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# A ROYAL DECREE FOR THE ACCESSION OF THE KINGDOM OF SPAIN TO THE INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA 2010

**A Legislation Drafting Project submitted in partial fulfillment of the requirements for the award of the Degree of Master of Laws (LL.M.) in International Maritime Law at the IMO International Maritime Law Institute**

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# CHAPTER I - EXPLANATORY NOTE

## 1 INTRODUCTION

In today's society, the environment is not an abstract entity anymore. This has led to the adoption of an international legal framework dealing with its protection.

Marine pollution also comes from ships: as a result of maritime accidents (causing large spills of oil or hazardous substances in the sea), or through operational discharges of waste materials. Pollution originated by oil has probably been – maybe because of the spectacular nature and impact of the 'black tides'- the one that has called the most everyone's attention.

The transport of dangerous goods by sea was considered a technical matter and its regulation was left to the maritime industry.[1] However, the advent of maritime accidents and the relevance of this kind of pollution has influenced the action of the international community, which has faced the problem from two perspectives: the preventive one, regarding those norms that establish rules and sanctions regarding ship safety standards, such as the United Nations Convention on the Law of the Sea (UNCLOS) or the Convention for the Prevention of Pollution from Ships (MARPOL); and the compensatory ones, which set up liability systems and compensations to those affected by the pollution. These Conventions, such as the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC) or the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention), provide for a system of limitation of liability and compensation.

## 2 HISTORICAL BACKGROUND

Since so few dangerous goods were carried by sea until the latter part of the nineteenth century, special regulations had not been considered necessary. The first

[1] Güner-Özbek, Meltem D.; The Carriage of Dangerous Goods by Sea, Hamburg Studies on Maritime Affairs, Springer, Germany, 2008, p. 28.

traceable reference to regulations dealing with dangerous goods appeared in the British Merchant Shipping Act, 1894 (section 301).

It is true that there have been comparatively few major accidents at sea involving dangerous goods, with the exception of accidents involving oil tankers and bulk carriers. Nevertheless, dangerous cargoes have been involved in some of the worst disasters in shipping history and small accidents occur frequently. Among the most notable incidents involving dangerous goods are the loss of the *Mont Blanc* in Halifax, Canada, in 1917, causing 3000 deaths, injuring 9000 persons and destroying 6000 homes. The *Mont Blanc* had been overloaded with explosives. In 1944, the freighter *Fort Stikine*, carrying explosives and cotton, exploded in Bombay killing 1250 persons and destroying or damaging 15 ships.

However, the starting point should be the accident of the *Torrey Canyon* in 1967. The ship ran aground off the coast of Cornwall, fouling the waters of UK and France. The incident exposed a number of serious problems, one of them being the absence of an international agreement on liability and compensation. The first proposals after the *Torrey Canyon* incident suggested that a future international regime might embrace pollution not only by oil but all hazardous and noxious substances (HNS).[2] However, the features of the HNS involved difficult implications and finally, the 1992 CLC and Fund Convention approved in 1969 were limited to pollution by oil. The main difficulties with HNS lay in the wide range of substances involved, their different degrees of toxic risk, the different packing they require, and the expectation that a convention on HNS would not only cover pollution but other dangers involved in the carriage of those substances, such as fire or explosion. An equitable two-tier system for the different categories of cargo interests seemed difficult to achieve.

The international regime in response to the *Torrey Canyon* incident was limited to pollution, but the necessity for a new regime would not be forgotten. In 1979, the tanker *Beltegeuse* exploded whilst discharging a cargo of crude oil, killing 50 people. Final liability claims amounted exceeded US$ 120 million. Given the potential scale

[2] De La Rue, Colin and Anderson, Charles B.; Shipping and the Environment, Second Edition, Informa, London, 2009, p. 269.

of such disasters, a need was recognized for an international system of compensation.[3] A draft convention on HNS was adopted at the CMI conference in Montreal in 1981 but it was not approved during the IMO Diplomatic Conference held in London in 1984. In 1989, the chemical tanker *Masquasar*, carrying 257700 tonnes of chemicals, exploded killing all 23 crew and burned during 5 days. In 1993, the tanker *British Trent*, carrying gasoline, collided with another ship. Although there was no pollution damage, the gasoline caught fire and nine crew died as a result of smoke inhalation. There were also several cases in which governments undertook salvage operations to recover containers of toxic chemicals lost at sea in maritime accidents, without later being able to recover the expense since no international system was in place to ensure payment of compensation for the cost of these measures.[4] Public opinion exerted pressure for an international HNS regime, and an agreement was finally reached at the IMO Diplomatic Conference in 1996 which approved the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (1996 HNS Convention).

## 3 THE 1996 HNS CONVENTION AND THE PROTOCOL OF 2010 TO THE INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA, 1996

The 1996 HNS Convention was adopted by an international conference held in London by the International Maritime Organization in May 1996. Its aim is to ensure adequate, prompt and effective compensation for damage to persons and property, costs of clean up and reinstatement measures and economic losses resulting from the maritime transport of HNS,[5] covering both pollution damage and damage caused by other risks, e.g. fire and explosion.[6] The Convention required for its entry into force the ratification of at least 12 States, including four States, each with not less than 2 million units of gross tonnage. The comments of national delegations at the 1996 Diplomatic Conference indicated that there would be wide support for the

[3] De La Rue, Colin and Anderson, Charles B.; *op. cit*., p. 270.

[4] *Ibid*, p. 271.

[5] http://www.hnsconvention.org/Pages/TheConvention.aspx

[6] *Ibid.*

Convention, particularly in Europe. However, by July 2009, fourteen States[7] had acceded the Convention but only three of them had a tonnage above 2 million units of gross tonnage. The lack of ratifications prevented the entry into force of the Convention and evidenced the disagreement of most of the States with some of its provisions. On 30 April 2010, in order to address the practical issues that had prevented States from ratifying the 1996 HNS Convention, a Protocol (2010 Protocol) to it was adopted and was open for signature from 1 November 2010 to 31 October 2011, afterwards opened for accession. These two instruments together constitute the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (2010 HNS Convention).

