund. This fund also benefits from his insurer like it does for the insured. The LLMC Convention refers to national laws for creation measures of the Fund. In France it was the decree of October 27, 1967 which provides measures to create funds. This decree provides that any person who wishes to benefit from a limitation of liability shall present a motion to the President of the Commercial Court of the port of the vessel if the vessel is French or place of seizure if the ship is foreign.

An important point is that the fund can be created after the realization of the damage as long as no damages and interest were paid. It is rare that the president of the Commercial Court is opposed to the constitution of the fund. His main role is to check the formation of the funds and the amount

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as a result of any event, a collision or not, or if it results from the use of equipment or facilities in the service of the ship or its cargo. This coverage is also effective under a contract of towage.

8 International Convention on the Limitation of Liability for Maritime Claims, Brussels, October 10<sup>th</sup>, 1957.

9 Note that this limitation of liability does not apply in cases of gross negligence of the owner or other beneficiaries.



paid by the shipowner. Furthermore it is also up to him to appoint a judge-commissioner and an executor.

The establishment of this fund is primordial for the shipowner. Thanks this Fund his creditors cannot exercise their rights over his property.

The administrator has an important role because he must inform creditors and claimants of the constitution of the fund. Subsequently, he must present a distribution schedule to the judge-commissioner which includes all claims. Finally, each claim is paid by the fund depositary (usually the bank where the fund has been created) or by the guarantor who became surety in the constitution of the fund. Claims are covered proportionately. Each creditor is paid to the « *pro rata* ». The establishment of a fund is not an obligation; it is left to the free disposal of the shipowner. This will not compromise its right to limit his liability. Indeed, the article 10 of the LLMC Convention states: « *The limitation of liability may be invoked even if the liability limitation fund has not been made up* »<sup>10</sup>.

In addition, another institution has been put in place to compensate the shipowners lack of means and their insurers. These are P&I Clubs. P&I clubs are like a mutual for shipowners and charterers of vessels. Initially, P&I Clubs were introduced to cover the civil liability of shipowners and charterers of the ship. Note that the civil liability policy of shipowners presented above has been introduced into French law only recently. Previously, insurers did not guarantee such risks. Today, insurers compete more and more P&I Clubs by providing liability insurance. Note also that the role of P&I Clubs is not exclusively to fund the compensation of environmental damages (or other pollution damage) but they have a real role of negotiation in case of a risk of pollution. Indeed, if a damaged vessel may cause pollution, the representative of the club will take over the negotiations with local authorities to choose all necessary measures. A P&I Club will take over the funding of rehabilitation measures only if the owner or charterer is a member of the Club.

National law and measures introduced by the European law allows some compensation of damage to the environment. Even so, it seems insufficient face to the necessary protection of the environment and the cost of pollution damages after HNS pollution. The entry into force of the HNS Convention is strongly awaited by many entities like environmentalists or lawyers whose work to repair damage to the environment would be facilitated. We certainly go more and more towards a « juridicization » of environment but his goal is praiseworthy if it provides a better protection.

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10 Article 10 of LLMC Convention.

## II. Compensation inside the HNS Convention:

### II.1. Introducing HNS Convention:

The HNS Convention was adopted the 3<sup>rd</sup> May of 1996, in London, by an international conference organized by the IMO. It was inspired by the Civil Liability Convention<sup>11</sup>, The CLC Convention of 1969<sup>12</sup>, and by the Convention which create the IOPC fund of 1971<sup>13</sup>. Both deal with pollutions from oil spill. Unlike the CLC Convention of 1969, which was adopted following the Torrey Canyon catastrophe, and additional protocols of 1984 and 1992 which were put in place following the Amoco Cadiz's and Exxon Valdez's pollution, the HNS Convention had never been carried by a strong media pressure following a particular accident.

International Convention of 1996, the Hazardous and Noxious Substances Convention (The HNS Convention) aim's is to guaranty a decent, quick and efficient compensation for damages did to people and goods. This compensation consists on the payment of cleaning measures, restoration measures, and economic loss link to the transport by sea of hazardous and noxious substances.

In this goal, HNS Convention put in place an extensive definition of the « damage ». Article 1.6 of the Convention presents a wide definition of it. Indeed, this definition cover all loss of goods or all damages undergo by goods out of the ship and damages caused by them. But also some loss or damages by contamination of the environment caused by this substances<sup>14</sup>.

However, from article 1.9 of the HNS Convention: « *Carriage by sea means the period from the time when the hazardous and noxious substances enter any part of the ship's equipment, on loading, to the time they cease to be present in any part of the ship's equipment, on discharge. If no ship's equipment is used, the period begins and ends respectively when the hazardous and noxious substances cross the ship's rail.* »<sup>15</sup>

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11 See reports 6.1.1 and 6.1.3

12 International Convention on Civil Liability for Oil Pollution Damage, Adopted November 29<sup>th</sup>, 1969.

13 The 1971 International Oil Pollution Compensation Fund.

14 Article 1.6 of the HNS Convention: «Damage" means: (a) loss of life or personal injury on board or outside the ship carrying the hazardous and noxious substances caused by those substances; (b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances; (c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and (d) the costs of preventive measures and further loss or damage caused by preventive measures. Where it is not reasonably possible to separate damage caused by the hazardous and noxious substances from that caused by other factors, all such damage shall be deemed to be caused by the hazardous and noxious substances except if, and to the extent that, the damage caused by other factors is damage of a type referred to in article 4, paragraph 3. In this paragraph, "caused by those substances" means caused by the hazardous or noxious nature of the substances.

