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# International Convention on Liability and Compensation for Damage in Connection with The Carriage of Hazardous and Noxious Substances by Sea (HNS): An Analysis

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## ABSTRACT

*The HNS Convention, 1996 establishes an international liability framework addressing damage caused by Hazardous and Noxious Substances (HNS) in the marine environment. Analysis of the 1996 Convention reveals procedural deficiencies within its liability regime, subsequently rectified through the enactment of the 2010 Protocol. The completion of these amendments underscores the imperative for state ratification, facilitating the convention's enforcement. Failure to implement this unified global regime risks the proliferation of disparate local legal frameworks governing HNS spill liability, potentially exacerbating logistical and legal complexities. Therefore, universal adoption of the convention is essential to ensure comprehensive and effective international regulation in this critical area. The HNS Convention introduces a two-tier strict liability system towards the ship owners and shippers. The convention provides a system to compensate the victims who have faced damages due to the HNS substances which were being carried by the sea vessels.*

**Keywords:** HNS Convention, Maritime, Pollution, Liability, Hazardous.

## I. INTRODUCTION

A Dutch Jurist Hugo Grotius introduced the doctrine of *mare liberum* in the seventeenth century.<sup>2</sup> This doctrine says that the states have the freedom to utilize the seas for trade purposes.<sup>3</sup> However, after a while, the states realized that this doctrine cannot be applied globally, and new legislations have been made for various uses and issues of sea and one such necessity was to introduce an international regime for chemical spills in the sea.<sup>4</sup>

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<sup>2</sup> GROTIUS, H., THE FREEDON OF THE SEAS. (Translation with a revision of the Latin Text of 1633 by Ralph Van Deman Magoffin, and edited by James Brown Scott, 1916).

<sup>3</sup> CHURCHILL, R.R., LOWE, A.V., THE LAW OF THE SEA 4 (3rd ed. 1999).

<sup>4</sup> Lief Bleyen, Liability for Pollution from Hazardous and Noxious Substances, UNIVERSITY OF OSLO (2010), <https://core.ac.uk/download/pdf/30816558.pdf>

Following World War II, the world has seen an increase in international trade on high seas which increased the marine environment pollution. This threat was not only due to the increase in oil carriage but also due to the increase in the carriage of hazardous and noxious substances during the early 1970s.<sup>5</sup> In contemplation to prevent marine pollution, the international community came together for the establishment of a set of measures. Nevertheless, the establishment of a regime towards oil pollution and liability towards it received attention when it has been compared to the probable pollution by hazardous and noxious substances.<sup>6</sup> Post several major spills such as the Grand Camp incident in Texas city which was followed by many more incidents led the states to contemplate establishing a liability regime that protects the third parties from the aftermath and the damages caused by chemical accidents and spills in the sea.<sup>7</sup> In 1984, the International Maritime Organisation has proposed the Hazardous and Noxious Substances Convention (hereinafter 'HNS Convention') in a diplomatic conference where the international community failed to reach an agreement on the draft of the said convention. Preceding this, another conference was held in the International Maritime Organisation where the convention was adopted on 3<sup>rd</sup> May 1996, however, the convention has not yet been brought into force to date.<sup>8</sup> There is a need for the HNS Convention to institute an international structure to resolve the compensation matters related to the carriage of hazardous and noxious substances. The HNS Convention introduces a two-tier strict liability system towards the ship owners and shippers. The convention provides a system to compensate the victims who have faced damages due to the HNS substances which were being carried by the sea vessels.<sup>9</sup>

## **II. EVOLUTION AND NEED OF THE HNS CONVENTION**

### **(A) Background:**

The HNS Convention provides the mechanism to give the victims quick compensation for the loss and damages caused due by the leak of hazardous and noxious substances (HNS), fires and explosions into the water and environment.<sup>10</sup> To receive the compensation, it is sufficient if the damage is caused due to hazardous and noxious substances, there is no need to prove the negligence of the shipowner or the shipper.<sup>11</sup> As per the HNS Convention, the shipowner and

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<sup>5</sup> GUNER-OZBEK, M., THE CARRIAGE OF DANGEROUS GOODS BY SEA 241 (2008).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Jonathan R. Pawlow, Liability for Shipments by Sea of Hazardous and Noxious Substances, 17 LAW & POL'Y INT'L Bus. (1985), <https://www.jstor.org/stable/26975590>.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, art 1, IMO Doc. LEG/CONF.6/3 (Jan. 13, 1984).

