



IMO

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**MERCHANT SHIPPING (LIABILITY AND
COMPENSATION FOR HAZARDOUS AND
NOXIOUS SUBSTANCES DAMAGE)
REGULATIONS**

**A Legislation Drafting Project submitted in partial fulfillment of the
requirements for the award of the Degree of Master of Laws (LL.M.) at the
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Table of International Conventions and National Legislation

International Conventions

- **Convention on Limitation of Liability for Maritime Claims (LLMC Convention)**, adopted 19 November 1976, entered into force 1 December 1986, Protocol of 1996, adopted 3 May 1996, and entered into force 13 May 2004;
- **International Convention on Civil Liability for Oil Pollution Damage, (CLC)**, adopted in Brussels, 29 November 1969, entered into force 19 June 1975, replaced by 1992 Protocol, adopted 27 November 1992, entered into force 30 May 1996;
- **International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the ‘HNS Convention’)**, 1996, International Maritime Organization, London, 3 May 1996, not in force, superseded by 2010 Protocol, adopted 30 April 2010, not yet in force, *Comité Maritime International (CMI)*, **Handbook of Maritime Conventions**, 2004 Vancouver Edition, LexisNexis, Matthew Bender, Doc. 6-11;
- **International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, (FUND Convention)**, adopted in Brussels, 18 December 1971, entered into force 16 October 1976, superseded by the 1992 Protocol, adopted 27 November 1992, and entered into force 30 May 1996;
- **Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT 1992)**, adopted in London, 27 November 1992, entered into force 30 May 1996;
- **Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC PROT 1996)**, adopted 2 May 1996, entered into force 13 May 2004;
- **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 ‘2010 HNS Protocol’)**, adopted 30 April 2010, not yet in force.

National Legislation

Main Legislation

- **Authority for Transport in Malta Act**, Cap. 499 of the Laws of Malta, Act XV of 2009, as amended by Legal Notice 336 of 2010 and Act XI of 2010;
- **Merchant Shipping Act**, Cap. 234 of the Laws of Malta, Act XI of 1973, as amended by Legal Notice No. 148 of 1975 and Acts: XI of 1977, XXXI of 1981, XIII of 1983, XXIV of 1986 and XXXVII of 1988; Legal Notices Nos. 37 of 1989 and 152 of 1989; Acts VIII and XXXVII of 1990, and XVII of 1991; Legal Notices Nos. 86 of 1993 and 125 of 1995; Acts XXIV of 1995 and XXII of 2000; Legal Notices 278 and 340 of 2002, and 361 of 2003; Acts XIII of 2004 and XIV of 2006; Legal Notices 181 of 2006, and 411 and 439 of 2007; by Resolution of the House of Representatives No. 329 of the 9th January, 2008; and Acts XV of 2009, and VII and VIII of 2010;
- **Oil Pollution (Liability and Compensation) Act**, Cap. 412 of the Law of Malta, Act XX of 1999, as amended by Legal Notice 223 of 2003, giving force of law in Malta to the **International Convention on Civil Liability for Oil Pollution Damage, (CLC)**, adopted in Brussels, 29 November 1969, entered into force 19 June 1975, replaced by 1992 Protocol, adopted 27 November 1992, entered into force 30 May 1996 and the **International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, (FUND Convention)**, adopted in Brussels, 18 December 1971, entered into force 16 October 1976, superseded by the 1992 Protocol, adopted 27 November 1992, and entered into force 30 May 1996.

Legal Notices

- **Merchant Shipping (Limitation of Liability for Maritime Claims) Regulations**, 2003, L.N. 361 of 2003.

Subsidiary Legislation

- **Limitation of Liability for Maritime Claims Regulations**, 2004, S.L.234.16, Legal Notice 361 of 2003, as amended by Legal Notices 103 and 261 of 2004, and 411 of 2007;
- **Merchant Shipping (Liability for Bunker Oil Pollution Damage) Regulations**, 2009, S.L.234.46, Legal Notice 40 of 2009, giving force of law in Malta to the **International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention)**, adopted 23 March 2001, entered into force 21 November 2008.

Explanatory Note

1. Introduction

Resolution 3 adopted by the 2010 International Conference on the Revision of the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, Circular letter No. 3111 of 11 October 2010, specifies that in the implementing legislation dealing with the liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea, States only need to express their consent to be bound by 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“, so as to avoid the undesirable situation of having two conflicting regimes being operational. For this reason it is advisable to implement a consolidated text incorporating the 2010 HNS Protocol to the „International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996“, into the Laws of Malta. In fact Resolution 3 urges States “to deposit the appropriate instruments only in respect of the Protocol, without any references to the 1996 HNS Convention.” Moreover, Article 18 of the Protocol specifically states that the Convention and the Protocol are to be read and interpreted as one single instrument, which shall constitute and be called 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 aim of the Convention is to provide a regime that is adequate, prompt and effective in awarding compensation for loss or damage to persons, property and the environment arising from the carriage of hazardous and noxious substances¹ by sea. The 2010 HNS Convention does not only cover pollution damage but also damage caused by other risks, such as fire and explosion.

¹ Hereinafter referred to as HNS.

A two-tier compensation system was introduced under which the shipowner is held liable for the loss or damage incurred up to a certain amount, which is covered by insurance. The second tier consists of a compensation fund, known as the HNS Fund, which provides compensation when, for some reason, the victims did not obtain compensation, or if the compensation was inadequate, from the shipowner or his insurer. Contributions to the Fund will be made out by those companies and other entities which receive HNS after sea transport in a State Party in excess of the thresholds laid down in the Convention.

Hereunder follows a brief historical discussion on what led the international community to adopt the 2010 HNS Protocol.

1.1 Historical Background

After the incident of the „*Torrey Canyon*“, in 1967, the international community believed that the new „International Convention on Civil Liability for Oil Pollution Damage“ adopted in 1969 by the International Maritime Consultative Organization,² (the International Maritime Organization“³ predecessor), dealing with oil pollution would also encompass pollution caused by hazardous and noxious substances. However, IMCO acknowledged that the carriage of chemical substances by sea entailed far more difficulties and complexities, considering the wide range of chemicals and substances being transported by various types and sizes of ships which led to other difficulties. For instance, the different types and sizes of vessels used in the carriage of HNS resulted in various difficulties in ensuring a uniform imposition of compulsory insurance requirements.⁴ Furthermore, since HNS cargoes were received by various parties, it was also deemed difficult to devise a compensation system which could levy contributions from the cargo interests.⁵ Thus, the issue regarding HNS was put aside for the time being and domestic tort law

² Hereinafter be referred to as IMCO.

³ Hereinafter be referred to as IMO.

⁴ Khee-Jin Tan, Alan; **Vessel-Source Marine Pollution: The Law and Politics of International Regulation**, Cambridge University Press, New York, (2006), p. 335.

⁵ Ibid.

was left responsible to resolve the matter. This ultimately proved that national regimes are highly inadequately equipped to deal with this subject.

In 1984, IMO convened a conference to consider a new instrument dealing with compensation for accidents involving HNS.⁶ However this was not successful as major cargo-owning countries resisted the imposition of liability on HNS-related damages. Disagreements focused particularly on:

- The extent of the cargo shipper's obligation to effect insurance and to assume liability for damage caused by HNS;
- The question of whether limits of liability should be invoked separately or reflect the „Convention on Limitation of Liability for Maritime Claims“ of 1976 provisions; and
- Whether HNS carried in package form, as opposed to bulk carriage, should also be covered under the relevant provisions.

Subsequently, States, particularly European States, threatened to take the matter into their own hands and apply their own law, forcing the IMO's Legal Committee to reconsider the HNS issue. Finally, an agreement was reached in 1996 on the adoption of the „International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea“. Khee-Jin Tan holds that the adoption of the HNS Convention was seen as a pro-active regulatory effort on behalf of IMO, since no major catastrophic HNS disasters had yet occurred.⁷ According to Shaw, although the 1996 Convention is long and complicated, this characteristic has not proved to be the stumbling block which restrained it from entering into force.⁸ The International Oil Pollution Compensation Funds (IOPC Funds) set up a

⁶ Official International Maritime Organization Website, <http://www.imo.org/OurWork/Legal/Pages/HNSConvention.aspx> 11 January 2011; see also Ibid.

⁷ Khee-Jin Tan, Alan; *op. cit.* p. 336.

⁸ Shaw, Richard; **News from Intergovernmental and International Organizations: News from IMO: IMO Diplomatic Conference adopts HNS Protocol on 30 April 2010**, Comité Maritime International (CMI), CMI Newsletter, No. 1 – January/March 2010, ISSN 0778-9882, pp. 8 - 11.

„Focus Group“ responsible for the identification of the principal reasons for the failure of the 1996 HNS Convention to attract the necessary number of ratifications by States for its entry into force. The „Focus Group“ highlighted four principal areas of concern:

- Contributions by the receivers of packaged HNS goods;
- Contributions to the Liquefied Natural Gas (LNG) account;
- Non-submission of contributing cargo reports; and
- The definition of „hazardous and noxious substances“.⁹

The work carried out by the Focus Group led to the preparation of a draft Protocol aimed at amending the original 1996 Convention text. At the last two meetings of the IMO Legal Committee, the draft Protocol was refined and the text was thereafter adopted by the Plenary Session of the Diplomatic Conference in April 2010.¹⁰

⁹ Shaw, Richard; *loc. cit.*

¹⁰ Ibid.

2. The 2010 HNS Convention

Hereunder is an analysis of the main issues under the Convention, wherein the focus shall be on the 2010 HNS Convention, i.e. the consolidated text of the 1996 HNS Convention together with the 2010 HNS Protocol.

2.1 Scope of Application

Initially, a long debate ensued on whether the Convention should cover cargo such as packaged HNS or be restricted to bulk cargo. Eventually, it was decided that the Convention shall cater for carriage of dangerous cargo whatever its form and volume.¹¹ Under Article 1.5, the 2010 HNS Convention specifically delineates what is meant by hazardous and noxious substances for the purposes of this Convention. Thus, HNS is defined as:

- (i) oils, carried in bulk, as defined in regulation 1 of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973[...];
 - (ii) Noxious liquid substances, carried in bulk, as defined in regulation 1.10 of Annex II to the International Convention for the Prevention of Pollution from Ships, 1973 [...] and those substances and mixtures provisionally categorized as falling in pollution category X, Y or Z in accordance with regulation 6.3 of the said Annex II;
 - (iii) Dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983 [...] and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed [...];
 - (iv) Dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code [...];
 - (v) Liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983 [...] and the products for which preliminary suitable conditions for the carriage have been prescribed [...];
 - (vi) Liquid substances carried in bulk with a flashpoint not exceeding 60°C [...];
 - (vii) Solid bulk materials possessing chemical hazards covered by the International Maritime Solid Bulk Cargoes Code [...]; and
- (b) residues from the previous carriage in bulk of substances referred to in (a) (i) to (iii) and (v) to (vii) above.

¹¹ Guner-Ozbek, Meltem Deniz; **The Carriage of Goods by Sea**, Hamburg Studies on Maritime Affairs, Springer, 2008, p. 260.

According to De La Rue and Anderson,¹² the inclusion of oil as the first substance is of particular importance as it recognizes the risk of fire and explosion damage which can result from the carriage of oil. This can also be said, with regards to the inclusion of residues from previous cargoes, especially when borne in mind that “the fumes emitted by residues of oil and other substances can in certain circumstances present a greater risk of fire and explosion on a vessel in ballast than on one carrying the substance in bulk.”¹³

The 2010 HNS Convention, also refrains from incorporating coal in its definition of HNS, and this created a long debate prior to the adoption of its predecessor, the 1996 HNS Convention, since there have been occasions in which certain types of coal have proven to be hazardous. Some States did in fact feel that the latter Convention should be as inclusive as possible. The reasoning behind its exclusion was that the carriage of coal is usually done in small quantities at a relatively low risk, and thus its inclusion would ultimately result in coal receivers¹⁴ bearing a disproportionate burden of contributions for the purposes of the Convention.

Significantly, whereas the CLC and the „International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage“ establish a system of compensation geared at „pollution damage“, the 2010 HNS Convention widens its perspective by

¹² De La Rue, Colin and Anderson, Charles B.; **Shipping and the Environment: Law and Practice**, Second Edition, Informa, London, (2009), p. 275.

¹³ Ibid at p. 274.