15 Article 1.9 of the HNS Convention

HNS Convention is applicable for all harms made by noxious and hazardous substances arise: « *in the territory, including the territorial sea, of a State Party* »<sup>16</sup>.

This Convention can also consider: « *damage by contamination of the environment caused in the exclusive economic zone of a State Party, or, if a State Party has not established such a zone, in an area beyond and adjacent to the territorial sea of that State* »<sup>17</sup> » and « *to damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party* »<sup>18</sup> »

HNS Convention can be apply in any event linked to the transport by sea of hazardous and noxious substances on board of any vessel or marine machine whatever it is.

Indeed, the article 1 of the Convention precise: « *"Ship" means any seagoing vessel and seaborne craft, of any type whatsoever* »<sup>19</sup> ». This Convention can be apply from the time when that substances penetrate in any element of the ship's equipment (on loading) or, when there no ship element used, from the moment that they cross the ship's rail. Then the Convention stops to be applicable when substances are not anymore in the ship and had crossed the ship's rail<sup>20</sup>.

HNS is strongly influenced by the conventions dealing with marine pollution from oil spills<sup>21</sup>. This new Convention combine all people who create a risk of pollution (The industrial who needs that some HNS be carried by sea, and the owner of the vessel).

This agreement was originally designed as a dedicated system of compensation, it's able to cover from major disasters to the loss of one toxic barrel. It could act as the general system according to

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16 Article 3 a of the HNS Convention "This Convention shall apply exclusively: (a) to any damage caused in the territory, including the territorial sea, of a State Party;

17 Article 3 b of the HNS Convention: « *to damage by contamination of the environment caused in 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, in 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 baselines from which the breadth of its territorial sea is measured* »

18 Article 3 c of the HNS Convention: « *to damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party* »

19 Article 1.1 of the HNS Convention

20 Article 1.9 of the HNS Convention: « *"Carriage by sea" means the period from the time when the hazardous and noxious substances enter any part of the ship's equipment, on loading, to the time they cease to be present in any part of the ship's equipment, on discharge. If no ship's equipment is used, the period begins and ends respectively when the hazardous and noxious substances cross the ship's rail.* »

21 The CLC Convention adopter in Novembre 29<sup>th</sup>, 1969, Entered into Force in June 19<sup>th</sup>, 1975, replaced by the Protocole of 1992 adopted in November 27<sup>th</sup> and entered into force on May 30<sup>st</sup>, 1996. And The Convention of 1992 which put in place the IOPC Fund.

Unfortunately, this Convention is not yet entered into force. Several factors have prevented the ratification by many states.

The HNS Convention was created in 1996 but in 2011 it is still not effective. It is the lack of ratification that prevents its application. If states have primarily been refractory to this Convention, it was not because of its high technicality but, mainly because of several points which at the time of writing, was considered as unclear.

First it's the uncertainty about the true costs of this Convention which had limited the number of ratifications. For all that, the assessment of the financial impact of this Convention on ship owners or insurers is difficult to quantify because very few accidents occurred during transport by sea of hazardous substances.

But other problems have prevented the ratification of the Convention. These barriers were highlighted by the Assembly of the IOPC Fund. That's why The Assembly of the Fund put under discussion the Convention.

In October 2007, many states have expressed their support for the development of a new protocol to the Convention. The aim of this amendment is to modify the Convention and finally reach its ratification by many states. For creation of this protocol, the Assembly established a Working Group: The Working Group on the HNS Convention.

This Working Group focused on three major points of the Convention<sup>23</sup>. These are elements needed for the assessment of contributions for liquefied natural gas (LNG substances), the definition of « *receiver* » and the non-submission by the State of reports on cargo in contribution.<sup>24</sup> The contributions which have to be paid for the transportation of LNG were one of the obstacles highlighted by the Assembly of the IOPC Fund. First the Convention provided that for each State Party, contributions must be paid by any person who held immediately before the unloading the title of property of the LNG cargo, discharged in a port or a terminal of that State. The major problem of this proposition was its application. Indeed, some persons who are indebted of the contributions are not all the time under the state party jurisdiction.

Now, in view of the protocol, those responsible for contributions would no longer be those who held the title, but receiver under the definition specified by the Convention<sup>25</sup>.

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22 DMF 99, « La Convention SNPD: quelques réflexions sur la dernière pièce du dispositif », K. Le Couviour, p. 1075 à 1094.

23 Some of the Working group reports: 92FUND/A/ES.13/5, 92FUND/WGR.5/8 et 92FUND/A.13/22, 92FUND/WGR.5/13.

24 The article 43 of the HNS Convention makes it mandatory.

25 The definition of the "receiver" is at the article 1.4 of the HNS Convention: « Receiver" means either: (a) the person who physically receives contributing cargo discharged in the ports and terminals of a State Party; provided that if at the time of receipt the person who physically receives the cargo acts as an agent

The second issue studied by the Working Group was the setting up of a reporting system on the cargo leading to contributions, mostly on cargo packages. Thus, the Working Group has proposed simply to exclude goods in packages of contributions to the HNS Fund. But remember this does not mean that the Convention wouldn't include goods in package but simply that their transportation would not be contributing to the Fund. Limit of liability of shipowner carrying HNS in packaged will be increased.<sup>26</sup>

Finally, the attention of the Working Group focused on a final point concerning the non-submission of reports on cargo which need a contribution.