<sup>11</sup> Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious

shipper must obtain compulsory insurance before carrying the substances aboard, the compensation in case of damage is paid from this compulsory insurance.<sup>12</sup> The convention restricts the liabilities of the shipowners and shipper<sup>13</sup>, this restriction comes with a few exceptions through which the liability is usually either virtually unlimited or eliminated which happen under circumstances that include acts of war, intentional intervention by a third party, etc.<sup>14</sup>

Including the United States, many delegations opposed a few portions of the HNS Convention at the IMO Conference.<sup>15</sup> The United States opposed the liability limits of the shippers and shipowners as it might be inappropriate for public protection, they also opposed the concept of compulsory insurance as it might impose an extra burden on developing nations and their shipping industries.<sup>16</sup> The disagreements from various nations prevented the adoption of the HNS Convention.<sup>17</sup>

#### **(B) Need for the HNS Convention:**

The growth of international trade concerning hazardous and noxious substances is increasing the possible risk of HNS incidents, the prospective damages may include fire, an explosion of the products and pollution of water and the environment.<sup>18</sup> Therefore, in this situation, the international community should focus on the development of a proper civil liability system and the prevention of these accidents.<sup>19</sup>

#### **(C) The Inefficiency of the Existing Pollution Conventions:**

The existing treaties on the transportation of HNS substances on high seas concentrate more on the prevention and safety when compared to the aspects of compensation and liability. The International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73) emphasises obliterating the intentional pollution and reducing the accidental pollution being caused in the seas, the said convention deals with the control of pollution caused by bulk

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Substances by Sea, art 3, art. 7, IMO Doc. LEG/CONF.6/3 (Jan. 13, 1984).

<sup>12</sup> Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, art. 11, IMO Doc. LEG/CONF.6/3 (Jan. 13, 1984).

<sup>13</sup> Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, art.6, art. 8, IMO Doc. LEG/CONF.6/3 (Jan. 13, 1984).

<sup>14</sup> Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, art. 6A, art.8, IMO Doc. LEG/CONF.6/3 (Jan. 13, 1984).

<sup>15</sup> 7 INT'L ENV'T REP. (BNA) No. 5, 38-139 (May 9, 1984).

<sup>16</sup> *Id.* at 6.

<sup>17</sup> 7 INT'L ENV'T REP. (BNA) No. 5, at 138 (May 9, 1984).

<sup>18</sup> *Id.* at 6.

<sup>19</sup> Lief Bleyen, Liability for Pollution from Hazardous and Noxious Substances, UNIVERSITY OF OSLO (2010), <https://core.ac.uk/download/pdf/30816558.pdf>

harmful substances, sewage, oil, etc.<sup>20</sup> Besides this, the Protocol on Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, 1973 (Intervention Protocol) approves the actions taken by the parties to protect their shorelines and coastal areas from the marine pollution caused by products excluding oil.<sup>21</sup>

#### **(D) Inadequacy of the Existing Liability Conventions:**

The Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention)<sup>22</sup>, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Compensation Convention)<sup>23</sup>, and the Convention on Limitation of Liability for Maritime Claims (Limitation Convention)<sup>24</sup> are the three existing conventions that talk about the compensation and liability in the maritime shipping industry. The Convention on Civil Liability and the Compensation Convention came up with provisions to provide limited compensation for the damages caused due to marine pollution, they also provide a few measures which help in preventing the release and spilling of oil into the sea, however, these conventions do not provide a compensation scheme for any sort of damage caused by the HNS substances.<sup>25</sup> The Limitation Convention provides a compensation scheme for the damages caused by the HNS substances, despite that the convention has not gained the acceptance due to which it has not entered into force the reason being that the liability limits provided by the convention are inadequate from many ends. Besides this, the Limitation Convention is not exclusively made to deal with the HNS claims, its deals with a broad range of claims, this makes the HNS incidents victims contest with the non-HNS claimants which thereby reduces the compensation available to the HNS victims which are already limited in nature.<sup>26</sup>

#### **(E) The Establishment of the 1996 HNS Convention:**

Before the establishment and adoption of the HNS Convention, 1996, various discussions and negotiations took place to draft the HNS Convention. During the drafting process, the people working on the Convention conveyed their concern about the issue of liability which underwent numerous discussions to find out the probable possibilities. The following are possibilities which the drafting group has come up with:

- a. The first possibility is to hold the shipowner strictly liable for the compensation that

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<sup>20</sup> 12 I.L.M. 1319 (1973), opened for signature Jan. 15, 1974.