¹⁴ Under Article 1.4, a „receiver“ is:

- (a) the person who physically receives contributing cargo discharged in the ports and terminals of a State Party; provided that if at the time of receipt the person who physically receives the cargo acts as an agent for another who is subject to the jurisdiction of any State Party, then the principal shall be deemed to be the receiver, if the agent discloses the principal to the HNS Fund; or
- (b) The person in the State Party who in accordance with the national law of that State Party is deemed to be the receiver of contributing cargo discharged in the ports and terminals of a State Party, provided that the total contributing cargo received according to such national law is substantially the same as that which would have been received under (a).

catering not only for pollution but also for loss, damage or injury caused by HNS otherwise than by contamination, such as fire or explosion.¹⁵ „Damage“ under the HNS Convention refers to:

- (a) loss of life or personal injury on board or outside the ship carrying the hazardous and noxious substances caused by those substances;
- (b) Loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;
- (c) Loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and
- (d) The costs of preventive measures¹⁶ and further loss or damage caused by preventive measures.¹⁷

Furthermore, Article 1.6 of the 2010 HNS Convention specifies that in cases “where it is not reasonably possible to separate damage caused by the hazardous and noxious substances from that caused by other factors, all such damage shall be deemed to be caused by those hazardous and noxious substances”. Unless, such damage is caused by factors to which the HNS Convention does not apply, that is,

- (a) ...pollution damage as defined in the International Convention on Civil Liability for Oil Pollution Damage, 1969 [...];
- (b) To damage caused by a radioactive material of class 7 either in the International Maritime Dangerous Goods Code [...] or in the International Maritime Solid Bulk Cargoes Code [...]¹⁸

The 2010 HNS Convention applies to any damage caused within the territory of a State Party, including its territorial sea and any contamination of the environment caused in its exclusive economic zone¹⁹ established under international law. In default of such EEZ, it shall also apply

¹⁵ De La Rue, Colin and Anderson, Charles B.; *op. cit.*, p. 276.

¹⁶ Article 1.7 defines „preventive measures“ as “any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage.”

¹⁷ Article 1.6.

¹⁸ Article 4.3.

¹⁹ Hereinafter referred to as EEZ.

to any contamination in such area beyond and adjacent to the territorial sea of that State as determined under international law and extending up to 200 nautical miles. Article 3, extends the application of the Convention to damage, other than contamination, caused outside the territory of the State Party, however, caused by cargo carried onboard a ship registered under its jurisdiction or entitled to fly its flag. Finally, the Convention's applicability shall extend to preventive measures wherever taken to prevent or minimize such damage.²⁰

The Convention covers such claims for damage caused by the carriage of HNS by sea. However, these provisions shall not apply in those cases where under national law provisions regarding workers' compensation and social security schemes are incompatible with the Convention.²¹ Furthermore, its application does not extend to any warships, naval auxiliary or other ships owned or operated by the State and used only on Government non-commercial services, unless the State Party has decided otherwise and has notified the Secretary-General accordingly.²²

2.2 The Two-Tier Liability and Compensation System

Retaining the same structure as its predecessor, the 2010 HNS Convention was purposely drafted to consist of a two-tier system of liability and compensation. Thus, the first tier deals with the liability of the shipowner, whereas the second tier establishes an HNS Fund and the contributions to be done accordingly.

²⁰ Article 3.d.

²¹ Article 4.

²² Ibid.

2.2.1 The Liability of the Shipowner

2.2.1.1 Strict liability of the shipowner

The shipowner is strictly liable to pay compensation for any damage caused by the carriage of HNS onboard his vessel, unless the circumstances fall within one of the defences listed in the 2010 HNS Convention.²³ This means that such liability is not dependent upon the owner's fault or any other person he is responsible for. All that is necessary is to establish the causal link between the ship and the damage that ensued. Thus, for the purposes of this Convention the fact that the HNS that caused the damage was carried onboard the shipowner's vessel is sufficient to establish the shipowner's liability. Furthermore, such liability may not be attached to other persons connected with the operation of the vessel unless it may be proved that the damage resulted from their own recklessness or committed with intent to cause such damage.²⁴ This is to avoid unnecessary litigation.²⁵

(i) Defences available to the shipowner

The 2010 HNS Convention allows the shipowner to invoke certain defences that are similar to those found under the CLC. The shipowner may exonerate himself from liability if he proves:

- (a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (b) The damage was wholly caused by an act of omission done with the intent to cause damage to 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;

²³ Article 7.1.

²⁴ Article 7.5.

²⁵ **[Draft] IMO Guide for Interested Parties on the Workings of the Hazardous and Noxious Substances Convention 1996, (HNS Convention)**, LEG83/INF.3 para. 4.1; see also Guner-Ozbek, Meltem Deniz; *op. cit.*, p. 266.

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.²⁶

2.2.1.2 Limitation of Liability

A major concern during the drafting of the 1996 HNS Convention was that the limitation of liability of the shipowner established under other regimes in force at the time was too low when compared to the number of claims that would ensue after a catastrophic HNS incident. The 1996 HNS Convention and consequently the 2010 HNS Convention, thus, responded by not only introducing a second tier fund financed by cargo interests, but also increased the limit of the shipowner's liability to cater for such consequences should a disaster occur.²⁷

Article 9.1 of the 2010 HNS Convention distinguishes between bulk HNS and packaged HNS when it comes to calculating the limit of liability. Various countries called for the level of the shipowners' liability under the first tier to be increased. In fact, the level was increased with regards to packaged HNS up to 15%.²⁸ Therefore, Article 9.1 holds that the shipowner's liability shall be limited to an aggregate amount calculated as follows:

- (a) Where the damage has been caused by bulk HNS:
 - (i) 10 million units of account for a ship not exceeding 2,000 units of tonnage; and
 - (ii) For a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (a):
 - For each unit of tonnage from 2.001 to 50,000 units of tonnage, 1,500 units of account;
 - For each unit of tonnage in excess of 50,000 units of tonnage, 360 units of account

Provided, however, that this aggregate amount shall not in any event exceeds 100 million units of account.

- (b) Where the damage has been caused by packaged HNS [...]:

²⁶ Article 7.2.

²⁷ De La Rue, Colin and Anderson, Charles B.; *op. cit.*, p. 283 - 284.

²⁸ Shaw, Richard; *op. cit.*, p. 8 - 11; see also Martinez Gutierrez, Norman, A.; **Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes**, December 2010, Routledge, London/New York, p. 156.

- (i) 11.5 million units of account for a ship not exceeding 2,000 units of tonnage; and
- (ii) For a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
 - For each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,725 units of account;
 - For each unit of tonnage in excess of 50, 000 units of tonnage, 414 units of account;

Provided, however, that this aggregate amount shall not in any event exceed 115 million units of account.

Moreover, Article 9.2 states that if it results that the shipowner was responsible for the damage caused by acting recklessly or with the knowledge that such consequences would ensue, he would be denied the right to such limitation.

On 17 February 2004 the „Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976“ entered into force in Malta as a Legal Notice,²⁹ within which Malta reserved the right to exclude claims for damage within the meaning of the 1996 HNS Convention from occurrences that would take place after the coming into force of that Convention into Maltese Law. Although the above mentioned Legal Notice makes specific mention to the 1996 HNS Convention, once implemented as Subsidiary Legislation under the Laws of Malta the text encompasses any amendment or Protocol to that Convention, thus, applying to the 2010 HNS Convention.³⁰

2.2.1.3 Compulsory Insurance

Under Article 12, the 2010 HNS Convention holds that the shipowner is under an obligation to pay for an insurance coverage or other financial security, such as a bank guarantee of up to the limit of liability established under Article 9.1, explained above. The shipowner and his insurer are bound to guarantee the payment of compensation for any damages that result from an HNS incident. The shipowner is required to provide evidence of an insurance cover upon entry into

²⁹ **Merchant Shipping (Limitation of Liability for Maritime Claims) Regulations**, 2003, L.N. 361 of 2003, Article 11(1).

³⁰ **Limitation of Liability for Maritime Claims Regulations**, 2004, S.L.234.16, Article 11(1).

port of any State Party to the Convention by presenting a certificate.³¹ In those cases where the insurance coverage is presented to a State that has not as yet ratified the 2010 HNS Convention, other State Parties shall be responsible for issuing such certificate. This is similar to the provision established under the „Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969“. However, in the latter case, what is required is a blue card issued by Protection and Indemnity Clubs (P&I Clubs).³²

2.2.2 The HNS Fund

The HNS Fund was specifically established in order to cater for the payment of compensation to the victims suffering damage from HNS incidents in circumstances where for some reason the liability scheme provided under the first tier was inadequate or not available. However, as shall be pointed out, this Fund is not always liable to pay. Article 13 states that the HNS Fund shall be regarded as a juridical person having legal standing, and thus, may sue and be sued.

2.2.2.1 Liability of the HNS Fund

Article 14 states that the HNS Fund shall pay compensation to an HNS incident victim who has been “unable to obtain full and adequate compensation for the damage under the terms of chapter II:

- (a) Because no liability for the damage arises under chapter II;
- (b) Because the owner liable for the damage under chapter II is financially incapable of meeting the obligations under this Convention in full and any financial security that may be provided under chapter II does not cover or is insufficient to satisfy the claims for compensation for damage [...];
- (c) Because the damage exceeds the owner’s liability under the terms of chapter II.”

³¹ Article 12.

³² Guner-Ozbek, Meltem Deniz; *op. cit.*, p. 271.

The Convention also provides for defenses of force majeure or contributory negligence.³³ Moreover, where it is proved that there is a reasonable probability that the damage was caused by the victim himself or where the damage resulted from the negligence of such person the Fund shall be exonerated wholly or partially from its obligation to pay compensation. However, no such exoneration shall be possible in case of preventive measures.³⁴

(i) Limit of Compensation by the HNS Fund

The 2010 HNS Convention states that the aggregate compensation to be paid to the victim of any one incident shall not exceed 250 million units of account, inclusive of the amount paid by the shipowner or his insurer. Furthermore, the Convention stipulates that if the aggregate amount to be paid is less than the maximum sum allowed, then all claims will be paid in full. However, if the aggregate amount exceeds the maximum amount to be compensated, then payments will be made on a *pro rata* basis.

2.2.2.2 Contributions to the HNS Fund

Contributions will be made to the HNS Fund by HNS receivers who have received contributing cargo³⁵ in a State Party that exceeds the threshold allowed by the Convention. Such contributions will be paid in proportion to the quantities of HNS received by that person each year.

States shall be held liable for any financial losses incurred by the HNS Fund due to the fact that the required reports under Article 21 of the 2010 HNS Convention were not submitted. This report is a list which States are required to provide to the Director of the HNS Fund consisting of the name and address of receivers of quantities of contributing cargo exceeding the thresholds

³³ Article 14.

³⁴ *Ibid.*

³⁵ Article 1.10 states that “contributing cargo” means any bulk HNS which is carried by sea as cargo to a port or terminal in the territory of a State Party and discharged in that State. Cargo in transit which is transferred directly, or through a port or terminal, from one ship to another, either wholly or in part, in the course of carriage from the port or terminal of original loading to the port or terminal of final destination shall be considered as contributing cargo only in respect of receipt at the final destination.”

applicable during the preceding year together with the quantities of cargo received by each of such receivers. Article 21.5.b. states that the amount of contributions to the HNS Fund shall be invoiced to individual receivers, but in the case of LNG, the titleholder under article 19.1*bis*.b shall be liable to pay contributions. If this is done, then the 2010 HNS Convention stipulates that the Fund shall levy the remaining contributions by invoicing the receiver of the LNG cargo. Moreover, once ratified and until the Convention enters into force, State Parties are obliged to submit information to the IMO on contributing cargoes received. This will enable the Secretary-General of the IMO to determine the date of entry into force of the Convention.

However, Article 21*bis* deals with the issue of non-reporting States, a problem often encountered in the entry into force of the 1996 Convention. Furthermore, in default of satisfying the requirements under Article 21.2, the 2010 HNS Convention goes on to state that under Article 21*bis* the State Party shall be held liable for the loss suffered by the HNS Fund. Moreover, if an incident occurs, no damage will be paid for by the HNS Fund in respect of that State Party until the obligations listed under Article 21 have been complied with.

2.2.2.3 The HNS Fund Accounts

When fully operational, the HNS Fund will have four accounts consisting of:

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

Thus, it is possible that receivers of HNS might have to contribute to more than one account. However, levies applying to the individual receivers will be calculated in accordance to the quantities of contributing cargo received, and, in the case of the general account, in accordance

with Annex II of the Convention. The receiver will only be held liable to pay once his annual receipts of HNS exceed the thresholds listed hereunder:

Oil	Persistent oil	150,000 tons
Oil	Non-persistent oil	20,000 tons
LNG		No minimum quality
LPG		20,000 tons
Bulk solids and other HNS		20,000 tons

Each account will correspond to the cost of compensation payments arising from the damage caused by substances contributing to that account.³⁶ Moreover, such accounts will only begin to operate once the total quantity of contributing cargo in Member States during the preceding year, or another year as decided by the Assembly³⁷ of the HNS Fund, exceeds the following levels:

Oil account	350 million tons
LNG account	20 million tons
LPG account	15 million tons

Thus, due to the fact that initially there may not be a sufficient contribution basis in the form of the quantities of HNS received in State Parties to set up separate accounts, the HNS Fund may have only two accounts consisting of:

- (a) A separate account for oil; and
- (b) Another account with four sectors for LNG, LPG, bulk solids and other HNS.

³⁶ LEG83/INF.3, para.7.1; see also Guner-Ozbek, Meltem Deniz; *op. cit.*, p. 278.