Within the framework of the 1992 Convention which established the IOPC Fund, oil reports leading to contribution had to be submitted by States. But several of them have not fulfilled this obligation. To prevent this problem from recurring in the HNS Fund it was decided to implement sanctions against states that fail to submit report on HNS received in their ports. In addition, to ensure that states satisfy this requirement the Protocol provides that the HNS Fund will not pay compensation for damage to the state in question if it has not fulfilled its obligation to submit reports to the Fund (Except for claims for loss of life or personal injury)<sup>27</sup>.

Today, only two of the thirteen states, which have ratified the Convention, fulfilled the obligation to issue this report. Then Working Group proposed to temporarily suspend of its status the Contracting State who doesn't submit it.

This draft protocol produced by the Working Group was partially approved by the Board of IOPC Fund in June 2008. Only partly, because of differences of opinion about the quality of « receiver » which have been highlighted. To put an end to these discrepancies another group has been created. The final proposal adopted provides that the person liable to pay contributions is normally the receiver, but with the possibility for the title holder and the receiver to decide on a common agreement that the responsibility for making contributions falls on the keeper of title. However, if the holder of the title would not pay the contributions, the responsibility would be, under this proposal, to the receiver. In October 2008 the protocol was accepted by the IMO Legal Council. Finally, in 2010 the international community meet itself a last time to change the agreement and allow its coming into force. The day this Convention will come into force, the Convention will be called « The HNS Convention 2010 »<sup>28</sup>.

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for another who is subject to the jurisdiction of any State Party, then the principal shall be deemed to be the receiver, if the agent discloses the principal to the HNS Fund; or (b) the person in the State Party who in accordance with the national law of that State Party is deemed to be the receiver of contributing cargo discharged in the ports and terminals of a State Party, provided that the total contributing cargo received according to such national law is substantially the same as that which would have been received under (a). » (" Report 92FUND/A.13/22/1 of Septembre 24<sup>th</sup>, 2008)

26 Report 92FUND/A.13/22/1 of Septembre 24<sup>th</sup>, 2008

27 Report 92FUND/A.13/22/1 of Septembre 24<sup>th</sup>, 2008.

28 Diplomatic Conference of the IMO, London, From April 26<sup>th</sup> to April 30<sup>st</sup> 2010.

## II.2. Liability and compensation system within HNS Convention:

The HNS Convention reaffirms the obligation for the shipowner to contract insurance<sup>29</sup>. This Convention put the responsibility for damages over the shipowner's head<sup>30</sup> (Absolute Liability/Strict liability). In return, the latter could limit his liability<sup>31</sup> in accordance with the Convention. Besides, the Convention creates a second level of compensation by establishing a specific fund to damage from chemicals<sup>32</sup> (HNS).

### II.2.1. The shipowner: a strict liability, The receiver: a secondary liability

The shipowner's liability is strict and can be reach even if he didn't went wrong, without fault. But

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29 Article 12 of HNS Convention: « (1) The owner of a ship registered in a State Party and actually carrying hazardous and noxious substances shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, in the sums fixed by applying the limits of liability prescribed in article 9, paragraph 1, to cover liability for damage under this Convention. (2) A compulsory insurance certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with... »

30 Article 7.1 of HNS Convention: « Except as provided in paragraphs 2 and 3, the owner at the time of an incident shall be liable for damage caused by any hazardous and noxious substances in connection with their carriage by sea on board the ship, provided that if an incident consists of a series of occurrences having the same origin the liability shall attach to the owner at the time of the first of such occurrences. »

31 Article 9 of the HNS Convention Limitation of liability: «1 The owner of a ship shall be entitled to limit liability under this Convention in respect of any one incident to an aggregate amount calculated as follows: (a) 10 million units of account 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): for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 units of account 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. 2 The owner shall not be entitled to limit liability under this Convention if it is proved that the damage resulted from the personal act or omission of the owner, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. 3 The owner shall, for the purpose of benefitting from the limitation provided for in paragraph 1, constitute a fund for the total sum representing the limit of liability established in accordance with paragraph 1 with the court or other competent authority of any one of the States Parties in which action is brought under article 38 or, if no action is brought, with any court or other competent authority in any one of the States Parties in which an action can be brought under article 38. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the law of the State Party where the fund is constituted, and considered to be adequate by the court or other competent authority. »

32 Chapter III of HNS Convention: Compensation by the international Hazardous and Noxious substances Fund (HNS Fund), Article 13 Establishment of the HNS Fund: «1 The International Hazardous and Noxious Substances Fund (HNS Fund) is hereby established with the following aims: (a) to provide compensation for damage in connection with the carriage of hazardous and noxious substances by sea, to the extent that the protection afforded by chapter II is inadequate or not available; and (b) to give effect to the related tasks set out in article 15. 2 The HNS Fund shall in each State Party be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State. Each State Party shall recognize the Director as the legal representative of the HNS Fund. »

there are some cases of exemption<sup>33</sup> (art. 7, HNS Convention). The shipowner is not liable if: « *The damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or 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 the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped either* ».