The 2010 Protocol will enter into force eighteen months when the following requirements have been accomplished: the ratification by at least twelve States, four of them with at least a registered ship's tonnage of 2 million GT, and that contributors in those States have received during the preceding year a minimum of 40 million tones of cargo consisting of HNS.[8] So far, the treaty has been signed by 8 countries: Denmark, Canada, France, Germany, the Netherlands, Norway, Turkey and Greece.

## 4 LIMITATION OF LIABILITY

One of the peculiarities of carriage by sea, as opposed to the law governing other means of transportation, is the principle that a shipowner may limit its liability to persons suffering loss, damage, injury or death as a result of the operation of the ship. The owner's liability is limited to a maximum sum per occurrence, which the claimants share out of a fund established by judicial proceedings initiated by the shipowner.[9] The origin of the limitation of liability concept was developed with the aim of protecting shipping.

[7] Those States were: Angola, Cyprus, Ethiopia, Hungary, Liberia, Lithuania, Morocco, Russian Federation, Saint Kitts and Nevis, Samoa, Sierra Leone, Slovenia, Syrian Arab Republic and Tonga.

[8] Article 46 of the 2010 HNS Convention.

[9] Tetley, William; International Maritime and Admiralty Law, Les Éditions Yvon Blais, Canada 2002, p. 271.

## 4.1 LIMITATION OF LIABILITY IN SPAIN

The Spanish Civil Code establishes as a general rule in its article 1911 the principle of unlimited liability.[10] However, some forms of limitation of liability were already included in the Spanish Commercial Code of 1885: article 587 stated the limitation of liability by abandonment, and article 837 the limitation by value.
Nowadays, the limitation of liability system is in force after the ratification by Spain of several conventions regarding this matter, the Convention on Limitation of Liability for Maritime Claims (LLMC Convention) and the 1992 CLC among others.

## 4.2 THE INTERRELATIONSHIP BETWEEN THE 2010 HNS CONVENTION AND OTHER MARITIME LIABILITY CONVENTIONS

### 4.2.1 The 2010 HNS Convention and the LLMC Convention

The LLMC Convention is the regime governing the shipowners' limitation.[11] In the LLMC Convention, claims for oil pollution damage within the meaning of the 1992 CLC are expressly excluded from the scope of application by its article 3 (b). However, claims for pollution damage from substances other than oil (such as HNS) are allowed. The 1996 Protocol to the LLMC Convention inserted a new provision, and under article 18 (1) (b), States may reserve the right to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 or of any amendment or protocol thereto. This means that HNS claims would only be excluded from the application of the LLMC Convention if a State voluntarily excludes them.[12] Provided that the limits of liability in the LLMC Convention are lower than the ones in the 2010 HNS Convention (and therefore, so is the compensation) a reservation to exclude HNS claims from the application of the LLMC Convention is required prior to the ratification of Spain. Although the 2010

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[10] Meana, Verónica and García, Julia; "Spain" in Griggs, Patrick *et al.*; Limitation of Liability for Maritime Claims, Fourth Edition, Lloyd's of London Press Ltd., London, 2005, p. 409.

[11] Tetley, William; *op. cit*., p. 276.

[12] Martinez, Norman. A; Limitation of Liability in International Maritime Conventions. The relationship between global limitation conventions and particular liability regimes, Routledge, 2011, p. 105.

HNS Convention is not yet in force, this has already been done by States such as the UK, Norway or Malta. It has to be made clear that such reservation will have effect from the moment the 2010 HNS Convention shall enter into force, not before since that would exclude the compensation of HNS claims under the LLMC while the 2010 HNS Convention is not yet in force.

### 4.2.2 The 2010 HNS Convention and the 1992 CLC and Fund Convention.

The 1992 CLC and the Fund Convention are limited to pollution damage caused by persistent oil. However, non-pollution damage caused by persistent oil, such as fire or explosion is covered by the 2010 HNS Convention.

## 5 THE 2010 HNS CONVENTION

The 2010 HNS Convention falls under the scope of the limitation of liability conventions. It follows the successful two-tier model set up by the 1992 CLC and the Fund Convention for the compensation of pollution damaged caused by oil tankers. However, the 2010 HNS Convention covers the liability of the shipowners and the HNS Fund in one single instrument.[13]

### 5.1 CHAPTER I – GENERAL PROVISIONS

The HNS Convention provides a compensation up to 250 million SDR to be paid to victims of accidents involving HNS. HNS substances have been defined[14] by reference to various IMO Conventions (such as the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978) and Codes (such as the International Maritime Dangerous Goods Code –IMDG- or the International Maritime Solid Bulk Cargoes Code – IMSBC-). HNS include both bulk cargoes and packaged goods. Examples of them are oils; liquefied gases; bulk materials possessing chemical hazards.

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[13] *Ibid*, p.153.

[14] For a complete list of the Conventions and Codes defining the HNS, please refer to article 1(5) of the 2010 HNS Convention.

The 2010 HNS Convention will apply[15] to:

a) Damage caused in the territory or territorial sea of a State Party to the Convention;
b) Damage by contamination of the environment caused in the exclusive economic zone, or equivalent area, of a State Party;
c) Damage (other than pollution damage) caused outside the territory and the territorial sea of any State if this damage has been caused by a substance carried on board a ship registered in, or entitled to fly the flag of, a State Party;
d) And to preventive measures.