<sup>21</sup> T.I.A.S. No. 10561. concluded Nov. 2, 1973.

<sup>22</sup> 973 U.N.T.S. 3, adopted June 19, 1975.

<sup>23</sup> 1972 U.N. JURIDICAL Y.B. 103.

<sup>24</sup> 16 I.L.M. 606.

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 6.

must be paid to the victims of the HNS accidents and incidents. This possibility finds its roots in the conventional maritime law where only the shipowner is held for the liability and not the shipper.

- b. The second possibility states that unlike the first one, here only the shipper shall be held liable to pay the compensation to the victims.
- c. The third possibility suggested holding both the shipper and shipowner severally and jointly liable for the compensation.
- d. The fourth possibility suggested by the group was the two-tier liability system, as per this structure the shipowner will be held liable primarily followed by which the shipper shall be held liable for the excess liability.<sup>27</sup>

The group working on the draft convention discussed the above-mentioned possibilities and chose to opt for the two-tier structure for the liability system under the HNS Convention. In the International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea (hereinafter the IMO Conference), 1984, most of the participating member states considered the two-tier liability system and favoured it.<sup>28</sup> Nevertheless, a few discussions took place for the definition of 'shipper'. The definition for 'shipper' concerning the HNS goods is different and difficult when compared to the oil industry. In the oil industry, it is usually just one company that manages the transportation, drilling and distribution of cargo, on the other hand, the HNS industry usually has more than one party who deal with the goods.<sup>29</sup>

The member states also discussed cargoes that are covered under the draft of the 1996 HNS Convention. The idea of including only bulk HNS and excluding the packages HNS prevailed amongst the participating member states, the reason being that including only bulk HNS in the convention will provide more ease in defining 'shipper' and to enforce the requirements of the compulsory insurance. Nonetheless, the majority of the member states supported the idea of the HNS Convention having a wider scope, this included both bulk and packages HNS and the damages which occur through them. Therefore, the finalisation of the Convention took a considerable amount of time.<sup>30</sup>

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<sup>27</sup> FAURE, F., *Tort and Insurance Law*, 165, (2003).

<sup>28</sup> *Id.* at 18.

<sup>29</sup> *Id.* at 4

<sup>30</sup> *Id.* at 18.

### III. *MODUS OPERANDI* OF THE HNS CONVENTION, 1996

- **Role of CLC Convention:**

The following were the three questions that were considered for deciding the scope of the new (HNS) Convention by taking inspiration from the CLC Convention:

*“(a) What should be the substances, other than oil within the meaning given to it in the CLC?”*<sup>31</sup>

*(b) What 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?”*<sup>31</sup>

With respect to the first question, the method adopted was like the one in CLC, which says that the method which should be adopted for finalising the definition of HNS substances is indeed much difficult than the one used to define ‘oil’, the main reason behind this that HNS includes various substances which may cause damages. Concerning the second question, the committee making the draft HNS has decided that ‘damages’ under the HNS Convention will include personal injuries and loss of life along with the damage caused to the environment. Regarding the third question, it was decided that the two-tier liability and compensation structure used by the CLC Convention shall be implemented in the HNS Convention as well, which included the concept of the owner’s compulsory insurance and the fund convention.<sup>32</sup>

- **Scope of HNS Convention:**

The HNS draft Convention provides the framework to compensate the victims of the HNS accidents and incidents. The damages caused due to the release of hazardous and noxious substances into the atmosphere, any fire or explosions caused by them are covered by the Convention.<sup>33</sup>

It covers the damages which lead to pollution damage, loss of life, personal injury and property damage.<sup>34</sup> Besides this, the Convention also has provisions to cover the clean-up costs and the costs that occurred for the preventive measure.<sup>35</sup> The HNS Convention is built on the ‘polluter pays principle’, it stands by this principle by making sure that the HNS industries and shipping companies pay for the compensations for the damages and loss caused by an HNS incident.<sup>36</sup>

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<sup>31</sup> 3 FRANCESCO BERLINGIERI, INTERNATIONAL MARITIME CONVENTIONS: PROTECTION OF THE MARINE ENVIRONMENT, 209-248 (1<sup>st</sup> ed. 2016).