³⁷ Article 24.

Interestingly, the HNS Convention is based on a system of post-event contributions, meaning that levies are only due once an HNS incident occurs. In fact, such levies may be spread over several years, depending on the incident.

2.2.3 Entry into Force

Article 46 of the 2010 HNS Convention states that the Convention will enter into force eighteen months after the date on which the following requirements are fulfilled:

- (a) at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it, and
- (b) The Secretary-General has received information in accordance with article 20, paragraphs 4 and 6, that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c) of the Convention, as amended by this Protocol, have received during the preceding calendar year a total quantity of at least 40 million tons of cargo contributing to the general account.

Such criteria ensure that there will be sufficient quantities to cover the financial burdens of the HNS Fund were an incident to arise once the Convention enters into force.

In December 2000, the EU incorporated the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1968 under Regulation 44/2001. This resulted in exercising „exclusive Community competence“. The HNS Convention includes provisions on the competent jurisdiction and the recognition and enforcement of judgments, and that exclusive jurisdiction shall be exercised by the Courts of that State wherein the shipowner, or his insurer, has constituted a fund. Thus, as a Member State of the European Union, Malta must not assume obligations that are outside Community institutions. A solution was proposed by the Commission in 2001 with respect to the HNS Convention, envisaging a Council decision authorizing Member States to ratify the Convention subject to a specific reservation allowing for

a continued application of Regulation 44/2001 as between Member States with regards to the recognition and enforcement of judgments.³⁸

³⁸ Guner-Ozbek, Meltem Deniz; *op. cit.*, p. 281 - 283.

3. The Importance of Implementation

As a maritime country that highly contributes to the shipping industry due to its strategic position in the middle of the Mediterranean Sea, it is extremely important for Malta to join in eliminating the risks posed by HNS. A major disaster of this sort would surely result in an unconceivable loss.

Moreover, on 10 March 2003 Malta ratified the „Protocol of 2000 to the International Convention on Oil Pollution Preparedness, Response and Cooperation relating to Pollution Incidents by Hazardous and Noxious Substances, 1990 („OPRC-HNS Protocol“), within which State Parties agreed to act promptly and effectively in order to contain and minimize the damage that would ensue from an HNS incident. They held that it was important to bear in mind that the principle of „polluter pays“ is a general principle of international environmental law and should be followed.

Since Malta has ratified the above mentioned Protocol, it should also ratify the 2010 HNS Convention which regulates the current *lacuna* in the law: who shall be liable to compensate were an HNS incident to occur? Until now, Malta has been regulating the matter of responding to such an incident without dealing with the issue of „liability and compensation“ in case such an incident should take place. Although, under Maltese law, the shipowner’s liability in all other cases of pollution damage is limited by the provisions of the LLMC given force of law in Malta by S.L 234.16, such provisions specifically exclude maritime claims for damage within the definition given under the 2010 HNS Convention.³⁹ Thence, as has been discussed above, once ratified, the 2010 HNS Convention will stipulate who shall be liable to compensate. In so doing, the Convention implements a two-tier compensation and liability system that will ensure the compensation of damages and losses suffered.

³⁹ Article 1.6.

4. The Implementation Process

After consultation with the officer responsible for the implementation of IMO Conventions into the Laws of Malta at Transport Malta, it was suggested that the most appropriate mode of implementation of this Convention would be to incorporate it as subsidiary legislation under the Merchant Shipping Act, Chapter 234 of the Laws of Malta, in the form of a Legal Notice. This would in turn make it easily accessible to the general public. The Merchant Shipping Act incorporates most maritime-related instruments in the form of Legal Notices. It specifically states that the Authority responsible for the execution of the provisions established under such Act will be the Authority for Transport in Malta established by the Authority for Transport in Malta Act, Chapter 499 of the Laws of Malta. Through the Authority, the Government of Malta shall endeavour to achieve to “standardize practices in the transport sector in Malta in line with international norms”, whilst promoting “policies that favour the development of Malta as a maritime hub in the Mediterranean”.⁴⁰

Furthermore, in accordance with the Ratification of Treaties Act, Article 375 of the Merchant Shipping Act stipulates that the Government of Malta is empowered to ratify or accede to treaties or conventions dealing with merchant shipping listed under sub-section (2) including protocols, annexes and appendices thereto, and the Minister shall make any regulations giving effect to the provisions thereof, which shall include the power to hold that in those cases where provisions of the Merchant Shipping Act conflict with those of the newly ratified or acceded treaty or convention, such provisions shall no longer be applicable. Article 375(2) makes specific mention to the 1996 HNS Convention. However, the same Article also provides for the possibility of any amendments or Protocols to be called for, and thereby extends to the 2010 Protocol and the 2010 HNS Convention.⁴¹

⁴⁰ **Authority for Transport in Malta Act**, (Cap. 499), Article 4(2).

⁴¹ **Merchant Shipping Act**, (Cap. 234), Article 375(5).

A draft Legal Notice is attached herewith, and Regulations have been drafted with the purpose of giving the provisions established under the 2010 HNS Convention force of law in Malta. Bearing in mind the „Merchant Shipping (Liability for Bunker Oil Pollution Damage) Regulations“ and the „Oil Pollution (Liability and Compensation) Act“, the same format and wording was followed for the purposes of consistency and uniformity.

Of particular importance are Regulations 3, 4 and 5 which deal with the scope of application of the 2010 HNS Convention provisions, recognize the HNS Fund as having legal personality in Malta and explain the procedure to be followed by the parties and the Court in claims resulting from damage caused by an incident covered by the 2010 HNS Convention. The Court designated by the Regulations to hear such claims shall be the Civil Court, First Hall, in accordance with the provisions stipulated in S.L.234.46 and Chapter 412 of the Laws of Malta wherein it is stated that the Civil Court, First Hall shall be responsible for maritime claims falling within their application.

Regulation 3.1 makes use of the words “Maltese waters”. Although it is advisable to use the phrase „territory of Malta, including the territorial sea and exclusive economic zone“ in line with the 2010 HNS Convention rather than „Maltese waters“, which is narrower in meaning, it has been decided to retain such words in order to follow the wording of both S.L.234.46 and Chapter 412 for consistency in drafting. Moreover, Regulation 3.3, in stipulating that actions for compensation shall be brought in Malta before the Civil Court, First Hall, states that it refers to incidents “sustained in Malta, including the territorial waters of Malta and any exclusive economic zone of Malta as may be established in accordance with international law, including waters enclosed in Malta’s contiguous zone claim and the waters superjacent to Malta’s continental shelf claim.” The question raised is why would there be any need to mention the contiguous zone and continental shelf when it is understood that if an incident occurs within Malta’s contiguous zone claim then it would fall within the ambit of Malta’s EEZ and if it does not then it is in accordance with the jurisdiction of the High Seas. Again, it has been decided that it would be best to retain the wording used in the above mentioned subsidiary legislation and Act

in order to ease the understanding and compliance therewith. Furthermore, in accordance with the provisions established under the „Merchant Shipping (Liability for Bunker Oil Pollution Damage) Regulations“ and the „Oil Pollution (Liability and Compensation) Act“, Regulation 5d states “all judicial terms for the filing of any written pleadings or other acts by the HNS Fund shall be extended by five working days and no such times may be abridged to less than five working days.” This ensures consistency and uniformity between the draft Regulations recommended herewith and the Liability and Compensation Legislation presently in force in Malta. Moreover, Regulation 8.2 ensures that Maltese law shall comply with legislation and decisions decided by other Courts belonging to Member States of the European Union. Thence, this provision guarantees that Maltese law is compliant with European legislation in accordance with European Council Decision 2002/971/EC⁴² and as requested by Regulation 44/2001 discussed above.

It is noteworthy that unlike Subsidiary Legislation 234.46,⁴³ the draft Regulations on liability and compensation in connection with the carriage of HNS by sea do not refer to the Merchant Shipping (Limitation of Liability for Maritime Claims) Regulations to provide for the limitation regime for the purposes of such draft Regulations. This is due to the fact that, as discussed above, such Regulations specifically exclude maritime claims falling within the ambit of the HNS Convention. The draft Regulations also have the 2010 HNS Convention attached therewith as a First Schedule together with its corresponding Annexes 1 and 2. Furthermore, for the purposes of the draft Regulations attached herewith, the term „HNS Convention“ refers to the 2010 HNS Convention consolidating the 1996 HNS Convention and the 2010 HNS Protocol, and has been defined as:

“the HNS Convention” means 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), consolidating the International

⁴² **Council Decision of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention)**, (2002/971/EC), Official Journal L 337, 13 December 2002, Vol. 45, p. 0055 at 0056.

⁴³ **Merchant Shipping (Liability for Bunker Oil Pollution Damage) Regulations**, 2009, S.L.234.46; Regulation 3.6.

Convention on Liability and Compensation for Damages in Connection with the Carriage of Hazardous and Noxious Substances by Sea, signed in London on the 3rd May, 1996, and superseded by the Protocol of 2010 thereto, signed in London on the 30th April, 2010, and found in the First Schedule to these Regulations, including any amendment or Protocol related thereto as may from time to time be ratified, acceded to or accepted by the Government of Malta and other instruments, standards and specifications of a mandatory nature related thereto adopted or developed by the International Maritime Organization (IMO).

**Merchant Shipping (Liability and Compensation for
Hazardous and Noxious Substances Damage)
Regulations**

SUBSIDIARY LEGISLATION 234.47

MERCHANT SHIPPING (LIABILITY AND COMPENSATION FOR HAZARDOUS AND NOXIOUS SUBSTANCES DAMAGE) REGULATIONS

___April, 2011

LEGAL NOTICE ___ of 2011

In exercise of the powers conferred by Article 375 of the Merchant Shipping Act, the Minister for Transport and Communications in consultation with the Malta Environment and Planning Authority and in concurrence with the Prime Minister and Minister of Finance has made the following Regulations:

PART 1

General Provisions

1. The Title of these Regulations is the Merchant Shipping (Liability and Compensation for Hazardous and Noxious Substances Damage) Regulations. Citation

2. (1) In these Regulations unless the context otherwise requires – Interpretation

“the Act” means the Merchant Shipping Act; Cap. 234

“the HNS Convention” means 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), consolidating the International Convention on Liability and Compensation for Damages in Connection with the Carriage of Hazardous and Noxious Substances by Sea, signed in London on the 3rd May, 1996, and superseded by the Protocol of 2010 thereto, signed in London on the 30th April, 2010, and found in the First Schedule to these

Regulations, including any amendment or Protocol related thereto as may from time to time be ratified, acceded to or accepted by the Government of Malta and other instruments, standards and specifications of a mandatory nature related thereto adopted or developed by the International Maritime Organization (IMO);

“the HNS Fund” means the International Hazardous and Noxious Substances Fund established under the provisions of the HNS Convention;

“the Minister” means the Minister responsible for shipping and includes any public officer, or an officer of any body corporate established by law, acting under his authority;

“Registrar-General” means the Registrar-General of Shipping and Seamen appointed under Article 363 of the Act and includes any person acting under his authority; Cap. 234

“territorial waters of Malta” shall have the same meaning as is assigned to the term in the Territorial Waters and Contiguous Zone Act. Cap. 226

(2) Unless otherwise defined in the Act or in these Regulations, or unless the context so required, words and expressions used in these Regulations shall have the same meaning assigned to them in the HNS Convention.

(3) Any reference in these Regulations to an international Convention or its related protocol or code shall include reference to any amendment to such Convention, protocol or code accepted by the Government of Malta.

3. (1) Subject to the provisions of Sub-Articles (2) to (5) of this Article, the HNS Convention as may from time to time be amended and as it is in force, shall, unless otherwise provided in these Regulations and notwithstanding the provisions of any other law, form part of and be enforceable as part of the Laws of Malta and shall apply to all Maltese ships, wherever they may be and to all other ships while they are in Maltese waters as determined by the said Convention. Certain provisions of the 2010 HNS Convention given force of law in Malta.

(2) Where any action is being brought in Malta in terms of the provisions of the HNS Convention any reference in that Convention to “the Court”, or to “the Court or other competent authority”, shall in each case be read and construed as reference to the Civil Court, First Hall.

(3) Where damage, resulting from an incident, has been sustained in Malta, including the territorial waters of Malta and any exclusive economic zone of Malta as may be established in accordance with international law or similar area determined by Malta in accordance with international law, including the waters enclosed in Malta's contiguous zone claim and the waters superjacent to Malta's continental shelf claim, or if measures have been taken to prevent or minimise such damage in that area, action for compensation under the provisions of the HNS Convention shall be brought in Malta before the Civil Court, First Hall, by presenting a claim before such Court. Such a claim shall be instituted in accordance with subtitle II of Title VIII of Part I of Book Second of the Code of Organization and Civil Procedure:

Cap. 12

Provided that where any such exclusive economic zone or any such similar area has been established by Malta, the Minister shall by Order in the Gazette prescribe that the provisions of these Regulations shall also apply to such exclusive economic zone or such similar area as may be established in such Order.