Damage as defined by the Convention[16] includes loss of life or personal injury; loss or damage to property outside the ship carrying the HNS; loss or damage by contamination of the environment caused by HNS; and the costs of preventive measures (such as clean-up or removal of HNS from a wreck if the HNS present a hazard or pollution risk) and further loss or damage caused by them. Pollution caused by persistent oil is not covered by the Convention since that is covered by the 1992 CLC and Fund Convention[17] and neither it is the damage caused by radioactive material. It does not cover either damage caused during the transport of HNS to or from a ship. Non-pollution damaged caused by an oil spill, such as damage caused by fire, will be covered by the Convention. For example, if a drum containing dangerous chemicals falls onto the deck of a ship and injures a seaman working there, the Convention will not apply if the drum remains intact and the injuries are caused by the impact; however, if the contents escape and cause burns, the Convention will apply.[18] The Convention also covers incidents involving the carriage of HNS by sea by any sea-going vessel and seaborne craft of any type whatsoever[19], except warships

[15] Article 3 of the 2010 HNS Convention.

[16] Please refer to article 1(6) of the 2010 HNS Convention.

[17] IOPC FUNDS: An Overview of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010, p. 3.

[18] De La Rue, Colin and Anderson, Charles B.; *op. cit*., p. 277.

[19] Article 1(1) of the 2010 HNS Convention.

and other ships owned or operated by a State and used for non-commercial purposes.[20] States may exclude from the application of the Convention those ships not exceeding 200 gross tonnage that carry HNS in packaged form and within the ports of that State.[21]

5.2 CHAPTER II – LIABILITY

The 2010 HNS Convention establishes a system of strict liability of the shipowner (he is liable even in the absence of fault in his part). The Convention, however, provides with a list of the exceptions in which no liability shall attach to the owner:[22] when the damage resulted from an act of war, hostilities or a natural phenomenon exceptional, inevitable and irresistible; the damage was caused by an act or omission of a third party with the intention to cause such damage; or when the damaged was caused as a result of the failure of the shipper to furnish information concerning the nature of the substances shipped. This last exception has been justified taking into account that the HNS need to be carried in different forms of packaging and in many cases, there is no adequate description by the shipper on how to do so.[23] As set out, only the shipowner is liable for damage caused because of the carriage of HNS, and therefore, no claims shall arise in respect of his servants, agents or members of the crew; the pilot or any other person performing services for the ship; the charterer or his servants or agents; the salvor or his servants or agents; or any person taken preventive measures.[24]

The Convention establishes a two-tier system of liability: the shipowner is liable for the loss or damage up to a certain amount, which is covered by insurance (1st tier). A compensation fund (the HNS Fund) will provide additional compensation when the victims do not obtain full compensation from the shipowner or its insurer (2nd tier).

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[20] Article 4(4) of the 2010 HNS Convention.

[21] Article 5(1) of the 2010 HNS Convention.

[22] Article 7 of the 2010 HNS Convention.

[23] Martinez, Norman. A; *op. cit*., p. 153.
[24] Article 7(5) of the 2010 HNS Convention.

Regarding the first tier, the owner (the registered owner[25]) will be liable up to a certain amount. This will be covered by insurance. He will be able to limit is liability as follows:

- If the damage has been caused by bulked HNS, up to a maximum of 10 million units of account[26] if the ship does not exceed 2000 units of tonnage; and if the tonnage exceeds that tonnage, the limits of liability will be: (i) for each unit of tonnage from 2001 to 50000, 1500 units of account; (ii) for each unit of tonnage in excess of 50,000 units of tonnage, 360 units of account. The aggregate amount of (i) and (ii) shall not exceed 100 million units of account.[27]
- If the damage has been caused by packaged HNS or by both bulk and packaged HNS, compensation will be as follows: for ships which do not exceed 2000 units of tonnage, 11.5 million units of account; and for ships exceeding that tonnage: (i) for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,725 units of account; (ii) for each unit of tonnage in excess of 50,000 units of tonnage, 414 units of account. The aggregate of (i) and (ii) cannot exceed 115 million units of account.

The owner will not be able to limit liability if the damage was caused by his personal act or omission when that act or omission was committed with the intention to cause such damage, or recklessly and with knowledge that such damage would probably result.[28] In order to benefit from the limitation of liability, the shipowner or his insurer may constitute a fund for the total sum representing the limit of liability established in accordance to the quantities explained above.[29] The fund will be distributed among the claimants in proportion to the amounts of their established claims. If the total amount of claims exceeds the maximum amount available for compensation, the

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[25] Article 1(3) of the 2010 HNS Convention.

[26] The units of account shall be converted into national currency by reference to the Special Drawing Right .

[27] Article 9(1)(a) of the 2010 HNS Convention.

[28] Article 7(5) of the 2010 HNS Convention.

[29] For further information regarding the fund, please refer to Article 9(1) of the 2010 HNS Convention.

payments will have to be prorated. However, claims for loss of life or personal injury have priority over the other claims and up to two thirds of the available compensation is reserved for them.

Depending on the types of damage caused by the incident, it may be necessary for the shipowner to establish separate funds under two or more limitation regimes. For example, if a ship carrying crude oil collides with another ship, explodes and burst into flames, causing loss of life, property damage and pollution; it may be necessary for the shipowner to establish a CLC fund to meet claims for pollution, an HNS fund to deal with claims for loss of life, personal injury and property damage caused by the explosion or fire, and a fund under the LLMC Convention to deal with other claims such as claims for damage to the colliding ship attributable to the collision.[30]
To finish with the provisions regarding the liability of the shipowner, it should be noted that he is required to obtain insurance and the certificate of such insurance has to be carried on board. This certificate will be issued by the competent authority of the State Party.[31]

The second tier will be explained in relation to the provisions of Chapter III.

## 5.3 CHAPTER III - COMPENSATION BY THE INTERNATIONAL HAZARDOUS AND NOXIOUS SUBSTANCES FUND (HNS FUND)

Regarding the second tier mentioned above, a fund will be established to provide compensation for damage in connection with the carriage of HNS by sea, to cover those cases in which the protection afforded by chapter II is inadequate or not available.[32] These are: where no liability for the damage arises under chapter II; where the owner liable for the damage under chapter II is financially incapable of meeting the obligations; or where the damage exceeds the owner's liability under the terms of chapter II. The HNS Fund will not have any obligation to provide for

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[30] De La Rue, Colin and Anderson, Charles B.; *op. cit*., p. 285.