<sup>32</sup> 3 FRANCESCO BERLINGIERI, INTERNATIONAL MARITIME CONVENTIONS: PROTECTION OF THE MARINE ENVIRONMENT, 209-248 (1<sup>st</sup> ed. 2016).

<sup>33</sup> Draft HNS Convention, art. 1, paras. 5, 8, Annex.

<sup>34</sup> Draft HNS Convention, art. 1, paras. 6, art. 2(a).

<sup>35</sup> Draft HNS Convention, art. 1, paras. 6

<sup>36</sup> <https://www.imo.org/en/MediaCentre/HotTopics/Pages/HNS-2010.aspx>

Furthermore, the Annex of the HNS Convention provides a list of forty-five hazardous substances and the Convention will be applied only when the said substances are carried in an integral part of the ship in bulk quantity.<sup>37</sup>

**a. Definition of ‘Hazardous and Noxious Substances (HNS)’**

Article 1(5) of the 1996 HNS Convention defines HNS substances as “*substances, materials and articles carried on board a ship as cargo*”<sup>38</sup> which are also mentioned in many international instruments which were made for maritime safety and to prevent pollution.<sup>39</sup> Article 1(5)(b) of the Convention also says that “*residues from the previous carriage in bulk of substances referred to in (a)(i) to (iii) and (v) to (vii) above.*”<sup>40</sup> References made to several international codes under Article 1(5) of the Convention says that if any amendments are made to the said codes, they will be applied to the HNS Convention. The definition provided in the Convention includes solids and liquids which include both liquified gases and oils.<sup>41</sup>

Solid bulk materials including coal, fishmeal and waster are excluded and therefore they do not fall under the scope of the Convention. Besides the above-mentioned cargo, the oil causing pollution defined under the 1992 CLC Convention is also excluded under the HNS Convention.<sup>42</sup> Any fire and explosion caused due to the persistent oils come under the definition of HNS in the Convention.<sup>43</sup> Article 4(3)(b) of the Convention provides the exclusion to the damages caused by the radioactive materials which are mentioned under Appendix B of the Code for Safe Practice of Solid Bulk Cargoes.<sup>44</sup>

**b. Definition of ‘Ship’**

The HNS Convention provides us with a broad and informative definition of ‘ship’ to which the Convention can be applied.<sup>45</sup> Article 1(1) states that the definition of the ship includes “*any seagoing vessel and seaborne craft, of any type whatsoever*”.<sup>46</sup> The Convention also mentions

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<sup>37</sup> Id. at 6.

<sup>38</sup> International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, article 1(5). (here in after 1996 HNS Convention).

<sup>39</sup> Appendix I of Annex I, The international Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto; The International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983 (IBC Code); The International Maritime Dangerous Goods Code (IMDG code); The International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983 (IGC code); The Code of Safe practice for Solid Bulk Cargoes (BC) code.

<sup>40</sup> Id. at 40.

<sup>41</sup> Lief Bleyen, Liability for Pollution from Hazardous and Noxious Substances, UNIVERSITY OF OSLO (2010), <https://core.ac.uk/download/pdf/30816558.pdf>

<sup>42</sup> 1996 HNS, article 4 (3)(a)

<sup>43</sup> SASAMURA, Y., Development of the HNS Convention, 13th international symposium on the Transport of Dangerous Goods by Sea and Inland Waterways, 497, (1998).

<sup>44</sup> Id. at 18.

<sup>45</sup> 1996 HNS, Article 1(1).