It should be noted that the term « *shipowner* » means the person(s) whose name(s) is (are) registered as owner, or in the case of a lack of registration, it means the holder of the property (art. 1-3). It does not cover the notion of operator.

Besides, the owner of hazardous or noxious substances involved in the event is not, however, responsible under the Convention.

The fact that the liability is focused on the shipowner's head<sup>34</sup> is made because the objective of this Convention is to award quickly compensation. It seems logic to centralize this responsibility on the head of the shipowner, because, it's certainly a chemical pollution but first it's a ship accident.

The owner is liable only for the fact that damage was caused by an HNS during its carriage by sea. The shipowner is still liable even if the damage is caused directly or indirectly by substances transported. If the ship accident injured a person, the shipowner will have to indemnify him, even if the accident is the consequence of the dangerous nature of substances.

If the risk is not related to property rights but to the power it gives, it remains without impact as long

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33 Article 7 of the HNS Convention: «Except as provided in paragraphs 2 and 3, the owner at the time of an incident shall be liable for damage caused by any hazardous and noxious substances in connection with their carriage by sea on board the ship, provided that if an incident consists of a series of occurrences having the same origin the liability shall attach to the owner at the time of the first of such occurrences. (2) No liability shall attach to the owner if the owner 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 ».

34 Articles 7.1 and 7.5 of the HNS Convention: « Except as provided in paragraphs 2 and 3, the owner at the time of an incident shall be liable for damage caused by any hazardous and noxious substances in connection with their carriage by sea on board the ship, provided that if an incident consists of a series of occurrences having the same origin the liability shall attach to the owner at the time of the first of such occurrences. » « Subject to paragraph 6, no claim for compensation for damage under this Convention or otherwise may be made against: (a) 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 (howsoever described, 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) the servants or agents of persons mentioned in (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.»

as ownership and control are intimately linked. There is an abandon of the distortion between operational responsibility and liability.

It should be noted that in principle the responsibility of the owner is covered by insurance<sup>35</sup>. He must have buy insurance to an insurance company or often to a P&I club. This requirement must be evidenced by the issuance of a certificate<sup>36</sup>. Victims can seek compensation for loss caused to them directly to the insurer. This is again in the aim of a quick compensation. For all that, some authors criticize the concept of a compulsory insurance. Indeed, this obligation has a noble objective which is to repair damages caused by HNS. But we can fear that the beneficiary of this insurance won't be induced to take all measures necessary for the security of navigation. He could feel released from his liability thanks his insurance.

Same criticisms of the compulsory insurance of the tanker's owner have been told about the system set up by the CLC Convention.

A new point introduced by this Convention is the liability of the receiver. It can be sought in case of damage caused by HNS. Indeed, the Convention highlights the principle of « *importer-payer* »<sup>37</sup>. This principle has two aspects. The liability of the receiver may be sought, but we also have to point out that it is up to him, in part, to finance the HNS Fund<sup>38</sup>. This duty of contribution and liability of the importer which is highlighted by HNS Convention seems warranted. Indeed, if he had not imported these substances there would be no pollution. In addition, he will have benefited from the economic benefit of using these substances if they had arrived safely.

Even so, the shipowner and his insurer may benefit from a limitation of liability. But in the only case he did not commit a criminal negligence. To benefit from this limitation of liability the owner must provides a fund to the competent court. He could depose the required amount or submit a bank guarantee (P&I Clubs).

The Protocol of 2010 has planned to raise this ceiling to 15% for packaged goods.

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35 Article 12 of the HNS Convention: « Article 12 Compulsory insurance of the owner: 1 The owner of a ship registered in a State Party and actually carrying hazardous and noxious substances shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, in the sums fixed by applying the limits of liability prescribed in article 9, paragraph 1, to cover liability for damage under this Convention... »

36 Article 12.2 of the HNS Convention: « A compulsory insurance certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. »

37 Ph. Boisson, La convention SNPD de 1996 et l'indemnisation des dommages causés par le transport maritime de marchandises dangereuses, DMF, 1996.

38 Article 18 of the HNS Convention: « Annual contributions to the general account: 1 Subject to article 16, paragraph 5, annual contributions to the general account shall be made in respect of each State Party by any person who was the receiver in that State in the preceding calendar year, or such other year as the Assembly may decide, of aggregate quantities exceeding 20,000 tonnes of contributing cargo, other than substances referred to in article 19, paragraph 1, which fall within the following sectors: (a) solid bulk materials referred to in article 1, paragraph 5(a)(vii); (b) substances referred to in paragraph 2; and (c) other substances.



## II.2.2. Creation of a compensation fund based on the IOPC Fund:

The compensation by shipowner is based on a strict liability. Also shipowner could benefit of a limitation of liability if he did not commit criminal negligence. According to Article 9.1 of the HNS Convention the compensation will reach a ceiling at 10 million SDR for ships not exceeding 2,000 grt, 82 millions for those not exceeding 50,000 grt and 100 million SDR for bigger ships<sup>39</sup>.