(4) The Civil Court, First Hall, shall determine the distribution of compensation by the HNS Fund, and where such fund is insufficient to satisfy the claims of those who are entitled to compensation, the amount of compensation of each claimant shall be reduced *pro rata*.

(5) The appropriate authority for the purpose of issuing the certificate attesting that insurance or other financial security is in force, as referred to in Article 12(2) of the HNS Convention, in respect of ships registered in Malta shall be the Registrar-General who shall for the purposes of Article 12(7) of that Convention and subject to the provisions of the same Convention and of these Regulations determine the conditions of issue and validity of such certificate and, in respect of ships registered in a State not a Party to the HNS Convention shall be the said Registrar-General who shall have such powers as aforesaid, or the appropriate authority of a State Party to the Convention, in accordance with the provisions thereof:

Provided that a certificate referred to in Sub-Article (5) in respect of a ship registered under the Malta flag, issued before the entry into force of these Regulations by another State Party to the HNS Convention shall remain valid until such date stated on the said certificate.

4. (1) In accordance with Article 13(2) of the HNS Convention, the HNS Fund shall be recognized as a legal person capable under the Laws of Malta of assuming rights and obligations and of being a party in legal proceedings before the Court, and the Director referred to in the said Article and defined under Article 1(15) of the HNS Convention shall also be recognized as the legal representative of the HNS Fund.

Certain provisions regulating the HNS Fund given force of law in Malta.

(2) Any person who in a calendar year has received contributing cargo shall pay initial contributions and, as required, annual contributions to the HNS Fund in accordance with Articles 16, 18 and 19 of the HNS Convention.

(3) Any person who in a calendar year has received contributing cargo so as to be liable to contribute to the HNS Fund pursuant to Articles 18 or 19 of the HNS Convention, shall, not later than the 1st March of the following year, inform the Minister of the quantity of such contributing cargo received by him.

(4) The Minister shall, at a time and in the manner prescribed in the internal regulations of the HNS Fund, communicate the information mentioned Article 21 of the HNS Convention to the Director of the HNS Fund.

(5) (a) For the purposes of this Sub-Article “associated person” means a company or other body corporate which in either case is another company’s subsidiary, associate or holding company, or is the manager of or managed by, or otherwise controls or is controlled by that body corporate or a subsidiary or associate of that body corporate’s holding company – and associate of a body corporate means a body corporate being the subsidiary of the same holding company.

(b) Any person having received in a calendar year contributing cargo in ports of other installations in Malta in the manner specified in Articles 18 and 19 of the HNS Convention in total quantities exceeding

-
(i) 20,000 tonnes of contributing cargo for the purposes of Article 18 of that Convention;
or

- (ii) 150,000 tonnes of contributing oil or 20,000 tonnes of other oil for the purposes of Article 19 of that Convention,

shall pay an annual contribution to the HNS Fund in accordance with Articles 18 and 19 of that Convention in the amount and by the date determined by the HNS Fund Assembly:

Provided that, notwithstanding that the quantity received in Malta in a calendar year by any such person does not exceed the limits specified in the respective Sub-Articles but when aggregated with the quantity of contributing cargo received in the same calendar year in Malta by any associated person or persons exceeds the limits specified, such person shall pay contributions in respect of the actual quantity received by him.

(6) Where damage resulting from an incident, as defined in Article 1 of the HNS Convention, has been sustained in Malta, including the territorial waters of Malta and any area determined by an Order of the Minister made for the purposes of the proviso to Article 4(4) of these Regulations, or if measures have been taken to prevent or minimise such damage in that area, any action against the HNS Fund for compensation under Article 14 of the HNS Convention shall be brought in Malta before the Civil Court, First Hall.

(7) The notification to the HNS Fund under Article 39(7) of the HNS Convention shall be made by means of a judicial act against the HNS Fund and notified in the office of the Minister.

(8) The HNS Fund shall be entitled to take action against defaulting contributors before the Civil Court, First Hall.

5. Notwithstanding the provisions of any other law –

Procedure

- (a) the Civil Court, First Hall shall have jurisdiction to try and determine cases and actions that in accordance with these Regulations are to be brought before it;
- (b) when a written pleading or other judicial act is to be filed against the HNS Fund, it shall be sufficient if in such pleading or act there

is designated the HNS Fund and it shall not be necessary in such pleading or act to name the office or the name of the person for the time being holding the office having, in accordance with the constitution of the HNS Fund, the judicial representation of that Fund;

- (c) the pleadings and acts referred to in paragraph (b) of this Article shall be notified at the office of the Minister who shall within five working days transmit the same to the headquarters of the HNS Fund through the Ministry responsible for Foreign Affairs;
- (d) all judicial terms for the filing of any written pleadings or other acts by the HNS Fund shall be extended by five working days and no such times may be abridged to less than five working days.

6. It shall be the duty of the registered owner of the ship and of the master to ensure that the ship is in compliance with the provisions of these Regulations and such person, if in fault, shall be liable to the penalties provided for in the Act, and if no such penalty is provided, such person shall for each offence be liable to a fine (multa) not exceeding 500 units.

Duty to ensure compliance

7. (1) No Maltese ship to which Article 12 of the HNS Convention applies shall proceed or attempt to proceed to sea unless there is in force in respect of the ship the certificate referred to in Article 12(2) to the HNS Convention.

Prohibition of proceeding to sea without appropriate certificate

(2) No foreign flagged ship to which Article 12 of the HNS Convention applies shall proceed or attempt to proceed to ports, installations or the territorial waters of Malta unless there is in force in respect of the ship the certificate referred to in Article 12(2) of the HNS Convention.

(3) The master of every ship to which Sub-Article (2) applies shall, at the time when clearance for the ship is demanded, produce to the designated officer from whom such clearance is demanded, the certificate referred to in the said Sub-Article, and clearance shall not be granted, until the said certificate is so produced.

8. (1) Judgments of foreign courts having jurisdiction under Article 40 of the HNS Convention and adjudicating compensation for damage, as defined in Article 1(6) of the HNS Convention, are recognized and declared enforceable in Malta, unless:

Judgments of foreign courts.

- (a) the judgment was fraudulently obtained;
- (b) the defendant was not given reasonable notice and a fair opportunity to present his case.

(2) Judgments on matters covered by the HNS Convention shall, when given by a court of a Member State to which Decision 2002/971/EC applies, other than a court of the Republic of Denmark, be recognized and enforced in Malta according to the relevant internal Community rules.

9. (1) Without prejudice to the powers conferred by Article 10 of these Regulations, the Minister may make regulations, rules or orders, or give instructions, as are necessary for carrying into effect of the provisions of the HNS Convention.

Power to make regulations.

(2) Any power conferred on the Minister by these Regulations to make regulations, rules or orders or to give instructions, shall include power –

- (a) to vary, alter, substitute or repeal any such regulation, rule, order or instruction, without prejudice to the making of a new regulation, rule or order, or the giving of a new instruction;
- (b) to prescribe that any person liable to make any contribution under these Regulations shall give such security for the payment thereof as may be prescribed;
- (c) to make such transitional or other incidental or supplementary provision as may appear to the Minister to be appropriate;
- (d) to prescribe anything that may be or is to be prescribed under these Regulations.

(3) Regulations, rules and orders made under any of the provisions of these Regulations, may be made in the English language only.

10. (1) The Schedules to these Regulations shall be in the English language only, and such text shall apply also to the Maltese text of these Regulations.

Language and
amendment of
Schedules

(2) The Minister may by regulations amend, add to, vary, revoke or substitute the Schedules to these Regulations to conform with any amendments to the HNS Convention, made in accordance with the said Convention and accepted by the Government of Malta and may by any such regulations alter the reference in any Article of these Regulations to any provision of the HNS Convention by a reference to such provision of the Convention which in accordance with any amendment thereto accepted by the Government of Malta replaces such provision.

PART 2

First Schedule

Text of 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“) and Annex I and II annexed thereto.

Chapter I - General Provisions

Definitions

Article 1

For the purposes of this Convention:

1. “Ship” means any seagoing vessel and seaborne craft, of any type whatsoever.
2. “Person” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.
3. “Owner” means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, “owner” shall mean such company.
4. “Receiver” means either:
 - (a) the person who physically receives contributing cargo discharged in the ports and terminals of a State Party; provided that if at the time of receipt the person who physically receives the cargo acts as an agent for another who is subject to the jurisdiction of any State Party, then the principal shall be deemed to be the receiver, if the agent discloses the principal to the HNS Fund; or
 - (b) the person in the State Party who in accordance with the national law of that State Party is deemed to be the receiver of contributing cargo discharged in the ports and terminals of a State Party, provided that the total contributing cargo received according to

such national law is substantially the same as that which would have been received under (a).

5. "Hazardous and noxious substances (HNS)" means:
- (a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:
 - (i) oils, carried in bulk, as defined in regulation 1 of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended;
 - (ii) noxious liquid substances, carried in bulk, as defined in regulation 1.10 of Annex II to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances and mixtures provisionally categorized as falling in pollution category X, Y or Z in accordance with regulation 6.3 of the said Annex II;
 - (iii) dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, as amended, and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code;
 - (iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, as amended;
 - (v) liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, as amended, and the products for which preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code;

- (vi) liquid substances carried in bulk with a flashpoint not exceeding 60°C (measured by a closed-cup test);
 - (vii) solid bulk materials possessing chemical hazards covered by the International Maritime Solid Bulk Cargoes Code, as amended, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code in effect in 1996, when carried in packaged form; and
- (b) residues from the previous carriage in bulk of substances referred to in (a) (i) to (iii) and (v) to (vii) above.

5bis. "Bulk HNS" means any hazardous and noxious substances referred to in article 1, paragraph 5(a) (i) to (iii) and (v) to (vii) and paragraph 5(b).

5ter. "Packaged HNS" means any hazardous and noxious substances referred to in article 1, paragraph 5(a) (iv).

6. "Damage" means:

- (a) loss of life or personal injury on board or outside the ship carrying the hazardous and noxious substances caused by those substances;
- (b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;
- (c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and
- (d) the costs of preventive measures and further loss or damage caused by preventive measures.

Where it is not reasonably possible to separate damage caused by the hazardous and noxious substances from that caused by other factors, all such damage shall be deemed to be caused by the hazardous and noxious substances except if, and to the extent that, the damage caused by other factors is damage of a type referred to in article 4, paragraph 3.

In this paragraph, "caused by those substances" means caused by the hazardous or noxious nature of the substances.

7. "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage.

8. “Incident” means any occurrence or series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage.

9. “Carriage by sea” means the period from the time when the hazardous and noxious substances enter any part of the ship's equipment, on loading, to the time they cease to be present in any part of the ship's equipment, on discharge. If no ship's equipment is used, the period begins and ends respectively when the hazardous and noxious substances cross the ship's rail.

10. "Contributing cargo" means any bulk HNS which is carried by sea as cargo to a port or terminal in the territory of a State Party and discharged in that State. Cargo in transit which is transferred directly, or through a port or terminal, from one ship to another, either wholly or in part, in the course of carriage from the port or terminal of original loading to the port or terminal of final destination shall be considered as contributing cargo only in respect of receipt at the final destination.

11. The “HNS Fund” means the International Hazardous and Noxious Substances Fund established under article 13.

12. “Unit of account” means the Special Drawing Right as defined by the International Monetary Fund.

13. “State of the ship's registry” means in relation to a registered ship the State of registration of the ship, and in relation to an unregistered ship the State whose flag the ship is entitled to fly.

14. “Terminal” means any site for the storage of hazardous and noxious substances received from waterborne transportation, including any facility situated off-shore and linked by pipeline or otherwise to such site.

15. “Director” means the Director of the HNS Fund.

16. “Organization” means the International Maritime Organization.

17. “Secretary-General” means the Secretary-General of the Organization.

Annexes

Article

2

The Annexes to this Convention shall constitute an integral part of this Convention.

**Scope of
application**

Article 3

This Convention shall apply exclusively:

- (a) to any damage caused in the territory, including the territorial sea, of a State Party;
- (b) to damage by contamination of the environment caused in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;
- (c) to damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and
- (d) to preventive measures, wherever taken, to prevent or minimize such damage as referred to in (a), (b) and (c) above.

Article 4

1. This Convention shall apply to claims, other than claims arising out of any contract for the carriage of goods and passengers, for damage arising from the carriage of hazardous and noxious substances by sea.

2. This Convention shall not apply to the extent that its provisions are incompatible with those of the applicable law relating to workers' compensation or social security schemes.

3. This Convention shall not apply:

- (a) to pollution damage as defined in the International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended, whether or not

*MERCHANT SHIPPING (LIABILITY AND COMPENSATION FOR
HAZARDOUS AND NOXIOUS SUBSTANCES DAMAGE)* [S. 234.47]

compensation is payable in respect of it under that
Convention; and

(b) to damage caused by a radioactive material of class 7 either in the International Maritime Dangerous Goods Code, as amended, or in the International Maritime Solid Bulk Cargoes Code, as amended.