<sup>46</sup> Id. at 44.

the exclusion of warships and other state vessels which are not used for any commercial purpose.<sup>47</sup> Besides the HNS Convention, state-owned vessels are excluded from the scope of various other International Conventions.<sup>48</sup>

**c. Geographical Scope under the HNS Convention:**

Identification of the geographical scope in the HNS Convention is difficult as it depends on the following factors:

- Type of damage suffered,
- The jurisdictional zone where the damage occurs, and
- Whether the ship was registered in any of the contracting states or not.<sup>49</sup>

The HNS Convention becomes applicable only when a ship causes a pollution accident in the Territorial Sea (TS) and Exclusive Economic Zones (EEZ) of a contracting state. Besides this, the Convention is applicable if any damage occurs to property outside the ship in the TR of a contracting state.<sup>50</sup> However, if a similar incident takes place in High Seas (HS) or EEZ of the contracting states, HNS Convention becomes applicable only if the ship causing the damage belongs to a contracting state. The above-mentioned rules are applied to the damages caused outside the ship which are relevant to loss of life on board or outside the ship.<sup>51</sup>

**d. Definition of ‘Damage’**

Article 1(6) of the HNS Convention defines what damages are covered under the Convention. Definition for ‘damage’ under the HNS Convention is inspired from the one used in the CLC Convention, however, the definition in the HNS Convention is much broader and covers more aspects when compared to the CLC Convention. The following is the definition used for damages under 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*

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<sup>47</sup> 1996 HNS, article 4 (4).

<sup>48</sup> *Id.* at 18.

<sup>49</sup> Lief Bleyen, Liability for Pollution from Hazardous and Noxious Substances, UNIVERSITY OF OSLO (2010), <https://core.ac.uk/download/pdf/30816558.pdf>

<sup>50</sup> *Id.* at 18.

<sup>51</sup> 1996 HNS , article 3(d).

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..... ‘‘caused by those substances’’ means caused by the hazardous or noxious nature of the substances.’’<sup>52</sup>

- **Liability Regime under the 1996 HNS Convention:**

In the liability regime under the HNS Convention, the shipper and the shipowner of the ship that is carrying the HNS substances are strictly liable for the damages caused by an HNS incident which removes the burden of the victims to prove the negligence.<sup>53</sup> Besides this, when an HNS incident includes two or more vessels, then the owners of the involved vessels are severally and jointly liable for the damage caused.<sup>54</sup> In a situation where a vessel is carrying the HNS substances belonging to two or more shippers which end up causing damages, even then the shippers are jointly and severally liable. However, the Convention has the right to provide recourse to every shipper against the other shippers, third parties and the ship owners.<sup>55</sup>

- a. **First Tier: Strict and Vicarious Liability of the Shipowner:**

The first tier of the liability structure of the HNS Convention is like the one in CLC Convention. As already mentioned above, in this part, the shipowner shall be held *strictly liable* for the damages caused by an HNS incident. The concept of strict liability is an old one that was introduced by an English case law *Rylands v. Fletcher*<sup>56</sup>.

Since its introduction, the concept of strict liability has been applied frequently by various countries in various businesses and day to day life.<sup>57</sup> There are many reasons behind the

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<sup>52</sup> 1996 HNS, article 1(6).

<sup>53</sup> 1996 HNS, article 3, article 7.

<sup>54</sup> *Id.*, art. 4.

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Fletcher vs. Rylands*, L.R. Ex. 265,279f (1866).

<sup>57</sup> Lief Bleyen, Liability for Pollution from Hazardous and Noxious Substances, UNIVERSITY OF OSLO (2010), <https://core.ac.uk/download/pdf/30816558.pdf>

introduction of strict liability in the shipping industry through liability conventions like the HNS Convention, the following are a few reasons:

- Firstly, to secure the payment of compensation to the victims for the damages caused by an HNS incident.<sup>58</sup>
- Secondly, the shipping industry at present is in a good position to provide compensation amount for the damages caused by the hazardous substances. The industry knows the operations better and the risks posed to the environment involved in the transportation of HNS.<sup>59</sup>
- Thirdly, a strict liability regime braces the shipowners from avoiding the aspect of environmental pollution and makes them act under the principle of due diligence.<sup>60</sup>

The above-mentioned reasons show that adopting the concept of strict liability will help the HNS Convention achieve its goals, the preamble of the HNS Convention talks about the need for prompt and effective delivery of compensation to the victim, which is as follows:

*“Convinced of the need to ensure that adequate, prompt and effective compensation is available to persons who suffer damage caused by incidents in connection with the carriage by sea of such substances,”*<sup>61</sup>

The Convention also lists down the exception to the liability of a shipowner under Article 7(2)<sup>62</sup>, along with being strict the liability is carried towards the registered shipowner<sup>63</sup>. The shipowner shall be held liable for any damage which is caused by the people involved with the operation of the ship.<sup>64</sup>

#### **i. Exceptions to the shipowner’s liability:**

There are a set of limitations to the shipowner’s liability that can be invoked to avoid liability under a few situations. The following are situations mentioned under Article 7(2) of the Convention:

*“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*

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<sup>58</sup> ZHU LING., COMPULSORY INSURANCE FOR BUNKER OIL POLLUTION DAMAGE, 90-93 (Mar. 20. 2007)

<sup>59</sup> Id. at 57.