As we saw it before, shipowner must necessarily have insurance. HNS Convention provides that the insurance covers the first part of compensation. In addition, this Convention created a second level of compensation through a compensation Fund<sup>40</sup>. The Fund can compensate for a maximum value of 250 million SDR.

The Fund is financed by states parties to the Convention. The funding is based on the same principle of calculation than for petroleum products. For petroleum products the funding is made by the receivers of petroleum products by sea (on the territory of a Member State). They have to contribute according to their amount of imports. The international shipping community is also funding a portion of the Fund. We have to precise that protocol of 2010 removed the contribution obligations of the receivers of dangerous goods in package. This charge was transferred to receivers of goods in bulk.

The Fund established by the HNS Convention has a similar mechanism to the IOPC Fund, but more complex view to the diversity of HNS. Indeed, a separate account is created for each noxious substance carried<sup>41</sup>.

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39 Article 9.1 of the HNS Convention: « The owner of a ship shall be entitled to limit liability under this Convention in respect of any one incident to an aggregate amount calculated as follows: (a) 10 million units of account 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): for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 units of account 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. »

40 Article 14 of the HNS Convention: « 1 For the purpose of fulfilling its function under article 13, paragraph 1(a), the HNS Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of chapter II: (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 obligations 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 these obligations and a financial security being treated as 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. »

41 Article 16 of the HNS Convention: « The HNS Fund shall have a general account, which shall be divided into sectors. » Article 16.2 of the HNS Convention: « The HNS Fund shall, subject to article 19,

Given the similarity between the activities of the HNS Fund and those of the IOPC Funds, it was proposed that HNS Fund and IOPC Funds have a same Secretariat. The use of a joint Secretariat would benefit from the experience of the IOPC Funds and would reduce administrative costs for both Funds.

But major functional differences exist however between the HNS Fund and IOPC Funds. While IOPC Funds deal only with claims regarding damage caused by pollution, the HNS Fund is called to handle a wider class of potential claims under, for example, loss of life or injury. Furthermore, the funding mechanism under the HNS Convention is much more complex than for IOPC Funds.

One of the objectives of the Fund, in these particulars, is to give all branches of HNS industry a sense of responsibility and prevention. Moreover, this sense of responsibility, established by the Fund, may be limited by the largesse of contribution's hypothesis of the Fund. Indeed, the right to go to law against the Fund is broader than the right to act against the shipowner (Exceeding the ceiling, financial inability of the shipowner, liability of the Fund in case of a unknown carrier).

However, it should be noted that the Fund may be exonerated from its obligation to compensate the victim if he cannot prove that the damage is due to an incident involving a ship, or if the Fund proves that the damage is due to a negligence of the victim or a victim's intentional act<sup>42</sup>.

Besides, the legislator intended to place the responsibility/liability for pollution on the owner and his insurer. Indeed, we can see that the maximum limitation of liability of the owner and therefore of his insurer is high, which has the effect of limiting the admission of claims supported by the Fund.

In addition, it is expected that the liability limits set by the Convention are regularly adjusted to make allowance of the inflation. Also, a periodic review will be organized to ensure the relevance of the relationship between limitation of liability and new knowledge in the study of any damage caused by HNS (A procedure for expedited review of limitation of liability ceiling is foreseen).

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paragraphs 3 and 4, also have separate accounts in respect of: (a) oil as defined in article 1, paragraph 5(a)(i) (oil account); (b) ) liquefied natural gases of light hydrocarbons with methane as the main constituent (LNG) (LNG account); and (c) liquefied petroleum gases of light hydrocarbons with propane and butane as the main constituents (LPG) (LPG account). »

42 Article 14. 3 and article 14.4 of the HNS Convention: « The HNS Fund shall incur no obligation under the preceding paragraphs if: (a) it proves that the damage resulted from an act of war, hostilities, civil war or insurrection or was caused by hazardous and noxious substances which had escaped or been discharged from a warship or other ship owned or operated by a State and used, at the time of the incident, only on Government non-commercial service; or (b) the claimant cannot prove that there is a reasonable probability that the damage resulted from an incident involving one or more ships. 4 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. The HNS Fund shall in any event be exonerated to the extent that the owner may have been exonerated under article 7, paragraph 3. However, there shall be no such exoneration of the HNS Fund with regard to preventive measures. »

The particularity of this fund is that the call for contribution is made after the event, it allow compensating the victim's claim avoiding for the contributor to lock in large amounts of money if no event occurs.

### II.3. Expected changes from the entry into force of HNS Convention and Fund:

HNS Convention has had for main objective to overcome the shortcomings of international law regarding the protection of the environment against marine pollution from transport of hazardous substances. This agreement is innovative in many ways but it is easy to see that its application may be delayed again for the many questions posed by professionals industry.

#### II.3.1. Main issues regarding liability and compensation:

The HNS Convention provides a distortion between civil liability and operative liability. This may have the negative effect of paralyzing the liability of shipowners. Indeed, they could feel released from any liability for damage arising from their cargo, by consequence they may be less vigilant. This convention is innovative.