[31] Please refer to Article 12 of the 2010 HNS Convention for further information in relation the insurance of the shipowner.
[32] Article 13 of the 2010 HNS Convention.

compensation if the damage was caused by an act of war or other hostilities; if the HNS came from a warship or a State-owned ship; or if the claimant cannot prove that the damage arose from an incident involving one or more ships. In general, the Fund will be exonerated to the same extent that the shipowner may be exonerated. The aggregate amount of compensation payable by the HNS Fund under this article shall in respect of any incident be limited, so that the total sum of that amount and any amount of compensation actually paid under chapter II for damage within the scope of application of this Convention as defined in article 3 shall not exceed 250 million units of account. If the total amount of the claims exceeds the maximum compensation available, payments will have to be prorated, and claims for loss of life or injury will have priority.[33]

The HNS Fund will eventually have four accounts (oil, liquefied natural gas (LNG), liquefied petroleum gas (LPG) and a general account with two sectors (bulk solids and other HNS). Initially, the Fund will only have two accounts, one for oil and another one for LNG, LPG, bulk solids and other HNS. Regarding the contributions:

a) To the general account, annual contributions shall be made in respect of each State Party by any person who was the receiver in that State in the preceding calendar year, of aggregate quantities exceeding 20,000 tonnes of contributing cargo, other than substances referred to in article 19, paragraph 1 and paragraph 1bis, 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.
b) To the oil account, annual contributions will be made by: (i) by any person who has received in that State in the preceding calendar year, total quantities exceeding 150,000 tonnes of contributing oil as defined in article 1, paragraph 3 of the 1992 Fund, and who is or would be liable to pay contributions to the International Oil Pollution Compensation Fund in accordance with article 10 of that Convention; and (ii) by any person who was the receiver in that State in the preceding calendar year, or such other year as the Assembly may

[33] For more information regarding the HNS Fund, please refer to Article 14 of the 2010 HNS Convention.

decide, of total quantities exceeding 20,000 tonnes of other oils carried in bulk listed in appendix I of Annex I to the MARPOL Convention.

c) To the LPG account, annual contributions will be made by any person who in the preceding calendar year was the receiver in that State of total quantities exceeding 20,000 tonnes of LPG.

d) In the case of the LNG account, annual contributions to the LNG account shall be made in respect of each State Party by any person who in the preceding calendar year was the receiver in that State of any quantity of LNG.

An initial contribution, which shall be determined by the Assembly, will be made by the persons liable to pay contributions (as stated above).

States Parties shall provide the Director of the HNS Fund with a list of the persons entitled to pay contributions, the name and address of receivers of the contributors included in it, and are also obliged to submit information to the IMO on contributing cargoes received. Failure to do so may result in the payment of a compensation to the HNS Fund by the State, the temporal withdrawal of the State Party condition and the inability to claim compensation until these obligations have been fulfilled.[34]

If contributions are not paid, appropriate action (including court action) will be taken against the contributor.[35] However, States are entitled to assume responsibility for obligations imposed by the Convention on any person liable to pay contributions at the time of accession.[36]

The HNS Fund will have an Assembly, a Secretariat and a Director. The Assembly will consist of all States Parties to the Convention and Protocol and will normally meet once a year. Functions of the Assembly will include the approval of settlements of claims against the Fund and the amounts to be levied as contributions.[37]

[34] Please refer to Articles 21 and 21bis of the 2010 HNS Convention for further information regarding the reports.

[35] Article 22 of the 2010 HNS Convention.

[36] Article 23 of the 2010 HNS Convention.

[37] For more information regarding organizational and administrative issues, please refer to articles 24 to 35 of the 2010 HNS Convention.

## 5.4 CHAPTER IV – CLAIMS AND ACTIONS

Actions for compensation under both chapters II and III have to be brought within three years from the knowledge of the damage and the identity of the owner. In no case shall an action be brought later than ten years from the date of the incident which caused the damage.[38]

As to jurisdiction, claimants shall take legal action in a court in the State Party in whose territory or waters the damage occurred. In this context "waters" means the territorial sea or the Exclusive Economic Zone (EEZ), or an equivalent area, of a State Party.[39] If the incident occurred outside the territory of any State, actions for compensation may only be brought in the State Party where the ship is registered, where the shipowner has habitual residence or place of business or the State Party where the shipowner has established the fund mentioned in article 9 (3).

Actions against the HNS Fund will be brought before the same court as actions taken against the shipowner, and if no owner was liable, in the courts of the State Party which would have been competent if an owner had been liable.[40]

Chapter IV includes also a supersession clause in Article 42, which provides that the Convention will supersede any convention to the extent that such convention would be in conflict with it.

## 5.5 CHAPTER V – TRANSITIONAL PROVISIONS

The first session of the Assembly shall take place not more than thirty days after the entry into force of the Convention.

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[38] Article 37 of the 2010 HNS Convention.

[39] IOPC FUNDS: An Overview of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010, p. 9.

[40] Provisions regarding jurisdiction may be found in articles 38 and 39 of the 2010 HNS Convention.

## 5.6 CHAPTER VI – FINAL CLAUSES

The 2010 Protocol opened for accession on 31 October 2011. Accession shall be accompanied by the submission to the Secretary General of the IMO of data on the total quantities of contributing cargo liable for contributions received in that State during the preceding calendar year in respect of the general account and each separate account.[41]

The Convention provides a simple procedure to increase the limits in the future. Amendments to the limits have to be proposed by at least half of the States Parties to the Convention (and in no case less than six States). These amendments shall be adopted by a two-thirds majority of the Contracting States.[42]

Other provisions regarding denunciation (Article 49), extraordinary sessions of the Assembly (Article 50), Cessation (Article 51), winding-up of the HNS Fund (Article 52), the depositary (Article 53) and the languages of the Convention (Article 54) are included in this Chapter.