4. Except as provided in paragraph 5, the provisions of this Convention shall not apply to warships, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service.

5. A State Party may decide to apply this Convention to its warships or other vessels described in paragraph 4, in which case it shall notify the Secretary-General thereof specifying the terms and conditions of such application.

6. With respect to ships owned by a State Party and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in article 38 and shall waive all defences based on its status as a sovereign State.

Article 5

1. A State may, at the time of ratification, acceptance, approval of, or accession to, this Convention, or any time thereafter, declare that this Convention does not apply to ships:

- (a) which do not exceed 200 gross tonnage; and
- (b) which carry hazardous and noxious substances only in packaged form; and
- (c) while they are engaged on voyages between ports or facilities of that State.

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

3. Any State which has made the declaration under paragraph 1 or 2 may withdraw such declaration at any time.

4. A declaration made under paragraph 1 or 2, and the withdrawal of the declaration made under paragraph 3, shall be deposited with the Secretary-General who shall, after the entry into force of this Convention, communicate it to the Director.

5. The HNS Fund is not liable to pay compensation for damage caused by substances carried by a ship to which the Convention does not apply pursuant to a declaration made under paragraph 1 or 2, to the extent that:

- (a) the damage as defined in article 1, paragraph 6(a),
- (b) or (c) was caused in:

- (i) the territory, including the territorial sea, of the State which has made the declaration, or in the case of neighbouring States which have made a declaration under paragraph 2, of either of them; or
 - (ii) the exclusive economic zone, or area mentioned in article 3(b), of the State or States referred to in (i);
- (b) the damage includes measures taken to prevent or minimize such damage.

Duties of State

Parties

Article 6

Each State Party shall ensure that any obligation arising under this Convention is fulfilled and shall take appropriate measures under its law including the imposing of sanctions as it may deem necessary, with a view to the effective execution of any such obligation.

Chapter II -

Liability Liability

of the owner

Article 7

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

2. No liability shall attach to the owner if the owner proves that:

- (a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or

- (c) the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function; or
- (d) the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped either
 - (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.

3. If the owner proves that the damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from liability to such person.

4. No claim for compensation for damage shall be made against the owner otherwise than in accordance with this Convention.

5. Subject to paragraph 6, no claim for compensation for damage under this Convention or otherwise may be made against:

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

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

6. Nothing in this Convention shall prejudice any existing right of recourse of the owner against any third party, including, but not limited to, the shipper or the receiver of the substance causing the damage, or the persons indicated in paragraph 5.

Incidents involving two or more

ships Article 8

1. Whenever damage has resulted from an incident involving two or more ships each of which is carrying hazardous and noxious substances, each owner, unless exonerated under article 7, shall be liable for the damage. The owners shall be jointly and severally liable for all such damage which is not reasonably separable.

2. However, owners shall be entitled to the limits of liability applicable to each of them under article 9.

3. Nothing in this article shall prejudice any right of recourse of an owner against any other owner.

Limitation of

liability

Article 9

1. The owner of a ship shall be entitled to limit liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:

- (a) Where the damage has been caused by bulk HNS:
- (i) 10 million units of account for a ship not exceeding 2,000 units of tonnage; and
 - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
 - for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 units of account;
 - for each unit of tonnage in excess of 50,000 units of tonnage, 360 units of account;
- provided, however, that this aggregate amount shall not in any event exceed 100 million units of account.
- (b) Where the damage has been caused by packaged HNS, or where the damage has been caused by both bulk HNS and packaged HNS, or where it is not possible to determine whether the damage originating from that ship has been caused by bulk HNS or by packaged HNS:

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- (i) 11.5 million units of account for a ship not exceeding 2,000 units of tonnage; and

- (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
 - for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,725 units of account;
 - for each unit of tonnage in excess of 50,000 units of tonnage, 414 units of account;

provided, however, that this aggregate amount shall not in any event exceed 115 million units of account.

2. The owner shall not be entitled to limit liability under this Convention if it is proved that the damage resulted from the personal act or omission of the owner, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

3. The owner shall, for the purpose of benefitting from the limitation provided for in paragraph 1, constitute a fund for the total sum representing the limit of liability established in accordance with paragraph 1 with the court or other competent authority of any one of the States Parties in which action is brought under article 38 or, if no action is brought, with any court or other competent authority in any one of the States Parties in which an action can be brought under article 38. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the law of the State Party where the fund is constituted, and considered to be adequate by the court or other competent authority.

4. Subject to the provisions of article 11, the fund shall be distributed among the claimants in proportion to the amounts of their established claims.

5. If before the fund is distributed the owner or any of the servants or agents of the owner or any person providing to the owner insurance or other financial security has as a result of the incident in question, paid compensation for damage, such person shall, up to the amount that person has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

6. The right of subrogation provided for in paragraph 5 may also be exercised by a person other than those mentioned therein in respect of any amount of compensation for damage which such person may have paid but only to the extent that such subrogation is permitted under the applicable national law.

7. Where owners or other persons establish that they may be compelled to pay at a later date in whole or in part any such amount of compensation, with regard to which the right of subrogation would have been enjoyed under paragraphs 5 or 6 had

the compensation been paid before the fund was distributed, the court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce the claim against the fund.

8. Claims in respect of expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize damage shall rank equally with other claims against the fund.

9. (a) The amounts mentioned in paragraph 1 shall be converted into national currency on the basis of the value of that currency by reference to the Special Drawing Right on the date of the constitution of the fund referred to in paragraph 3. The value of the national currency, in terms of the Special Drawing Right, of a State Party which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect on the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a State Party which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.

(b) Nevertheless, a State Party which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 9(a) may, at the time of ratification, acceptance, approval of or accession to this Convention or at any time thereafter, declare that the unit of account referred to in paragraph 9(a) shall be equal to 15 gold francs. The gold franc referred to in this paragraph corresponds to sixty-five-and-a-half milligrammes of gold of millesimal fineness nine hundred. The conversion of the gold franc into the national currency shall be made according to the law of the State concerned.

(c) The calculation mentioned in the last sentence of paragraph 9(a) and the conversion mentioned in paragraph 9(b) shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in paragraph 1 as would result from the application of the first two sentences of paragraph 9(a). States Parties shall communicate to the Secretary-General the manner of calculation pursuant to paragraph

9(a), or the result of the conversion in paragraph 9(b) as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

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

11. The insurer or other person providing financial security shall be entitled to constitute a fund in accordance with this article on the same conditions and having the same effect as if it were constituted by the owner. Such a fund may be constituted even if, under the provisions of paragraph 2, the owner is not entitled to limitation of liability, but its constitution shall in that case not prejudice the rights of any claimant against the owner.

Article 10

1. Where the owner, after an incident, has constituted a fund in accordance with article 9 and is entitled to limit liability:

- (a) no person having a claim for damage arising out of that incident shall be entitled to exercise any right against any other assets of the owner in respect of such claim; and
- (b) the court or other competent authority of any State Party shall order the release of any ship or other property belonging to the owner which has been arrested in respect of a claim for damage arising out of that incident, and shall similarly release any bail or other security furnished to avoid such arrest.

2. The foregoing shall, however, only apply if the claimant has access to the court administering the fund and the fund is actually available in respect of the claim.

Death and injury

Article 11

Claims in respect of death or personal injury have priority over other claims save to the extent that the aggregate of such claims

exceeds two-thirds of the total amount established in accordance with article 9, paragraph 1.

Compulsory insurance of the owner Article 12

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

2. A compulsory insurance certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party such compulsory insurance certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. 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.

3. The compulsory insurance certificate shall be in the official language or languages of the issuing State. If the language used is neither English, nor French nor Spanish, the text shall include a translation into one of these languages.

4. The compulsory insurance certificate shall be carried on board the ship and a copy shall be deposited with the authorities who keep the record of the ship's registry or, if the ship is not

registered in a State Party, with the authority of the State issuing or certifying the certificate.

5. An insurance or other financial security shall not satisfy the requirements of this article if it can cease, for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate under paragraph 2, before three months have elapsed from the date on which notice of its termination is given to the authorities referred to in paragraph 4, unless the compulsory insurance certificate has been issued within the said period. The foregoing provisions shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this article.

6. The State of the ship's registry shall, subject to the provisions of this article, determine the conditions of issue and validity of the compulsory insurance certificate.

7. Compulsory insurance certificates issued or certified under the authority of a State Party in accordance with paragraph 2 shall be accepted by other States Parties for the purposes of this Convention and shall be regarded by other States Parties as having the same force as compulsory insurance certificates issued or certified by them even if issued or certified in respect of a ship not registered in a State Party. A State Party may at any time request consultation with the issuing or certifying State should it believe that the insurer or guarantor named in the compulsory insurance certificate is not financially capable of meeting the obligations imposed by this Convention.

8. Any claim for compensation for damage may be brought directly against the insurer or other person providing financial security for the owner's liability for damage. In such case the defendant may, even if the owner is not entitled to limitation of liability, benefit from the limit of liability prescribed in accordance with paragraph 1. The defendant may further invoke the defences (other than the bankruptcy or winding up of the owner) which the owner would have been entitled to invoke. Furthermore, the defendant may invoke the defence that the damage resulted from the wilful misconduct of the owner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the owner against the defendant. The defendant shall in any event have the right to require the owner to be joined in the proceedings.

9. Any sums provided by insurance or by other financial security maintained in accordance with paragraph 1 shall be available exclusively for the satisfaction of claims under this Convention.

10. A State Party shall not permit a ship under its flag to which this article applies to trade unless a certificate has been issued under paragraph 2 or 12.

11. Subject to the provisions of this article, each State Party shall ensure, under its national law, that insurance or other security in the sums specified in paragraph 1 is in force in respect of any ship, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an offshore facility in its territorial sea.

12. If insurance or other financial security is not maintained in respect of a ship owned by a State Party, the provisions of this article relating thereto shall not be applicable to such ship, but the ship shall carry a compulsory insurance certificate issued by the appropriate authorities of the State of the ship's registry stating that the ship is owned by that State and that the ship's liability is covered within the limit prescribed in accordance with paragraph 1. Such a compulsory insurance certificate shall follow as closely as possible the model prescribed by paragraph 2.

Chapter III - Compensation By The International Hazardous And Noxious Substances Fund (HNS Fund) Establishment of the HNS Fund

Article 13

1. The International Hazardous and Noxious Substances Fund (HNS Fund) is hereby established with the following aims:

- (a)* to provide compensation for damage in connection with the carriage of hazardous and noxious substances by sea, to the extent that the protection afforded by chapter II is inadequate or not available; and
- (b)* to give effect to the related tasks set out in article 15.

2. The HNS Fund shall in each State Party be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State. Each State Party shall recognize the Director as the legal representative of the HNS Fund.

Compensation Article 14

1. For the purpose of fulfilling its function under article 13, paragraph 1(a), the HNS Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of chapter II:

- (a) because no liability for the damage arises under chapter II;
- (b) because the owner liable for the damage under chapter II is financially incapable of meeting the obligations under this Convention in full and any financial security that may be provided under chapter II does not cover or is insufficient to satisfy the claims for compensation for damage; an owner being treated as financially incapable of meeting these obligations and a financial security being treated as insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under chapter II after having taken all reasonable steps to pursue the available legal remedies;
- (c) because the damage exceeds the owner's liability under the terms of chapter II.

2. Expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimize damage shall be treated as damage for the purposes of this article.

3. The HNS Fund shall incur no obligation under the preceding paragraphs if:

- (a) it proves that the damage resulted from an act of war, hostilities, civil war or insurrection or was caused by hazardous and noxious substances which had escaped or been discharged from a warship or other ship owned or operated by a State and used, at the time of the incident, only on Government non-commercial service; or
- (b) the claimant cannot prove that there is a reasonable probability that the damage resulted from an incident involving one or more ships.

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

person. The HNS Fund shall in any event be exonerated to the extent that the owner may have been exonerated under article 7, paragraph 3. However, there shall be no such exonerated of the HNS Fund with regard to preventive measures.

5.
 - (a) Except as otherwise provided in subparagraph (b), the aggregate amount of compensation payable by the HNS Fund under this article shall in respect of any one 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.
 - (b) The aggregate amount of compensation payable by the HNS Fund under this article for damage resulting from a natural phenomenon of an exceptional, inevitable and irresistible character shall not exceed 250 million units of account.
 - (c) Interest accrued on a fund constituted in accordance with article 9, paragraph 3, if any, shall not be taken into account for the computation of the maximum compensation payable by the HNS Fund under this article.
 - (d) The amounts mentioned in this article shall be converted into national currency on the basis of the value of that currency with reference to the Special Drawing Right on the date of the decision of the Assembly of the HNS Fund as to the first date of payment of compensation.

6. Where the amount of established claims against the HNS Fund exceeds the aggregate amount of compensation payable under paragraph 5, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Convention shall be the same for all claimants. Claims in respect of death or personal injury shall have priority over other claims, however, save to the extent that the aggregate of such claims exceeds two-thirds of the total amount established in accordance with paragraph 5.