Moreover, the definition of « *damage* » in the HNS Convention is much broader than the one given in the Convention on Civil Liability of 1992 and than the one of 1992 which create the IOPC Fund, which can't be apply to pollution damage. Types of damage covered by the HNS are:

*« (The) loss of life or personal injury on board or outside the ship carrying the hazardous and noxious substances caused by those substances; loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances; loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and the costs of preventive measures and further loss or damage caused by preventive measures<sup>43</sup>. »*

One important point of the HNS Convention is that it covered: *« (The) loss of life or personal injury on board or outside the ship carrying the hazardous and noxious substances caused by those substances »*

This agreement seeks to create an equality for victims regardless their location or status (crew member or not). The aim of intensify interests of victims is highlighted by the Article 11 of the Convention which provides that victims and their dependents should be considered as « *preferred*

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43 Article 1.6 of HNS Convention: the definition of the "damage"

*creditors » over others (up to two thirds of the total amount of damage).*

The HNS Convention also provides some compensation for environmental damage<sup>44</sup> as such, however, by asserting the priority of other claims. The agreement provides compensation for pollution damage to the environment other than the shortfall in earning by limiting the compensation to the cost of:

*« Reasonable measures of the rehabilitation of the environment<sup>45</sup>, the management of expenses made in the name of cleaning measure and economic loss».*

We have to clarify that the HNS Convention does not include damage to cargo which are still manage by the charter party or bill of lading.

One of the major points of this Convention is that it does not apply to all goods considered dangerous (HNS) but to a limited list.

The HNS are very varied and include both solid cargoes and liquid substances in bulk, than goods carried in packaged form.

The Convention defines « hazardous and noxious substances » as any substances, materials and articles carried on board as cargo, which are referred to in the following instruments (reservation made to certain qualifications)<sup>46</sup>:

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44 Article 13.b of the HNS Convention: « This Convention shall apply exclusively to damage by contamination of the environment caused in 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, in 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 baselines from which the breadth of its territorial sea is measured. »

45 Same definition in 1992 CLC Convention.

46 Article 1.5 of the HNS Convention: « "Hazardous and noxious substances" (HNS) means: (a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below: (i) oils carried in bulk listed in appendix I of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended; (ii) noxious liquid substances carried in bulk referred to in appendix II of Annex II to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances and mixtures provisionally categorized as falling in pollution category A, B, C or D in accordance with regulation 3(4) of the said Annex II<sup>1</sup>; (iii) dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983, as amended, and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.3 of the Code; (iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, as amended; (v) liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983, as amended, and the products for which preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code; (vi) liquid substances carried in bulk with a flashpoint not exceeding 60°C (measured by a closed cup test); (vii) solid bulk materials possessing chemical hazards covered by appendix B of the Code of Safe Practice for Solid Bulk Cargoes, as amended, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code when carried in packaged form; and (b)

- The International Convention for the Prevention of Pollution From Ships, 1973, modified by the Protocol of 1978 and relative (MARPOL Convention), Appendix I of the Annex I and Appendix II of the Annex II.
- The chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983
- The International Maritime Dangerous Goods Code (IMDG Code)
- The Appendix B of the Code of Safe Practice for Solid Bulk Cargoes

The definition also includes residues from the previous carriage of substances and liquid substances in bulk with a flashpoint not exceeding 60°C.

The HNS carried in bulk can be solids, liquids including hydrocarbons (persistent or not), or liquefied gases such as liquefied natural gas (LNG) and liquefied petroleum gas (LPG). Many solids bulk such as coal, grains and iron ore are excluded from this definition, given the low risk they represent. Goods in packaged also fall under this definition if they are covered by the IMDG Code.

The International Maritime Dangerous Goods Code, called *IMDG Code*, is defined by the IMO and updated every two years. This Code became mandatory under the leadership of the SOLAS Convention of 1974. Indeed, it is an amendment to the Chapter VII of the Transport of Dangerous Goods adopted in May 2002 that made this Code mandatory since the 1<sup>st</sup> of January, 2004. In 1961, a working group of the Maritime Safety Committee of IMO has begun the preparation of this Code. This working group was assisted by the United Nations Committee of Experts on the Transport of Dangerous Goods. This code's aims are to strengthen the safety of transport of dangerous goods while making easier a free circulation and without hindrance. It specifies cases of liability on the face of the declaration, the terms of packaging and stowage, segregation and classification of goods.

The code is international and allows the observance of rules enacted by all and consistently speaking. Amendments to the code may come from two sources. There is first of all proposals submitted directly to IMO by Member States. In the second place the changes necessary to respect the United Nations' Recommendations on the Transport of Dangerous Goods. The last edition of the IMDG Code was in March 2011.

Thus, the IMDG Code lists hundreds of materials that can be dangerous when carried in packaged form. In practice, however, the number of HNS substances transported in significant quantities is

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residues from the previous carriage in bulk of substances referred to in (a)(i) to (iii) and (v) to (vii) above.  
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relatively low.

The IMDG Code divided into nine different schedules substances considered dangerous. This classification is based on the dangerousness of the substance (Class 1: Explosives Class 2: gases Class 3: flammable liquids ...). As well, some schedules are subdivided. For example the Class 2 of Gas is subdivided into three categories namely flammable, non-flammable and toxic gases.