# 6 REASONS TO ACCEED TO THE 2010 HNS CONVENTION

The International Maritime Organization and the IOPC Funds, both organizations to which Spain is a member have worked closely in the drafting and the 2010 Protocol of the Convention. Reasons put forward when requiring the adherence to the Convention have been, among others, the dangers caused by the carriage by sea of HNS and therefore, the necessity to create an immediate and effective compensation to those persons who may suffer damage caused by HNS carried by sea. Also, the need of implementing uniform international rules and the necessity for these being effective of the adherence, implementation and enforcement by the international community. In this regard, the IMO has urged all State Members to adhere to the

[41] Other provisions in relation with Signature, ratification, acceptance, approval and accession and entry into force can be found in articles 45 and 46 of the 2010 HNS Convention.

[42] Please refer to article 48 of the 2010 HNS Convention for further information regarding this matter.

Convention in several occasions, either through the adoption of resolutions, such as Resolution A.932 (22); or through the efforts of the Secretary General.[43]

The United Nations Conference on Trade and Development (UNCTAD), during the Multiyear Expert Meeting on Transport and Trade Facilitation held in December 2010 suggested that the ratification of the 2010 HNS Convention would provide useful solutions especially for coastal States whose economic well-being and prosperity depended to a large extent on their marine resources, biodiversity, fisheries and tourism.[44]

In respect of the European Union (EU), maritime safety policy aims at eradicating substandard shipping. The Erika and Prestige have been unparalleled incidents in Europe, and they have stimulated the change in the law regarding to maritime safety and marine pollution. The EU called for the adherence to the 1996 HNS Convention through its Council Decision of 18 November 2002 authorizing Member States to ratify or accede the Convention in the interest of the Community because it would make for improved victim protection under international rules on marine pollution liability, in keeping with the UNCLOS. The Decision reminds Member States that Articles 38, 39 and 40 of the 1996 HNS Convention fall under its jurisdiction (the same applies to those articles in the amended HNS Convention). Although the EU has not made any declaration with regards to the 2010 HNS Convention, it does not seem that its position towards the protection of the environment has changed. In this respect, in 2008 the Member States of the EU signed a statement regarding maritime safety. In that statement, Member States committed themselves to specifically act with the IMO with the aim of achieving, as early as possible, an agreement on a widely acceptable international framework regulating the liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea.[45]

[43] http://www.imo.org/mediacentre/pressbriefings/pages/53-hns-2010.aspx

[44] United Nations Conference on Trade and Development (UNCTAD) - Multiyear Expert Meeting on Transport and Trade Facilitation, Geneva, Switzerland, 8 - 10 December 2010.
[45] Statement by the Member States on Maritime Safety, 19 November 2008.

The implementation of the 2010 HNS Convention is the necessary complement of a safe transport of dangerous goods regime, to which Spain is already part by sea, but also by air (International Air Transport Association – IATA- dangerous Goods Regulations, which constitutes a manual of carrier regulations to be followed by all IATA members[46]) and by road (European Agreement concerning the International Carriage of Dangerous Goods by Road).

Although there are no official statistics regarding incidents in which HNS are involved, during the 4th R&D Forum on HNS in 2009 it was said that:[47]

– 109 significant shipping incidents involving HNS recorded and analyzed worldwide
– 106 incidents/near misses in the Mediterranean Sea (1988-2007)
– 423 spills from ships or port installations in the United States over 5 years (1992-1996).

Lastly, it should be noted that dangerous chemicals are more easily dispersed in the marine environment, and their levels of toxicity are likely to be higher than those of oil. In the event of a spill, a quick, efficient, and therefore expensive cleaning operation would be necessary. Taking into account that the volume of HNS other than oil carried by sea is constantly increasing, the need for an international liability regime regarding HNS is urgent.

## 7 METHOD OF IMPLEMENTATION

The system of implementation of the HNS Convention should be based in the already existing implementation of the 1992 CLC and Fund Convention.

Spain being a monist country, when an international treaty has been ratified or acceded becomes automatically part of national law. In this case, the only concern is the extent to which the treaty provisions can be regarded as 'self-executing' to enable

[46] Güner-Özbek, Meltem D.; *op.cit.*, p. 28.

[47] http://www.hnsconvention.org/Documents/Implementation_HNSConvention.pdf

authorities and national courts to apply them directly.[48] Especially when the Convention has left issues that need to be regulated by the adopting State. This has been the case in the HNS Convention – which also declares that every State Party shall ensure that any obligation arising under this Convention is fulfilled and shall take appropriate measures under its law with a view to the effective execution of any such obligation.[49]

In this regard, the following issues should be addressed in a national norm:

1. The procedure for reporting contributing cargo data. This is a requirement that needs to be fulfilled before the entry in force of the Convention. For that purpose, some guidelines for the adoption by States of similar legislation have been developed by the IMO and the IOPC Funds. Two forms can be found in Annexes I and II of this document.
2. The definition of a "receiver" of HNS. The definition of receiver in the Convention allows for two options, one offering a common definition for all State parties and the other leaving State parties to define receiver under their own national law. Although the Convention provides two options for the definition of receiver in its article 1.4 above, there is a general consensus that the definition under the article 1.4 (a) should be the one to be used by Contracting States, mainly for reasons of practicality and equity.[50]
3. The development of a regime for the collection of contributions in respect of receipts of cargoes carried in domestic traffic.
4. A regime regarding the issuing of insurance certificates.
5. A provision regarding the initial contributions that shall be made in respect of each State, as provided by Article 20 of the 2010 HNS Convention.
6. The elaboration of a list of contributors that shall be kept up to date.[51]
7. The competent courts.