7. The Assembly of the HNS Fund may decide that, in exceptional cases, compensation in accordance with this Convention can be paid even if the owner has not constituted a fund in accordance with chapter II. In such cases paragraph 5(d) applies accordingly.

Related tasks of the HNS

Fund Article 15

For the purpose of fulfilling its function under article 13, paragraph 1(a), the HNS Fund shall have the following tasks:

- (a) to consider claims made against the HNS Fund; 187
- (b) to prepare an estimate in the form of a budget for each calendar year of:

Expenditure:

- (i) costs and expenses of the administration of the HNS Fund in the relevant year and any deficit from operations in the preceding years; and
- (ii) payments to be made by the HNS Fund in the relevant year;

Income:

- (iii) surplus funds from operations in preceding years, including any interest;
 - (iv) initial contributions to be paid in the course of the year;
 - (v) annual contributions if required to balance the budget; and
 - (vi) any other income;
- (c) to use at the request of a State Party its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or mitigate damage arising from an incident in respect of which the HNS Fund may be called upon to pay compensation under this Convention; and
 - (d) to provide, on conditions laid down in the internal regulations, credit facilities with a view to the taking of preventive measures against damage arising from a particular incident in respect of which the HNS Fund may be called upon to pay compensation under this Convention.

General provisions on contributions Article 16

1. The HNS Fund shall have a general account, which shall be divided into sectors.
2. The HNS Fund shall, subject to article 19, paragraphs 3 and 4, also have separate accounts in respect of:
 - (a) oil as defined in article 1, paragraph 5(a)(i) (oil account);
 - (b) liquefied natural gases of light hydrocarbons with methane as the main constituent (LNG) (LNG account); and
 - (c) liquefied petroleum gases of light hydrocarbons with propane and butane as the main constituents (LPG) (LPG account).
3. There shall be initial contributions and, as required, annual contributions to the HNS Fund.
4. Contributions to the HNS Fund shall be made into the general account in accordance with article 18, to separate accounts in accordance with article 19 and to either the general account or separate accounts in accordance with article 20 or article 21, paragraph 5. Subject to article 19, paragraph 6, the general account shall be available to compensate damage caused by hazardous and noxious substances covered by that account, and a separate account shall be available to compensate damage caused by a hazardous and noxious substance covered by that account.
5. For the purposes of article 18, article 19, paragraph 1(a)(i), paragraph 1(a)(ii) and paragraph 1(b), article 20 and article 21, paragraph 5, where the quantity of a given type of contributing cargo received in the territory of a State Party by any person in a calendar year when aggregated with the quantities of the same type of cargo received in the same State Party in that year by any associated person or persons exceeds the limit specified in the respective subparagraphs, such a person shall pay contributions in respect of the actual quantity received by that person notwithstanding that that quantity did not exceed the respective limit.
6. “Associated person” means any subsidiary or commonly controlled entity. The question whether a person comes within this definition shall be determined by the national law of the State concerned.

General provisions on annual contributions Article 17

1. Annual contributions to the general account and to each separate account shall be levied only as required to make payments by the account in question.

2. Annual contributions payable pursuant to articles 18, 19 and article 21, paragraph 5, shall be determined by the Assembly and shall be calculated in accordance with those articles on the basis of the units of contributing cargo received during the preceding calendar year or such other year as the Assembly may decide.

3. The Assembly shall decide the total amount of annual contributions to be levied to the general account and to each separate account. Following that decision the Director shall, in respect of each State Party, calculate for each person liable to pay contributions in accordance with article 18, article 19, paragraph 1 and paragraph *1bis*, and article 21, paragraph 5, the amount of that person's annual contribution to each account, on the basis of a fixed sum for each unit of contributing cargo reported in respect of the person during the preceding calendar year or such other year as the Assembly may decide. For the general account, the above-mentioned fixed sum per unit of contributing cargo for each sector shall be calculated pursuant to the regulations contained in Annex II to this Convention. For each separate account, the fixed sum per unit of contributing cargo referred to above shall be calculated by dividing the total annual contribution to be levied to that account by the total quantity of cargo contributing to that account.

4. The Assembly may also levy annual contributions for administrative costs and decide on the distribution of such costs between the sectors of the general account and the separate accounts.

5. The Assembly shall also decide on the distribution between the relevant accounts and sectors of amounts paid in compensation for damage caused by two or more substances which fall within different accounts or sectors, on the basis of an estimate of the extent to which each of the substances involved contributed to the damage.

Annual contributions to the general

account Article 18

1. Subject to article 16, paragraph 5, annual contributions to the general account shall be made in respect of each State Party by any person who was the receiver in that State in the preceding calendar year, or such other year as the Assembly may decide, of aggregate quantities exceeding 20,000 tonnes of contributing cargo, other than substances referred to in article 19, paragraph 1 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.

2. Annual contributions shall also be payable to the general account by persons who would have been liable to pay contributions to a separate account in accordance with article 19, paragraph 1 and paragraph *1bis*, had its operation not been postponed or suspended in accordance with article 19. Each separate account the operation of which has been postponed or suspended under article 19 shall form a separate sector within the general account.

Annual contributions to separate accounts Article 19

1. Subject to article 16, paragraph 5, annual contributions to separate accounts shall be made in respect of each State Party:

- (a) in the case of the oil account,
 - (i) by any person who has received in that State in the preceding calendar year, or such other year as the Assembly may decide, total quantities exceeding 150,000 tonnes of contributing oil as defined in article 1, paragraph 3 of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, as amended, 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 decide, of total quantities exceeding 20,000 tonnes of other oils carried in bulk listed in appendix I of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended;
 - (b) in the case of the LPG account, by any person who in the preceding calendar year, or such other year as the Assembly may decide, was the receiver in that State of total quantities exceeding 20,000 tonnes of LPG.
- 1bis.** (a) In the case of the LNG account, subject to article 16, paragraph 5, annual contributions to the LNG account shall be made in respect of each State Party by any person who in the preceding calendar year, or such other year as the Assembly may decide, was the receiver in that State of any quantity of LNG.
- (b) However, any contributions shall be made by the person who, immediately prior to its discharge, held title to an LNG cargo discharged in a port or terminal of that State (the titleholder) where:
 - (i) the titleholder has entered into an agreement with the receiver that the titleholder shall make such contributions; and
 - (ii) the receiver has informed the State Party that such an agreement exists.
 - (c) If the titleholder referred to in subparagraph (b) above does not make the contributions or any part thereof, the receiver shall make the remaining contributions. The Assembly shall determine in the internal regulations the circumstances under which the titleholder shall be considered as not having made the contributions and the arrangements in accordance with which the receiver shall make any remaining contributions.
 - (d) Nothing in this paragraph shall prejudice any rights of recourse or reimbursement of the receiver that may arise between the receiver and the titleholder under the applicable law.

2 Subject to paragraph 3, the separate accounts referred to in paragraph 1 and paragraph 1bis above shall become effective at the same time as the general account.

3. The initial operation of a separate account referred to in article 16, paragraph 2 shall be postponed until such time as the quantities of contributing cargo in respect of that account during the preceding calendar year, or such other year as the Assembly may decide, exceed the following levels:

- (a) 350 million tonnes of contributing cargo in respect of the oil account;
- (b) 20 million tonnes of contributing cargo in respect of the LNG account; and
- (c) 15 million tonnes of contributing cargo in respect of the LPG account.

4. The Assembly may suspend the operation of a separate account if:

- (a) the quantities of contributing cargo in respect of that account during the preceding calendar year fall below the respective level specified in paragraph 3; or
- (b) when six months have elapsed from the date when the contributions were due, the total unpaid contributions to that account exceed ten per cent of the most recent levy to that account in accordance with paragraph 1.

5. The Assembly may reinstate the operation of a separate account which has been suspended in accordance with paragraph 4.

6. Any person who would be liable to pay contributions to a separate account the operation of which has been postponed in accordance with paragraph 3 or suspended in accordance with paragraph 4, shall pay into the general account the contributions due by that person in respect of that separate account. For the purpose of calculating future contributions, the postponed or suspended separate account shall form a new sector in the general account and shall be subject to the HNS points system defined in Annex II.

Initial contributions Article 20

1. In respect of each State Party, initial contributions shall be made of an amount which shall, for each person liable to pay contributions in accordance with article 16, paragraph 5, articles 18, 19 and article 21, paragraph 5, be calculated on the basis of a fixed sum, equal for the general account and each separate account, for each unit of contributing cargo received in that State during the

calendar year preceding that in which this Convention enters into force for that State.

2. The fixed sum and the units for the different sectors within the general account as well as for each separate account referred to in paragraph 1 shall be determined by the Assembly.

3. Initial contributions shall be paid within three months following the date on which the HNS Fund issues invoices in respect of each State Party to persons liable to pay contributions in accordance with paragraph 1.

Reports Article 21

1. Each State Party shall ensure that any person liable to pay contributions in accordance with articles 18, 19 or paragraph 5 of this article appears on a list to be established and kept up to date by the Director in accordance with the provisions of this article.

2. For the purposes set out in paragraph 1, each State Party shall communicate to the Director, at a time and in the manner to be prescribed in the internal regulations of the HNS Fund, the name and address of any person who in respect of the State is liable to pay contributions in accordance with articles 18, 19 or paragraph 5 of this article, as well as data on the relevant quantities of contributing cargo for which such a person is liable to contribute in respect of the preceding calendar year.

3. For the purposes of ascertaining who are, at any given time, the persons liable to pay contributions in accordance with articles 18, 19 or paragraph 5 of this article and of establishing, where applicable, the quantities of cargo to be taken into account for any such person when determining the amount of the contribution, the list shall be prima facie evidence of the facts stated therein.

4. If in a State Party there is no person liable to pay contributions in accordance with articles 18, 19 or paragraph 5 of this article, that State Party shall, for the purposes of this Convention, inform the Director of the HNS Fund thereof.

5. In respect of contributing cargo carried from one port or terminal of a State Party to another port or terminal located in the same State and discharged there, States Parties shall have the option of submitting to the HNS Fund a report with an annual aggregate quantity for each account covering all receipts of contributing cargo, including any quantities in respect of which contributions are payable pursuant to article 16, paragraph 5. The State Party shall, at the time of reporting, either:

- (a) notify the HNS Fund that that State will pay the aggregate amount for each account in respect of the relevant year in one lump sum to the HNS Fund; or
- (b) instruct the HNS Fund to levy the aggregate amount for each account by invoicing individual receivers, or, in the case of LNG, the titleholder if article 19, paragraph 1*bis*(b) is applicable, for the amount payable by each of them. If the titleholder does not make the contributions or any part thereof, the HNS Fund shall levy the remaining contributions by invoicing the receiver of the LNG cargo. These persons shall be identified in accordance with the national law of the State concerned.

**Non-
reporting**

Article

21*bis*

1. Where a State Party does not fulfil its obligations under article 21, paragraph 2, and this results in a financial loss for the HNS Fund, that State Party shall be liable to compensate the HNS Fund for such loss. The Assembly shall, upon recommendation of the Director, decide whether such compensation shall be payable by a State.

2. No compensation for any incident shall be paid by the HNS Fund for damage in the territory, including the territorial sea of a State Party in accordance with article 3(a), the exclusive economic zone or other area of a State Party in accordance with article 3(b), or damage in accordance with article 3(c) in respect of a given incident or for preventive measures, wherever taken, in accordance with article 3(d), until the obligations under article 21, paragraphs 2 and 4, have been complied with in respect of that State Party for all years prior to the occurrence of an incident for which compensation is sought. The Assembly shall determine in the internal regulations of the HNS Fund the circumstances under which a State Party shall be considered as not having fulfilled these obligations.

3. Where compensation has been denied temporarily in

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accordance with paragraph 2, compensation shall be denied permanently if the obligations under article 21, paragraphs 2 and 4, have not been fulfilled within one year after the Director has notified the State Party of its failure to fulfil these obligations.

4. Any payments of contributions due to the HNS Fund shall be set off against compensation due to the debtor, or the debtor's agents.

5. Paragraphs 2 to 4 shall not apply to claims in respect of death or personal injury.

Non-payment of contributions Article 22

1. The amount of any contribution due under articles 18, 19, 20 or article 21, paragraph 5 and which is in arrears shall bear interest at a rate which shall be determined in accordance with the internal regulations of the HNS Fund, provided that different rates may be fixed for different circumstances.

2. Where a person who is liable to pay contributions in accordance with articles 18, 19, 20 or article 21, paragraph 5 does not fulfil the obligations in respect of any such contribution or any part thereof and is in arrears, the Director shall take all appropriate action, including court action, against such a person on behalf of the HNS Fund with a view to the recovery of the amount due. However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor.

Optional liability of States Parties for the payment of contributions

Article 23

1. Without prejudice to article 21, paragraph 5, a State Party may, at the time when it signs without reservation as to ratification, acceptance or approval, or deposits its instrument of ratification, acceptance, approval or accession or at any time thereafter, declare that it assumes responsibility for obligations imposed by this Convention on any person liable to pay contributions in accordance with articles 18, 19, 20 or article 21, paragraph 5, in respect of hazardous and noxious substances received in the territory of that State. Such a declaration shall be made in writing and shall specify which obligations are assumed.