<sup>60</sup> Id. at 57.

<sup>61</sup> 1996 HNS, Preamble.

<sup>62</sup> 1996 HNS, article 7(1)(2).

<sup>63</sup> 1996 HNS, article 7(5).

<sup>64</sup> Lief Bleyen, Liability for Pollution from Hazardous and Noxious Substances, UNIVERSITY OF OSLO (2010), <https://core.ac.uk/download/pdf/30816558.pdf>

*phenomenon of an exceptional, inevitable, and irresistible character; or*

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

*(c) the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function; or*

*(d) the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped either*

*(i) has caused the damage, wholly or partly; or*

*(ii) has led the owner not to obtain insurance in accordance with article 12;*

*provided that neither the owner nor its servants or agents knew or ought reasonably to have known of the hazardous and noxious nature of the substances shipped.”<sup>65</sup>*

The article also includes the acts of terrorism and piracy under the scope of exceptions. This article is required to be interpreted narrowly. Besides this, it is also important to note that even if the victim does not get compensation under the first tier due to the said exceptions, they are still protected by the second tier of the liability structure.<sup>66</sup>

## **ii. Limitation of Liability:**

As per the Convention, the shipowner and his insurer are limited only to a limited extent.<sup>67</sup>

Article 9 states that the limitation to the liability is applied as per the tonnage of the vessel and the quantity of hazardous and noxious substances that are being carried in the vessel.<sup>68</sup> Article 9 deals with the limitation of liability which is as follows:

*“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;*

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<sup>65</sup> 1996 HNS, Article 7(2).

<sup>66</sup> Id. at 4.

<sup>67</sup> 1996 HNS, article 9.

<sup>68</sup> Id., at 66.

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.”<sup>69</sup>

### iii. Compulsory Insurance:

The IMO has introduced the concept of compulsory insurance into the shipping law after the incident of *Torrey Canyon*.<sup>70</sup> The HNS Convention includes the provision of compulsory insurance in Article 12(1) which provides with the need to have insurance and a few other financial securities to make sure that the liabilities of the shipowners can be covered by the Convention.<sup>71</sup>

Article 12(2) of the Convention talks about the compulsory insurance certificate and the essentials which the certificate must contain:

“This compulsory insurance certificate shall be in the form of the model set out in annex I and shall contain the following particulars:

(a) name of the ship, distinctive number or letters and port of registry;

(b) name and principal place of business of the owner;

(c) IMO ship identification number;

(d) type and duration of security;

(e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and

(f) period of validity of certificate, which shall not be longer than the period of validity of the insurance or other security.”<sup>72</sup>

### b. Second Tier: The HNS Fund:

To ensure that the victims of the HNS incidents receive their compensation, the Convention has established a second tier in its liability regime which is structured as follows:

“(a) Because no liability for the damage arises under chapter II

(b) Because the owner liable for the damage under chapter II .....available legal remedies;

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<sup>69</sup> Id. at 66.

<sup>70</sup> Id. at 18.

<sup>71</sup> Id. at 66.

<sup>72</sup> 1996 HNS, Article 12.

(c) Because the damage exceeds the owner's liability under the terms of chapter II."<sup>73</sup>

### **i. Structure and Funding:**

The idea behind formation and establishment is like International Oil Pollution Compensation Funds (IOPC Funds), these shall be controlled and looked after by an Assembly consisting of representatives of the Governments of all its Member States. Similar IOPC Fund, the HNS Fund also has a Committee on Claims for Compensation. However, the major difference between these two funds is, the IOPC Funds only deal with and provide funds for claims related to damages caused by pollution, on the other hand the HNS Fund deal with a broader range of claims.<sup>74</sup>

The receivers of hazardous substances which have been navigated and transported by sea to the ports and berths of the member states are the financiers to the HNS Fund. The HNS Fund usually has four accounts:

- Separate accounts for oil
- LNG account
- LPG account
- General account for other hazardous substances and bulk solids<sup>75</sup>

Nonetheless, the operation of a specific separate account gets postponed until unless the quantities of the HNS substances received by the state parties reach a particular threshold, until the account belonging to a specific sector will be part of the general account.<sup>76</sup>

### **ii. Time Limit:**

Any claim against a shipowner should be presented within three years from the date of the incident<sup>77</sup>, the time limit to take any action against a shipper is up to six years from the date of the incident. The claims must be raised only in the contracting state where either the damage has taken place or the contracting state where the preventive measure has been taken.<sup>78</sup> In the case of the HNS fund, the claim can be brought up "*within three years from the date when the person suffering damages knew or ought reasonably to have known of the damage*".<sup>79</sup> However,

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<sup>73</sup> 1996 HNS, article 14.

<sup>74</sup> Måns Jacobsson, The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), IFLOS, 1-10 (Aug. 9, 2019), <https://www.iflos.org/wp-content/uploads/SumAc19-HNS-handout.pdf>.

<sup>75</sup> Id. at 73.

<sup>76</sup> Id. at 72.

<sup>77</sup> Id., arts. 13 para 1.

<sup>78</sup> ibid

<sup>79</sup> Id. article 37 (2)

after adding the period of limitation this period can be extended to ten years after which no claim can be brought in by the victim.<sup>80</sup>

**iii. Entry of Convention into force:**

Article 46 of the Convention lays down the set of requirements that need to be fulfilled for the Convention to enter into force:

*“(a) At least 12 states, including **four** States each with **not less than 2 million units** of gross tonnage, have expressed their consent to be bound by it, and*

*(b) The Secretary General has received information in accordance with article 43 that those persons in such States who would be liable to contribute pursuant to article 18 paragraph (1) (a) and (c), have received during the preceding calendar year a total quantity of at least **40 million tonnes** of cargo contributing to the general account.”<sup>81</sup>*

#### **IV. THE 2010 HNS PROTOCOL**

**(A) Need for the protocol:**

The HNS Convention was adopted in 1996, yet even after 12 years of its adoption by 2008 only 14 countries have ratified the Convention and of these countries only three countries had tonnage of more than 2 million tons which is required as per Article 46 of the Convention. The IMO Secretariat has conducted an enquiry to understand the reasons behind the Convention not coming into force despite it being introduced in 1996. The enquiry showed that the reasons included the heavy burden imposed on states by Article 21(3) of the Convention that the states should report all the vast range of packages substances that they receive. There was an issue regarding the LNG cargoes as well in which the titleholder will be responsible to make any sort of contribution which may not fall under the jurisdiction of a state; hence it gets difficult for the states to submit details of LNG cargoes which is required under the Convention.<sup>82</sup>

To overcome the said issues, a Protocol for the HNS Convention was adopted on 30<sup>th</sup> April 2010. The said protocol has amended the definition of HNS under Article 1(5) by including the definition of ‘Bulk HNS’ and ‘Packages HNS’ which in turn were necessary to amend Article 9 of the Convention where different limits were included for the hazardous and noxious substances.<sup>83</sup>

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<sup>80</sup> Id. article 37 (4)

<sup>81</sup> Id. article 46 (1).

<sup>82</sup> Id. at 33.

<sup>83</sup> Id. at 33.

**(B) New features of the 2010 HNS Protocol:**

In the 2010 Protocol four resolutions were adopted which are as follows:

1. *“The Assembly of the IOPC Fund was requested to set up the HNS Fund;*
2. *States Parties to the 2010 HNS Protocol, Member States of IMO and other appropriate organisations 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;*
3. *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; and*
4. *The Legal Committee of IMO was invited to reconsider its overview of the 1996 HNS Convention in light of the adoption of the Protocol.”*<sup>84</sup>

**(C) Packaged goods:**

The organisation of the system to report contributing cargo has been one of the main issues to implement the HNS Convention. The bulk cargo was not a problem for the implementation, however finding a way to collect data and make reports on the packages goods proved to be the problem. Both the shipping industry and the states found it difficult to report the packaged hazardous and noxious substances which led to the issue of under-reporting of the contributions.<sup>85</sup>

For the above-mentioned reasons, the 2010 Protocol excluded the contribution to HNS Funds from the HNS substances in packages form, however, any damage due to incidents involving the packaged HNS substances will fall into the scope of the Convention to provide the victims with the compensation and protect them in case of an accident or incident. To maintain the concept of shared liability between the cargo interest and the shipping industry which has been prevailing from the beginning, it was decided in the 2010 Diplomatic Conference that for the ships carrying the HNS in packaged forms the limitation amount has been increased by 15% and the same has been implemented in the 2010 Protocol.<sup>86</sup>

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<sup>84</sup> Id. at 31.