[48] Reporting guidelines on the submission of HNS contributing cargo (As adopted during the HNS Workshop held at IMO Headquarters, London, on 12-13 November 2012).

[49] Article 6 of the 2010 HNS Convention.

[50] Reporting guidelines on the submission of HNS contributing cargo (As adopted during the HNS Workshop held at IMO Headquarters, London, on 12-13 November 2012).

[51] Article 21 of the 2010 HNS Convention.

8. The recognition of the legal personality of the HNS Fund.

For a valid expression of consent, Article 20 (4) of the 2010 HNS Protocol requires that the expression of consent to be bound by this Protocol needs to be accompanied by the submission to the Secretary-General of the IMO of the above mentioned report on contributing cargo. Consent not accompanied by such report will not be accepted upon deposit of the instrument of ratification. On the other hand, States which decide to become Parties to the 2010 HNS Protocol should ensure that they deposit instruments only in respect of the Protocol, without any references to the HNS Convention, 1996.[52] The 2010 HNS Protocol has introduced an innovative provision[53] in its Article 20 (8) providing that States that had ratified the 1996 HNS Convention shall be deemed to have withdrawn its consent upon the signature of the 2010 Protocol or the deposit of the instrument of ratification.

Finally, the instrument of accession will be signed by the King. In accordance with article 2 of the Civil Code, the 2010 HNS Convention shall entry into force twenty days after its publication in the Official State Bulletin.

## 8 CONCLUSION

The international compensation regimes established under the 1992 CLC and 1992 Fund are one of the most successful compensation schemes in existence over the years. Most of the claims have been settled amicably as a result of negotiations. When the 1971 Fund was set up in 1978 it had only 14 Member States. As at 1 January 2013, 130 States had ratified or acceded to the 1992 CLC, and 111 States had ratified or acceded to the 1992 Fund Convention. This increase in the number of States appears to indicate that the Governments have considered the international compensation regime to be working well.

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[52] An Overview of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010, p. 8.

[53] Martinez, Norman. A; *op. cit*., p. 157.

After the disaster caused by the spill of the *Prestige*, the response of Spain should be a preventive one in order to minimize the consequences of a future accident.

Therefore, the protection of the marine environment requires the ratification of the 2010 HNS Convention to provide Spain with the adequate framework to fight against pollution in the marine ecosystem. The ratification of the 2010 HNS Convention will complete the protection of the environment regime to which Spain is already a party after the ratification of the aforesaid 1992 CLC and 1992 Fund, the LLMC Convention, the Bunkers Convention and the Intervention Convention.

# CHAPTER II – AUTHORIZATION OF THE PARLIAMENT

BOLETÍN OFICIAL
DE LAS CORTES GENERALES

CONGRESO DE LOS DIPUTADOS

X LEGISLATURE

SERIES C:
INTERNATIONAL CONVENTIONS (day, month, year)
Nº.
AND TREATIES

**APPROVED BY THE PARLIAMENT**

**(Nº) Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, signed in London on 30 April 2010.**

The plenary session of the Congress of Deputies of (day) (month) (year) has granted the authorization required by the Government under article 94(1) of the Constitution, for Spain to accede the Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, signed in London on 30 April 2010.

Publication is ordered pursuant to article 97 of the Rules of the Parliament.

Palace of the Parliament on (day) (month) (year). The Secretary General of the Parliament, (name).

## CHAPTER III - ACCESSION INSTRUMENT

# I. GENERAL PROVISIONS

## HEAD OF STATE

(nº) *INSTRUMENT of accession by Spain to the Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996. Signed in London on 30 April 2010.*

JUAN CARLOS I
King of Spain

Granted by the Parliament the authorization required by article 94.1 of the Constitution, and therefore, having the necessary requirements required by the Legislation been complied with, I sign this instrument of accession by Spain to the Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, signed in London on 30 April 2010, for it to be deposited, and for, in conformity with its article 20, Spain to become a party to the aforesaid Protocol.

In witness whereof I sign this instrument, duly stamped and countersigned by the undersigned Minister of Foreign Affairs.

In Madrid, on (day) (month) (year).

JUAN CARLOS R.

The Minister of Foreign Affairs,

(SIGNATURE).

## CHAPTER IV - ROYAL DECREE ESTABLISHING RULES FOR THE IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA, 2010.

MINISTRY OF THE PRESIDENCY

(nº) *ROYAL DECREE (nº) of (day) (month) (year), establishing rules for the implementation of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010. Signed in London on 30 April 2010.*

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, approved in London on the 30th April 2010, was acceded to by Spain on (day) (month) (year).

It is established by the Convention that the owners of vessels to which it relates shall be obliged to ensure adequate compensation for damage caused by pollution incidents in the territory or in the territorial sea of any of the State parties to the Convention.

Furthermore, the Convention requires State parties to regulate other issues such as the competent courts, the legal personality of the Fund or some definitions.

This determines the need to adopt this Royal Decree that will establish the necessary rules necessary for the effective implementation of the agreement.

By virtue of this, following the proposal of the Minister of Economy and Competitiveness and of the Minister of Transport, in accordance with the Council of State and after deliberation of the Council of Ministers at their meeting on (day) (month) (year),

I HEREBY DECREE:

Article 1. *Definitions.*

1. For the purposes of this Royal Decree, the Convention refers to the 2010 HNS Convention.

2. The definition of "receiver" included in article 1 (4) (a) of the Convention is hereby incorporated.

3. For the purpose of this Royal Decree, the definition of "agent" shall be the one provided by article 259 of the Consolidated Text of the State Ports and Merchant Marine Law of 5 September 2011.

4. For the purpose of this Royal Decree, "titleholder" as provided in article 19 (1) (b) of the Convention shall mean receiver as stated in paragraph 1 of this article.