2 Where a declaration under paragraph 1 is made prior to the entry into force of this Convention in accordance with article 46, it shall be deposited with the Secretary-General who shall after the entry into force of this Convention communicate the declaration to the Director.

3 A declaration under paragraph 1 which is made after the entry into force of this Convention shall be deposited with the Director.

4 A declaration made in accordance with this article may be withdrawn by the relevant State giving notice thereof in writing to the Director. Such a notification shall take effect three months after the Director's receipt thereof.

5 Any State which is bound by a declaration made under this article shall, in any proceedings brought against it before a competent court in respect of any obligation specified in the declaration, waive any immunity that it would otherwise be entitled to invoke.

Organization and administration Article 24

The HNS Fund shall have an Assembly and a Secretariat headed by the Director.

Assemb

ly

Article

25

The Assembly shall consist of all States Parties to this Convention.

Article 26

The functions of the Assembly shall be:

- (a) to elect at each regular session its President and two Vice-Presidents who shall hold office until the next regular session;

- (b) to determine its own rules of procedure, subject to the provisions of this Convention;
- (c) to develop, apply and keep under review internal and financial regulations relating to the aim of the

- HNS Fund as described in article 13, paragraph 1(a), and the related tasks of the HNS Fund listed in article 15;
- (d) to appoint the Director and make provisions for the appointment of such other personnel as may be necessary and determine the terms and conditions of service of the Director and other personnel;
 - (e) to adopt the annual budget prepared in accordance with article 15(b);
 - (f) to consider and approve as necessary any recommendation of the Director regarding the scope of definition of contributing cargo;
 - (g) to appoint auditors and approve the accounts of the HNS Fund;
 - (h) to approve settlements of claims against the HNS Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with article 14 and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of damage are compensated as promptly as possible;
 - (i) to establish a Committee on Claims for Compensation with at least 7 and not more than 15 members and any temporary or permanent subsidiary body it may consider to be necessary, to define its terms of reference and to give it the authority needed to perform the functions entrusted to it; when appointing the members of such body, the Assembly shall endeavour to secure an equitable geographical distribution of members and to ensure that the States Parties are appropriately represented; the Rules of Procedure of the Assembly may be applied, *mutatis mutandis*, for the work of such subsidiary body;
 - (j) to determine which States not party to this Convention, which Associate Members of the Organization and which intergovernmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Assembly and subsidiary bodies;
 - (k) to give instructions concerning the administration of the HNS Fund to the Director and subsidiary bodies;
 - (l) to supervise the proper execution of this Convention and of its own decisions;

- (m) to review every five years the implementation of this Convention with particular reference to the performance of the system for the calculation of levies and the contribution mechanism for domestic trade; and
- (n) to perform such other functions as are allocated to it under this Convention or are otherwise necessary for the proper operation of the HNS Fund.

Article 27

1. Regular sessions of the Assembly shall take place once every calendar year upon convocation by the Director.
2. Extraordinary sessions of the Assembly shall be convened by the Director at the request of at least one-third of the members of the Assembly and may be convened on the Director's own initiative after consultation with the President of the Assembly. The Director shall give members at least thirty days' notice of such sessions.

Article 28

A majority of the members of the Assembly shall constitute a quorum for its meetings.

Secretariat Article 29

1. The Secretariat shall comprise the Director and such staff as the administration of the HNS Fund may require.
2. The Director shall be the legal representative of the HNS Fund.

Article 30

1. The Director shall be the chief administrative officer of the HNS Fund. Subject to the instructions given by the Assembly, the Director shall perform those functions which are assigned to the Director by this Convention, the internal regulations of the HNS Fund and the Assembly.

2. The Director shall in particular:

- (a) appoint the personnel required for the administration of the HNS Fund;
- (b) take all appropriate measures with a view to the proper administration of the assets of the HNS Fund;
- (c) collect the contributions due under this Convention while observing in particular the provisions of article 22, paragraph 2;
- (d) to the extent necessary to deal with claims against the HNS Fund and to carry out the other functions of the HNS Fund, employ the services of legal, financial and other experts;
- (e) take all appropriate measures for dealing with claims against the HNS Fund, within the limits and on conditions to be laid down in the internal regulations of the HNS Fund, including the final settlement of claims without the prior approval of the Assembly where these regulations so provide;
- (f) prepare and submit to the Assembly the financial statements and budget estimates for each calendar year;
- (g) prepare, in consultation with the President of the Assembly, and publish a report on the activities of the HNS Fund during the previous calendar year; and
- (h) prepare, collect and circulate the documents and information which may be required for the work of the Assembly and subsidiary bodies.

Article 31

In the performance of their duties the Director and the staff and experts appointed by the Director shall not seek or receive instructions from any Government or from any authority external to the HNS Fund. They shall refrain from any action which might adversely reflect on their position as international officials. Each

State Party on its part undertakes to respect the exclusively international character of the responsibilities of the Director and the staff and experts appointed by the Director, and not to seek to influence them in the discharge of their duties.

Finances Article 32

1 Each State Party shall bear the salary, travel and other expenses of its own delegation to the Assembly and of its representatives on subsidiary bodies.

2 Any other expenses incurred in the operation of the HNS Fund shall be borne by the HNS Fund.

Voting Article 33

The following provisions shall apply to voting in the Assembly:

- (a) each member shall have one vote;
- (b) except as otherwise provided in article 34, decisions of the Assembly shall be made by a majority vote of the members present and voting;
- (c) decisions where a two-thirds majority is required shall be a two-thirds majority vote of members present; and
- (d) for the purpose of this article the phrase “members present” means “members present at the meeting at the time of the vote”, and the phrase “members present and voting” means “members present and casting an affirmative or negative vote”. Members who abstain from voting shall be considered as not voting.

Article 34

The following decisions of the Assembly shall require a two-thirds majority:

- (a) a decision under article 19, paragraphs 4 or 5 to suspend or reinstate the operation of a separate account;
- (b) a decision under article 22, paragraph 2, not to take or continue action against a contributor;
- (c) the appointment of the Director under article 26(d);
- (d) the establishment of subsidiary bodies, under article 26(i), and matters relating to such establishment; and
- (e) a decision under article 51, paragraph 1, that this Convention shall continue to be in force.

x exemptions and currency regulations Article 35

1. The HNS Fund, its assets, income, including contributions, and other property necessary for the exercise of its functions as described in article 13, paragraph 1, shall enjoy in all States Parties exemption from all direct taxation.

2. When the HNS Fund makes substantial purchases of movable or immovable property, or of services which are necessary for the exercise of its official activities in order to achieve its aims as set out in article 13, paragraph 1, the cost of which include indirect taxes or sales taxes, the Governments of the States Parties shall take, whenever possible, appropriate measures for the remission or refund of the amount of such duties and taxes. Goods thus acquired shall not be sold against payment or given away free of charge unless it is done according to conditions approved by the Government of the State having granted or supported the remission or refund.

3. No exemption shall be accorded in the case of duties, taxes or dues which merely constitute payment for public utility services.

4. The HNS Fund shall enjoy exemption from all customs duties, taxes and other related taxes on articles imported or exported by it or on its behalf for its official use. Articles thus imported shall not be transferred either for consideration or gratis on the territory of the country into which they have been imported except on conditions agreed by the Government of that country.

5. Persons contributing to the HNS Fund as well as victims and owners receiving compensation from the HNS Fund shall be subject to the fiscal legislation of the State where they are taxable, no special exemption or other benefit being conferred on them in this respect.

6. Notwithstanding existing or future regulations concerning currency or transfers, States Parties shall authorize the transfer and payment of any contribution to the HNS Fund and of any compensation paid by the HNS Fund without any restriction.

Confidentiality of information Article 36

Information relating to individual contributors supplied for the purpose of this Convention shall not be divulged outside the HNS Fund except in so far as it may be strictly necessary to enable the HNS Fund to carry out its functions including the bringing and defending of legal proceedings.

Chapter IV - Claims And

Actions Limitation of actions

Article 37

1. Rights to compensation under chapter II shall be extinguished unless an action is brought thereunder within three years from the date when the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the owner.

2. Rights to compensation under chapter III shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to article 39, paragraph 7, within three years from the date when the person suffering the damage knew or ought reasonably to have known of the damage.

3. In no case, however, shall an action be brought later than ten years from the date of the incident which caused the damage.

4. Where the incident consists of a series of occurrences, the ten-year period mentioned in paragraph 3 shall run from the date of the last of such occurrences.

jurisdiction in respect of action against the owner Article 38

1. Where an incident has caused damage in the territory, including the territorial sea or in an area referred to in article 3(b), of one or more States Parties, or preventive measures have been taken to prevent or minimize damage in such territory including the territorial sea or in such area, actions for compensation may be brought against the owner or other person providing financial security for the owner's liability only in the courts of any such States Parties.

2. Where an incident has caused damage exclusively outside the territory, including the territorial sea, of any State and either the conditions for application of this Convention set out in article 3(c) have been fulfilled or preventive measures to prevent or minimize such damage have been taken, actions for compensation may be brought against the owner or other person providing financial security for the owner's liability only in the courts of:

- (a) the State Party where the ship is registered or, in the case of an unregistered ship, the State Party whose flag the ship is entitled to fly; or
- (b) the State Party where the owner has habitual residence or where the principal place of business of the owner is established; or
- (c) the State Party where a fund has been constituted in accordance with article 9, paragraph 3.

3. Reasonable notice of any action taken under paragraph 1 or 2 shall be given to the defendant.

4. Each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under this Convention.

5. After a fund under article 9 has been constituted by the owner or by the insurer or other person providing financial security in accordance with article 12, the courts of the State in which such fund is constituted shall have exclusive jurisdiction to determine all matters relating to the apportionment and distribution of the fund.

**Jurisdiction in respect of action against the HNS
Fund or taken by the HNS Fund**

Article 39

1. Subject to the subsequent provisions of this article, any action against the HNS Fund for compensation under article 14 shall be brought only before a court having jurisdiction under article 38 in respect of actions against the owner who is liable for damage caused by the relevant incident or before a court in a State Party which would have been competent if an owner had been liable.

2. In the event that the ship carrying the hazardous or noxious substances which caused the damage has not been identified, the provisions of article 38, paragraph 1, shall apply mutatis mutandis to actions against the HNS Fund.

3. Each State Party shall ensure that its courts have jurisdiction to entertain such actions against the HNS Fund as are referred to in paragraph 1.

4. Where an action for compensation for damage has been brought before a court against the owner or the owner's guarantor, such court shall have exclusive jurisdiction over any action against the HNS Fund for compensation under the provisions of article 14 in respect of the same damage.

5. Each State Party shall ensure that the HNS Fund shall have the right to intervene as a party to any legal proceedings instituted in accordance with this Convention before a competent court of that State against the owner or the owner's guarantor.

6. Except as otherwise provided in paragraph 7, the HNS Fund shall not be bound by any judgement or decision in proceedings to which it has not been a party or by any settlement to which it is not a party.

7. Without prejudice to the provisions of paragraph 5, where an action under this Convention for compensation for damage has been brought against an owner or the owner's guarantor before a competent court in a State Party, each party to the proceedings shall be entitled under the national law of that State to notify the HNS Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the HNS Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgement rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgement was given, become binding upon the HNS Fund in the sense that the facts and findings in that

judgement may not be disputed by the HNS Fund even if the HNS Fund has not actually intervened in the proceedings.

Recognition and enforcement Article 40

1. Any judgement given by a court with jurisdiction in accordance with article 38, which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

- (a) where the judgement was obtained by fraud; or
- (b) where the defendant was not given reasonable notice and a fair opportunity to present the case.

2. A judgement recognized under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.

3. Subject to any decision concerning the distribution referred to in article 14, paragraph 6, any judgement given against the HNS Fund by a court having jurisdiction in accordance with article 39, paragraphs 1 and 3 shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each State Party.

Subrogation and recourse Article 41

1. The HNS Fund shall, in respect of any amount of compensation for damage paid by the HNS Fund in accordance with article 14, paragraph 1, acquire by subrogation the rights that the person so compensated may enjoy against the owner or the owner's guarantor.

2. Nothing in this Convention shall prejudice any rights of recourse or subrogation of the HNS Fund against any person, including persons referred to in article 7, paragraph 2(d), other than those referred to in the previous paragraph, in so far as they can limit their liability. In any event the right of the HNS Fund to subrogation against such persons shall not be less favourable than

that of an insurer of the person to whom compensation has been paid.

3. Without prejudice to any other rights of subrogation or recourse against the HNS Fund which may exist, a State Party or agency thereof which has paid compensation for damage in accordance with provisions of national law shall acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

Supersession clause Article 42

This Convention shall supersede any convention in force or open for signature, ratification or accession at the date on which this Convention is opened for signature, but only to the extent that such convention would be in conflict with it; however, nothing in this article shall affect the obligations of States Parties to States not party to this Convention arising under such convention.