The IMDG Code lists all hazardous substances that can be transported. Even so, all substances are not under the HNS Convention and could be under the cover of specific conventions. Indeed, in the case of a contamination made by persistent oil, the CLC and Marpol Conventions will be applicable. The HNS Convention has a wide agreement coverage. If a damage, other than an hydrocarbon contamination is noted (eg: an explosion), the HNS Convention will be applied. Some materials have their own convention. It's the case for bunker fuels (The Bunker Convention), nuclear waste and finally the waste carried on at the aim of immersion. All of these substances are not covered by the HNS Convention.

However, we may regret the restrictive characteristic of HNS covered by the HNS Convention. Indeed, The HNS Convention never deals with biological agents and GMOs in spite it turns out that they are dangerous for human's health, fauna and flora.

Others elements of the Convention lead to many questions about its real operation or to its effectiveness.

### II.3.2. Comments and doctrine on the application of the Convention (Summary):

One of the Convention's objectives is, of course, to allow compensation for damages caused by HNS. Another goal is to involve receivers in the implementation of security in the transport of dangerous goods.

Main originality of the HNS Fund is to place the financial burden on importers and receivers of goods. There is a highlighting of the « *importer-payers* » principle. It has been established for several purposes, but mainly because the fact of getting supported the financial burden on the importer of the system increases the security of HNS transport. This encourages importers to check the working safety of ships carrying such goods and therefore to make sail ships with needed and reliable facilities.

Several other questions remain unanswered without the possibility to resolve them before the entry into force of this Convention. Indeed, the main problem is the link of causation between the event and the damage suffered. It should be noted that, unlike oil spill, HNS may have an impact on the environment or over third parties several years after their dumping. It is sometimes very difficult for

the victim to establish a causal relationship between industrial activity and damage. The question is whether the judges accept the « *likelihood preponderance* » of the causal link between the substances and the pollution damage.

There is also a question about the deadline for the plaintiff to bring his action. On the Article 37-1 of the HNS Convention basis, the compensation rights foresee in the name of the liability extinguished itself, unless any action intended against the Fund. It happens in a term of three years from the moment the victim knew - or ought reasonably have known - the damage and the identity of the owner of the ship.

On the Article 37-2 of the Convention basis: « *Rights to compensation under chapter III shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to article 39, paragraph 7, within three years from the date when the person suffering the damage knew or ought reasonably to have known of the damage*<sup>47</sup> ». However, no legal action may be institute after ten years since the date on which the event occurred<sup>48</sup>. « *Where the incident consists of a series of occurrences, the ten-year period mentioned in paragraph 3 shall run from the date of the last of such occurrences*<sup>49</sup> ». Is the period of 10 years enough? Indeed some pollution damages should be established or proved a long time after the fact (spill, accident).

Besides, questions about terms of the Convention were laid down. As a matter of fact, each state could have its own definition of the « *receiver* » and it could lead to huge differences. During a workshop on this Convention in 2005 the term « *receiver* » has been defined. The IMO enjoin every state to apply this definition.

Moreover, some vessels are excluded from the scope of application of the Convention. Leaks or discharges of hazardous and noxious substances from ships of war, and other ships owned or operated by a State, are excluded from the scope of the HNS Convention. But these vessels have to be used only for a non-commercial service of the State. On its own, a State Party to the HNS Convention may decide, however, to apply the Convention to such ships. In which case, it shall notify this decision to the General Secretary of the International Maritime Organization, specifying the terms and conditions of this application<sup>50</sup>. Furthermore, under the Article 5-1 of the Convention, a State may choose not to apply the

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47 Article 37.2 of the HNS Convention

48 Article 37.3 of the HNS Convention: « In no case, however, shall an action be brought later than ten years from the date of the incident which caused the damage ».

49 Article 37.4 of the HNS Convention

50 Article 4.4 and 4.5 of the HNS Convention: « Except as provided in paragraph 5, the provisions of this Convention shall not apply to warships, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service. 5 A State Party may decide to apply this Convention to its warships or other vessels described in paragraph 4, in which case it shall notify the Secretary-General thereof specifying the terms and conditions of such application. »

Convention to vessels with a gross tonnage not exceeding 200, vessels carrying hazardous and noxious substances only in packaged and finally to vessels engaged on a trip between ports or facilities of that State<sup>51</sup>. In this case, the cargo on these ships is not considered as « Contributing ». Also, two neighboring states could agree that the Convention is not exercisable to vessels presented before if ships only travel between ports and facilities of these two countries<sup>52</sup>.

The HNS Convention provides a compensation of damages caused by contamination of the environment. This compensation is limited to costs of reasonable measures of rehabilitation. The HNS Convention plans the funding of rehabilitation measures<sup>53</sup>. This process allows the funding *ex ante* of reasonable measures which will be foreseen. It makes possible the beginning of the restoration work without the problem of lack of financial resources. But it is regrettable that the pure ecological damage is not treated by the Convention. Some authors complain that the contribution made to the Fund is calculated based on the dangerousness of the substance and not on its actual impact on the environment.

Unlike MARPOL Convention HNS main topics are hazardous and noxious materials. This agreement overcomes the lack of legislation on this matter. When The HNS Convention will enter into force it will complete the legal framework of protection of the environment. The target of these conventions is to promote an healthy environment instead of the destruction of the oceans and marine ecosystems by shipping and international dangerous goods transport. The HNS Convention provides compensation to those suffered an pollution damage. We know that HNS Convention covers only some damages. About the environment only some damages is covered. Indeed, the HNS Convention provides that the shipowner have to ensure the costs of preventive measures, such as cleaning operations at sea and on shore and reasonable measures of rehabilitation of the environment<sup>54</sup>.