<sup>85</sup> Måns Jacobsson, The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), IFLOS, 1-10 (Aug. 9, 2019), <https://www.iflos.org/wp-content/uploads/SumAc19-HNS-handout.pdf>.

<sup>86</sup> Id. at 84.

**(D) Liquefied natural gases (LNG)**

As already mentioned before, LNG contributions under the 1996 Convention can be paid only by the immediate title holder of that cargo before the discharge of the cargo into the contracting state's port. This system considerably had difficulties because the titleholder may not be under the jurisdiction of the contracting party. Furthermore, when the titleholder does not pay the contributions, then the receiver becomes liable.<sup>87</sup>

The 2010 Protocol has brought a solution to this issue, the receiver will remain liable for the contributions. However, if any agreement is made between the receiver and the titleholder, then the latter will be liable, for this it is important to mention in the agreement the state in which the substances are being received. Despite this, if the titleholder does not pay the contributions then the receiver shall be held liable.<sup>88</sup>

**(E) Cargo Reports Submission:**

It was observed that states are not complying with the rule of submitting reports on the cargo which is being contributed. In the past when the IOPC fund faced the same issues, through 2003 IOPC Supplementary Fund Protocol added an article for the states which do not follow the obligation, the article restricts the compensation for the damages that occurred due to oil pollution. In the conference held for the 2010 HNS Protocol, the states have accepted to include one such article into the Convention through the protocol.<sup>89</sup> The provision states that a State will not receive any compensation from the HNS Fund until it fulfils the condition of submitting reports on contributing cargoes for all the years before the incidents have taken place. However, this provision shall not be applied to the compensation claims made for personal injury and death.<sup>90</sup>

**V. CONCLUSION**

After reviewing the 1996 HNS Convention, the international community has found a few procedural gaps in the liability system of the Convention. To make the Convention work the 2010 Protocol was introduced to fill in the gaps.<sup>91</sup> The protocol has made significant changes to the Convention which are already mentioned above in this paper, it seems like the 2010

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<sup>87</sup> Id. at 84.

<sup>88</sup> Id. at 84.

<sup>89</sup> Lief Bleyen, Liability for Pollution from Hazardous and Noxious Substances, UNIVERSITY OF OSLO (2010), <https://core.ac.uk/download/pdf/30816558.pdf>.

<sup>90</sup> Måns Jacobsson, The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), IFLOS, 1-10 (Aug. 9, 2019), <https://www.iflos.org/wp-content/uploads/SumAc19-HNS-handout.pdf>.

<sup>91</sup> Id. at 18.

Protocol has been successful in providing solutions for the problems identified by the states for not ratifying the convention which ideally sweeps away the burden and reinforces the existing legal framework dealing with the liability regime for the marine casualties for the hazardous and noxious substances.<sup>92</sup>

The disastrous damages caused in the process of hazardous and noxious substances transportation show the requirement to have a productive compensation and liability convention to address the damages caused by HNS. Despite the dire need for the convention, it is not adopted by the international community, the international community needs to adopt the HNS Convention at the earliest instead of waiting for another disaster to take place. There might be a few unresolved issues that are still pertinent in the Convention that may not be suitable for some countries, but the states should show a spirit of compromise and keep aside their individual needs and private advantages for the sake of the international community<sup>93</sup> as this is the chance build a global regime for liability and compensation to damages caused by the HNS substances excluding oil.<sup>94</sup>

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<sup>92</sup> *Id.* at 83.

<sup>93</sup> *Id.* at 6.

<sup>94</sup> Lief Bleyen, *Liability for Pollution from Hazardous and Noxious Substances*, UNIVERSITY OF OSLO (2010), <https://core.ac.uk/download/pdf/30816558.pdf>.