5. For the purpose of this Royal Decree, and until the HNS Assembly provides criteria for the definition of transshipment, the criteria already established for the 1992 Fund shall be applicable in this respect.

Article 2. *Legal personality of the HNS Fund.*

The HNS Fund shall be recognized as a legal person capable under the laws of Spain of assuming rights and obligations and of being a party in legal proceedings before the courts of Spain.

Article 3. *Coverage of the liability for damage in connection with the*

*carriage of hazardous and noxious substances.*

1. As stated in article 12 (1) of the Convention, which Spain acceded on (day) (month) (year), the owners of ships 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 the Convention.

2. Navigation of merchant ships registered in Spain carrying hazardous and noxious substances as a cargo without the compulsory insurance certificate on board is prohibited.

3. Navigation in the Spanish territorial or internal waters of non-Spanish ships carrying a cargo of hazardous and noxious substances without a compulsory insurance certificate on board issued in compliance with the requirements of the Convention in the sums fixed by applying the limits of liability prescribed in article 9, paragraph 1 of the Convention is prohibited.

4. Harbor Authorities may require the presentation of the certificate upon the entry or the departure of the ships to which the paragraphs above apply. Harbor Authorities may also initiate the corresponding disciplinary proceedings in accordance with the Consolidated Text of the State Ports and Merchant Marine Law of 5 September 2011, as well as require the seizure or any other necessary measures in order to prevent any damage coming from any ship not complying with the obligations set in the previous paragraphs.

Article 4. *Norms applicable to the certificate.*

The insurance or other financial security certificate referred to in article 12 of the Convention shall be governed by the regulations included to this respect in this Royal Decree.

Article 5. *Certificate of insurance.*

If the basis of the certificate is an insurance policy, the insurance policy must have been concluded with the insurance companies that have been previously authorized by the Minister of Economy and Competitiveness to operate in class 12, “Civil Liability of Marine, Fluvial and Lake Vehicles” of the First Additional Provision of Law 30/1995 of 8 November, for the Regulation and Supervision of Private Insurance. If the insurance companies are domiciled in a country belonging to the European Economic Area, they shall be practicing in Spain under the right of establishment or the freedom to provide services.

Article 6. *Certificate of other financial security.*

If the basis of the certificate is a financial security, the latter must have been awarded by entities duly authorized to do so, according to the applicable law.

Article 7. *Insurance policy.*

The insurance policy shall be issued by:

a) Insurance companies which have been previously authorized by the Ministry of Economy and Competitiveness to operate in class 12 “Civil Liability in Maritime, Lacustrine or Fluvial Vehicles” section

A “Risk Branches Classification” of the Management and Supervision of Private Insurance Law of 8 November 1995

Insurance may be registered in one specific policy or in a policy covering other risks or liabilities of the shipowners.

b) Entities domiciled in a country belonging to the European Economic Area other than Spain authorized to operate in the field of vehicle liability sea, lake and river.

c) Branches established within the European Economic Area by insurers domiciled in third countries outside the European Economic Area, authorized to operate in the field of vehicle liability sea, lake and river.

d) Protection and Indemnity Clubs integrated into the International Group of P & I Clubs.

Article 8. *Financial security policy.*

The financial security certificate shall be issued by entities which have been previously authorized.

Article 9. *Limits of the coverage.*

1. The insurance or the financial security shall cover the liability of the shipowner as provided in the Convention.

2. The limit of the coverage of the insurance or of the financial security shall be the one in force. This limits shall include any amendments to the limits adopted by the Legal Committee of the IMO in compliance with article 48 of the Convention.

3. For the purpose of this article, the ship tonnage shall be calculated in accordance with the regulations contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.

4. For the purposes of this article, the definition and the conversion of the special drawing right shall be found in article 1 (12) and article 9 (9) (a), respectively, of the Convention.

Article 10. *Duration of the coverage.*

1. The duration of the insurance or of the financial security shall be for a period not longer than a year and the time zone shall be the Spanish one.

2. The effects of the insurance or of the financial security shall be regulated in accordance with article 12 of the Convention. The same will apply to any modification of the insurance or of the financial security.

Article 11. *Certificate application.*

1. The certificate evidencing the existence of the insurance shall be requested to the Directorate General of Insurance and Pension Funds by the shipowners or by the insurance companies covering them. If several insurance companies are covering the liability of the shipowner, the certificate shall be requested by the one representing all of them.

The request shall be made 20 days prior the date in which the certificate shall be necessary. In exceptional circumstances, the issuing entity may decrease this period.

2. The request shall be accompanied by evidence of the insurance or of the financial security, and by the properly filled in questionnaires, as required by the Directorate General of Insurance and Pension Funds to the shipowner or to the insurance company/ies.

3. The certificate shall be in the form of the one annexed to the Convention and a copy of it shall be send to the Directorate General of the Merchant Marine.

4. The duration of the certificate shall not be superior to the duration of the insurance or of the financial security.

5. The certificate may be issued not only for ships registered in Spain but also for ships registered in a non-contracting State.

Article 12. *Changes on the coverage during the validity of the certificate.*

1. If, during the validity of the certificate, the insurance contract or the financial security, decrease or lose their efficacy, the issuing authority shall annul the certificate and shall communicate so to the Directorate General of the Merchant Marine.

2. The shipowner or the insurance company shall communicate immediately to the issuing authority any circumstance leading to the lost, extinction or decrease of the validity of the insurance or of the financial security.

3. The shipowner is obliged to return the certificate to the issuing authority.

Article 13. *Competent courts*.

Where damage, resulting from an incident, has been sustained in Spain, including its territorial waters and the exclusive economic zone as established in Law 10/1997, of 4 of January, on the Territorial Sea and Law 15/1978, of 20 February, on the Economic Zone, respectively, in accordance with international law or in a similar area determined by Spain in accordance with international law, including the waters enclosed in its contiguous zone claim and the waters superjacent to its continental shelf claim, or if preventive measures have been taken to prevent or minimize such damage in that area, action for compensation under the provisions of the Convention shall be brought in Spain before the Court of First Instance and Instruction, as provided by article 85 of the Organic Law of the Judicial Power.