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51 Article 5.1 of the HNS Convention: « A State may, at the time of ratification, acceptance, approval of, or accession to, this Convention, or any time thereafter, declare that this Convention does not apply to ships: (a) which do not exceed 200 gross tonnage; and (b) which carry hazardous and noxious substances only in packaged form; and (c) while they are engaged on voyages between ports or facilities of that State. »

52 Article 5.2 of the HNS Convention: « Where two neighbouring States agree that this Convention does not apply also to ships which are covered by paragraph 1(a) and (b) while engaged on voyages between ports or facilities of those States, the States concerned may declare that the exclusion from the application of this Convention declared under paragraph 1 covers also ships referred to in this paragraph. ».

53 Article 1.6 of the HNS Convention: « Damage means: (...) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and (d) the costs of preventive measures and further loss or damage caused by preventive measures. »

54 Article 1.6 and 1.7 of the HNS Convention: « loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and (d) the costs of preventive measures and further loss or damage caused by preventive measures. Where it is not reasonably possible to separate damage caused by the hazardous and noxious substances from that caused by other factors, all such



Finally, in view of the international interest in the environment, it seems to be unfortunate not trying to make the agreement exercisable to the high seas. Some authors believe that partial application is possible on high seas but in the unique case where the discharge of chemicals offshore causes pollution or contamination in the territorial sea or EEZ of the coastal state.

### **III. Basic recommendations on claims for pollution damages following HNS spill:**

As it was described in part I of this report, without the entry into force of HNS Convention, pollution damage from a HNS pollution are compensated under the common rules of civil liability of the shipowner (LLMC Convention, and Insurances).

We underline again the lack of data for real feedback from HNS pollution<sup>55</sup>.

After a spill or an incident involving HNS goods, the victim has to present his claim to the insurer of shipowner. Until the application of the Convention and the HNS Fund, claimants must deal with the civil liability fund and respect the rules of compensation of maritime law. They have to use the forms, evidences, supporting files, as in every other damage caused by the ship.

For example, in the Napoli's case (2007), French collectivities affected by some oil and containers from the ship have claimed compensation for cleanup operations directly to the P and I Club. Several legal procedures have been initiated in Admiralty Courts to guarantee the damages and their compensation, mainly to avoid that claims be extinguished.

The compensation claim itself is not so different than in oil spill because of the same practice and the major role of maritime insurance. Indeed, we can underline that the claim forms used after the Napoli's pollution, are very similar with claim forms used by the IOPC Fund.

Consequently, basic recommendations will be the same and we can present here the main recommendations presented in the 6.1.1 report:

It is obvious that putting together the pieces in support of the claim requires the creation of a specific folder. This file is the opportunity of a real organization of the application and the ability to attach additional documents that will improve the presentation of the damage, the assessment and the compensation (admissibility and amount).

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damage shall be deemed to be caused by the hazardous and noxious substances except if, and to the extent that, the damage caused by other factors is damage of a type referred to in article 4, paragraph 3. In this paragraph, "caused by those substances" means caused by the hazardous or noxious nature of the substances. 7 "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage. »

55 See part I of the report.

### III.1. Purpose of the file:

This is primarily to gather all supporting documents and information which are presented in the claim form given by the insurer. It is also to provide any additional information and evidences relevant to the presentation of the Commune, its characteristics, its tourist attractions, its history, its population and its economic activities.

Depending on the nature of the damage and depending on the claim form chosen, this file will be detailed the description of clean-up, environmentally sensitive sites affected or the number of hotels, restaurants, vacation rentals, activities open to tourists, etc.. The idea is to highlight the elements that ground the claim.

On the substance of the file, it is bringing to experts all the documentation and evidences of the damage suffered, the expenses or losses incurred.

For example, the supporting file of a Claim Form regarding cleanup operations will gather all invoices of brought material and equipment, rates, and invoices of rented materials... The local authority will provide excerpts from his book of accounts as evidence of expenses actually incurred.

Similarly, for labor costs all the statements of earnings by agent and period, justifying the presence of such an agent, and its activity, must be joined.

For economic damages, join the accounting elements attesting for three years of reference (n-3) the amount of the collection of taxes, or profit, concerning the loss which is claimed.

### III.2. Form and structure of the supporting file:

To facilitate consideration of the claim by the experts, it is important to organize the file in parallel with the form used. Several annexes dedicated to each section of the claim form will make the structure of the supporting file.

It is finally hoped that the supporting file is made of different folders or different workbooks clearly identified according to evidence produced (different colors). A state of its contents on each subset is also required, along with a table of all the documentation produced within.

Finally, it is very likely that claims forms following HNS pollution will be very similar to those used for an oil spill. Even if the nature of pollution damage is different and the scope of convention is not the same, the compensation practice and the main liability rules are similar. Most of the time the experts are the same to assess a pollution damage, whatever the substance. So,

recommendations regarding the claim form and the supporting file could be useful in every case of marine pollution: Oil spill (CLC and Fund Conventions); HNS pollution (HNS Convention and HNS Fund); Oil spill from other ships (Bunker Convention).