Repeal provision. *Normative repeal.*

In case of conflict with any norm of the same or inferior rank, the provisions of this Royal Decree shall prevail.

First final provision. *Authorization to issue instructions.*

The Directorate General of the Merchant Marine and the Directorate General of Insurance and Pension Funds shall issue, in the scope of their competencies, the necessary instructions for the execution of this Royal Decree.

Second final provision. *Entry into force*.

This Royal Decree shall enter into force the next day after its publication in the Official State Bulletin.

In Madrid, on (day) (month) (year).

JUAN CARLOS R.

The Vice-President of the Government and Minister for the Presidency,

(SIGNATURE)

## CHAPTER V - RESOLUTION OF THE DIRECTORATE GENERAL OF THE MERCHANT MARINE, WHICH LAYS DOWN THE PROCEDURE FOR APPLYING AND ISSUING THE INSURANCE CERTIFICATES AS REQUIRED BY THE ROYAL DECREE (Nº) (SEE CHAPTER III) OF (DAY) (MONTH) (YEAR) WHICH ESTABLISHES RULES FOR THE IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA, 2010.

Official State Bulletin nº. (day, month, year)

MINISTRY OF TRANSPORT

**(Nº)** *RESOLUTION of (day) (month) (year), of the Directorate General of the Merchant Marine, which lays down the procedure for applying and issuing the insurance certificates as required by the Royal Decree (nº) (see Chapter III) of (day) (month) (year) which establishes rules for the implementation of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.*

The Royal Decree (nº) (see Chapter III) of (day) (month) (year) which establishes rules for the implementation of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea sets out in its articles that it is the task of the Directorate General of the Merchant Marine to enact the necessary resolutions for its implementation and enforcement.

In particular, it is deemed necessary to establish the procedure for applying for and issuing of certificates, in order to achieve a flexible system for processing the applications.

For the reasons above stated, and under the provisions of the first final provision of the aforesaid Royal Decree, I resolve:

First. *Request of the certificates evidencing the existence of the insurance or of the financial security.*

1. The dispatch of the certificates evidencing the existence of the insurance or of the financial security regulated by the Royal Decree (nº) (see Chapter III) of (day) (month) (year) which establishes rules for the implementation of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, shall be requested for every ship by the corresponding ship owner, or their insurance company, to the Directorate General of the Merchant Marine by submitting the application form in Annex I of this resolution, duly completed and signed.

In the event of the existence of co-insurance, the request shall be made by the insurer representing all of them.

Interested parties may act through a legal representative, in compliance with article 32 of the Legal System of the Public Administrations and the Common Administrative Procedure Law. This law shall govern the procedure for granting the certificates.

2. The request shall be made not less than thirty days beforehand from the date on which the certificate is intended to have effect, except in extraordinary circumstances, duly justified, in which the authority issuing the certificate may shorten the period.

3. It shall accompany the request of the original document certifying the insurance or other financial guarantee, as detailed:

a) Liability coverage provided by one of the entities referred to in Article 4 of the Royal Decree (nº) (see Chapter III) of (day) (month) (year).

In addition to the application, Annex II shall be presented, duly completed by the insurer.

In the case of coinsurance, the applicant, in addition to the above, must provide a document that clearly states that it holds, as insurer, the representation of other insurers. It will also be necessary to prove that representation when the request is made on behalf of the shipowner.

b) Liability coverage provided by one of the entities referred to in Article 4 of the Royal Decree (nº) (see Chapter III) of (day) (month) (year).

The blue card shall be presented, which shall contain at least the information specified in Annex III, confirming the assignment of the vessel to a Protection and Indemnity Club member of the International Group of Protection and Indemnity Clubs.

4. If the application does not meet the requirements stated in this section and the requirements, if any, of the applicable law, the person concerned will be required, within ten days, to rectify the mistake or attach the required documents, pointing out that, failure to do so, shall be interpreted as the withdrawal of the request, after a resolution given in the terms of article 42 of the Legal System of the Public Administrations and the Common Administrative Procedure Law.

Second. *General terms of dispatch of the Certificate evidencing the existence of insurance or other financial security.*

1. The certificate evidencing the existence of insurance or other financial security shall be issued by the Directorate General of the Merchant Marine, according to Annex IV, as it shall be required, once it has been verified, in respect of that ship, the existence of insurance or other financial guarantee, in force and complying with the requirements set out in Article 12 of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (hereinafter, the 2010 HNS Convention).

2. Where the insurance or other financial guarantee has been subscribed by entities other than those listed in article 4 of the Royal Decree (nº) (see Chapter III) of (day) (month) (year), no certificate shall be issued.

3. The certificate regulated by Royal Decree (nº) (see Chapter III), of (day) (month) (year), shall be issued to ships in the following situations:

a) Spanish registered vessels carrying hazardous and noxious substances.

b) Foreign ships carrying hazardous and noxious substances seeking to enter / leave a Spanish port or an offshore installation located in the territorial sea, flying the flag of a State not party to the 2010 HNS Convention.

Third. *Validity of the certificates evidencing the existence of the insurance or other financial security.*

1. The validity of the certificates evidencing the existence of insurance or other financial security must not exceed the validity of the insurance or financial security. Consequently, the owner of a vessel which carries a certificate of the existence of insurance or other financial security whose validity expires during trip, or in any other difficult circumstances, or if there may be delay in acquiring a new one, shall take the necessary measures to request a new certificate in advance.

Fourth. *Entry into force.*

This Decision shall apply from the following day after its publication in the "Official State Bulletin".

Madrid, (day) (month) (day). – The Director General of the Merchant Marine, (Name and Surname).

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