Chapter V - Transitional

Provisions Information on

contributing cargo Article 43

When depositing an instrument referred to in article 45, paragraph 3, and annually thereafter until this Convention enters into force for a State, that State shall submit to the Secretary-General data on the relevant quantities of contributing cargo received or, in the case of LNG, discharged in that State during the preceding calendar year in respect of the general account and each separate account.

First session of the

Assembly Article 44

The Secretary-General shall convene the first session of the Assembly. This session shall take place as soon as possible after

the entry into force of this Convention and, in any case, not more than thirty days after such entry into force.

Chapter VI - Final Clauses

Final clauses of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010

Article 44bis

The final clauses of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 2010 shall be the final clauses of 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.

, ratification, acceptance, approval and accession Article 45

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

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

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

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

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

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

6. Each State which has expressed its consent to be bound by this Protocol shall annually thereafter on or before 31 May until this Protocol enters into force for that State, submit to the Secretary-General 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.

7. A State which has expressed its consent to be bound by this Protocol and which has not submitted the data on contributing cargo required under paragraph 6 for any relevant years shall, before the entry into force of the Protocol for that State, be temporarily suspended from being a Contracting State until it has submitted the required data.

8. A State which has expressed its consent to be bound by the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 shall be deemed to have withdrawn this consent on the date on which it has signed this Protocol or deposited an instrument of ratification, acceptance, approval or accession in accordance with paragraph 2.

Entry into force Article 46

1. This Protocol shall enter into force eighteen months after the date on which the following conditions are fulfilled:

- (a) at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it; and
- (b) the Secretary-General has received information in accordance with article 20, paragraphs 4 and 6, that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.

2. For a State which expresses its consent to be bound by this Protocol after the conditions for entry into force have been met, such consent shall take effect three months after the date of expression of such consent, or on the date on which this Protocol enters into force in accordance with paragraph 1, whichever is the later.

Revision and amendment Article 47

1. A conference for the purpose of revising or amending the Convention, as amended by this Protocol, may be convened by the Organization.
2. The Secretary-General shall convene a conference of the States Parties to this Protocol, for revising or amending the Convention, as amended by this Protocol, at the request of six States Parties or one third of the States Parties, whichever is the higher figure.
3. Any instrument of ratification, acceptance, approval or accession deposited after the date of entry into force of an amendment to the Convention, as amended by this Protocol, shall be deemed to apply to the Convention as amended.

Amendment of limits Article 48

1. Without prejudice to the provisions of article 47, the special procedure in this article shall apply solely for the purposes of amending the limits set out in article 9, paragraph 1, and article 14, paragraph 5, of the Convention, as amended by this Protocol.
2. Upon the request of at least one half, but in no case less than six, of the States Parties, any proposal to amend the limits specified in article 9, paragraph 1, and article 14, paragraph 5, of the Convention, as amended by this Protocol, shall be circulated by the Secretary-General to all Members of the Organization and to all Contracting States.
3. Any amendment proposed and circulated in accordance with paragraph 2 shall be submitted to the Legal Committee of the Organization (the Legal Committee) for consideration at a date at least six months after the date of its circulation.
4. All Contracting States, whether or not Members of the Organization, shall be entitled to participate in the proceedings of the Legal Committee for the consideration and adoption of amendments.
5. Amendments shall be adopted by a two-thirds majority of the Contracting States present and voting in the Legal Committee, expanded as provided in paragraph 4, on condition that at least one half of the Contracting States shall be present at the time of voting.

6. When acting on a proposal to amend the limits, the Legal Committee shall take into account the experience of incidents, in particular the amount of damage resulting therefrom, changes in the monetary values, and the effect of the proposed amendment on the cost of insurance. It shall also take into account the relationship between the limits established in article 9, paragraph 1, and those in article 14, paragraph 5, of the Convention, as amended by this Protocol.

7. (a) No amendment of the limits under this article may be considered less than five years from the date this Protocol was opened for signature nor less than five years from the date of entry into force of a previous amendment under this article.

(b) No limit may be increased so as to exceed an amount which corresponds to a limit laid down in this Protocol increased by six per cent per year calculated on a compound basis from the date on which this Protocol was opened for signature.

(c) No limit may be increased so as to exceed an amount which corresponds to a limit laid down in this Protocol multiplied by three.

8. Any amendment adopted in accordance with paragraph 5 shall be notified by the Organization to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of eighteen months after the date of notification, unless within that period no less than one-fourth of the States which were Contracting States at the time of the adoption of the amendment have communicated to the Secretary-General that they do not accept the amendment, in which case the amendment is rejected and shall have no effect.

9. An amendment deemed to have been accepted in accordance with paragraph 8 shall enter into force eighteen months after its acceptance.

10. All Contracting States shall be bound by the amendment, unless they denounce this Protocol in accordance with article 49, paragraphs 1 and 2, at least six months before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

11. When an amendment has been adopted but the eighteen month period for its acceptance has not yet expired, a State which becomes a Contracting State during that period shall be bound by the amendment if it enters into force. A State which becomes a Contracting State after that period shall be bound by an amendment which has been accepted in accordance with paragraph 8. In the cases referred to in this paragraph, a State becomes bound

by an amendment when that amendment enters into force, or when this Protocol enters into force for that State, if later.

Denunciation Article 49

1. This Protocol may be denounced by any State Party at any time after the expiry of one year following the date on which this Protocol comes into force for that State.

2. Denunciation shall be effected by the deposit of an instrument to that effect with the Secretary-General.

3. A denunciation shall take effect twelve months, or such longer period as may be specified in the instrument of denunciation, following its receipt by the Secretary-General.

4. Notwithstanding a denunciation by a State Party pursuant to this article, any provisions of this Protocol relating to obligations to make contributions under articles 18, 19 or article 21, paragraph 5, of the Convention, as amended by this Protocol, in respect of such payments of compensation as the Assembly may decide relating to an incident which occurs before the denunciation takes effect shall continue to apply.

Extraordinary sessions of the Assembly Article 50

1. Any State Party may, within ninety days after the deposit of an instrument of denunciation the result of which it considers will significantly increase the level of contributions from the remaining States Parties, request the Director to convene an extraordinary session of the Assembly. The Director shall convene the Assembly to meet not less than sixty days after receipt of the request.

2. The Director may take the initiative to convene an extraordinary session of the Assembly to meet within sixty days after the deposit of any instrument of denunciation, if the Director considers that such denunciation will result in a significant increase in the level of contributions from the remaining States Parties.

3. If the Assembly, at an extraordinary session convened in accordance with paragraph 1 or 2, decides that the denunciation will result in a significant increase in the level of contributions from the remaining States Parties, any such State may, not later than one hundred and twenty days before the date on which the denunciation takes effect, denounce this Protocol with effect from the same date.

Cessatio

n Article

51

1. This Protocol shall cease to be in force:
 - (a) on the date when the number of States Parties falls below six; or
 - (b) twelve months after the date on which data concerning a previous calendar year were to be communicated to the Director in accordance with article 21, of the Convention, as amended by this Protocol, if the data show that the total quantity of contributing cargo to the general account in accordance with article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, received in the States Parties in that preceding calendar year was less than 30 million tonnes.

Notwithstanding subparagraph (b), if the total quantity of contributing cargo to the general account in accordance with article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, received in the States Parties in the preceding calendar year was less than 30 million tonnes but more than 25 million tonnes, the Assembly may, if it considers that this was due to exceptional circumstances and is not likely to be repeated, decide before the expiry of the above-mentioned twelve month period that the Protocol shall continue to be in force. The Assembly may not, however, take such a decision in more than two subsequent years.

2. States which are bound by this Protocol on the day before the date it ceases to be in force shall enable the HNS Fund to exercise its functions as described under article 52 and shall, for that purpose only, remain bound by this Protocol.

Winding up of the HNS Fund Article 52

1. If this Protocol ceases to be in force, the HNS Fund shall nevertheless:
 - (a) meet its obligations in respect of any incident occurring before this Protocol ceased to be in force; and
 - (b) be entitled to exercise its rights to contributions to the extent that these contributions are necessary to meet the obligations under (a), including expenses for the administration of the HNS Fund necessary for this purpose.
2. The Assembly shall take all appropriate measures to complete the winding up of the HNS Fund including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the HNS Fund.
3. For the purposes of this article the HNS Fund shall remain a legal person.

Depositary Article 53

1. This Protocol and any amendment adopted under article 48 shall be deposited with the Secretary-General.
2. The Secretary-General shall:
 - (a) inform all States which have signed this Protocol or acceded thereto, and all Members of the Organization, of:
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession together with the date thereof and data on contributing cargo submitted in accordance with article 20, paragraph 4;
 - (ii) data on contributing cargo submitted annually thereafter, in accordance with article 20, paragraph 6, until the date of entry into force of this Protocol;
 - (iii) the date of entry into force of this Protocol;
 - (iv) any proposal to amend the limits on the amounts of compensation which has been

- made in accordance with article 48,
paragraph 2;
- (v) any amendment which has been adopted in accordance with article 48, paragraph 5;
 - (vi) any amendment deemed to have been accepted under article 48, paragraph 8, together with the date on which that amendment shall enter into force in accordance with article 48, paragraph 9;
 - (vii) the deposit of any instrument of denunciation of this Protocol together with the date on which it is received and the date on which the denunciation takes effect; and
 - (viii) any communication called for by any article in this Protocol; and
- (b) transmit certified true copies of this Protocol to all States that have signed this Protocol or acceded thereto.

3. As soon as this Protocol enters into force, a certified true copy thereof shall be transmitted by the depositary to the Secretary-General of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Languages Article 54

This Protocol is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT London this thirtieth day of April two thousand and ten.
IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Protocol.

ANNEXE

S

ANNEX

I

**CERTIFICATE OF INSURANCE OR OTHER FINANCIAL
SECURITY IN
RESPECT OF LIABILITY FOR DAMAGE CAUSED BY
HAZARDOUS AND NOXIOUS SUBSTANCES (HNS)**

Issued in accordance with the provisions of 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

Name of ship	Distinctive number or letters	IMO ship identification number	Port of registry	Name and full address of the principal place of business of the owner

This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of 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.

Type of security

Duration of security

Name and address of the insurer(s) and/or guarantor(s)

Name

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Address

This certificate is valid until

Issued or certified by the Government of
(Full designation of the State)
At _____ On _____
(Place) (Date)
(Signature and Title of issuing or certifying official)

Explanatory Notes:

- 1 If desired, the designation of the State may include a reference to the competent public authority of the country where the certificate is issued.
- 2 If the total amount of security has been furnished by more than one source, the amount of each of them should be indicated.
- 3 If security is furnished in several forms, these should be enumerated.
- 4 The entry "Duration of the Security" must stipulate the date on which such security takes effect.
- 5 The entry "Address" of the insurer(s) and/or guarantor(s) must indicate the principal place of business of the insurer(s) and/or guarantor(s). If appropriate, the place of business where the insurance or other security is established shall be indicated.

ANNEX II - Regulations For The Calculation Of Annual 489 Contributions To The General Account

Regulation 1

1. The fixed sum referred to in article 17, paragraph 3 shall be determined for each sector in accordance with these regulations.
2. When it is necessary to calculate contributions for more than one sector of the general account, a separate fixed sum per unit of contributing cargo shall be calculated for each of the following sectors as may be required:
 - (a) solid bulk materials referred to in article 1, paragraph 5(a)(vii);
 - (b) oil, if the operation of the oil account is postponed or suspended;
 - (c) LNG, if the operation of the LNG account is postponed or suspended;
 - (d) LPG, if the operation of the LPG account is postponed or suspended;
 - (e) other substances.

Regulation 2

1. For each sector, the fixed sum per unit of contributing cargo shall be the product of the levy per HNS point and the sector factor for that sector.
2. The levy per HNS point shall be the total annual contributions to be levied to the general account divided by the total HNS points for all sectors.
3. The total HNS points for each sector shall be the product of the total volume, measured in metric tonnes, of contributing cargo for that sector and the corresponding sector factor.
4. A sector factor shall be calculated as the weighted arithmetic average of the claims/volume ratio for that sector for the relevant year and the previous nine years, according to this regulation.
5. Except as provided in paragraph 6, the claims/volume ratio for each of these years shall be calculated as follows:
 - (a) established claims, measured in units of account converted from the claim currency using the rate applicable on the date of the incident in question, for damage caused by substances in respect of which contributions to the HNS Fund are due for the relevant year; divided by

(b) the volume of contributing cargo corresponding to the relevant year.

6. In cases where the information required in paragraphs 5(a) and (b) is not available, the following values shall be used for the claims/volume ratio for each of the missing years:

(a) solid bulk materials referred to in article 1, paragraph 5 (a)(vii) 0

(b) oil, if the operation of the oil account is postponed 0

(c) LNG, if the operation of the LNG account is postponed 0

(d) LPG, if the operation of the LPG account is postponed 0

(e) other substances 0.0001

7. The arithmetic average of the ten years shall be weighted on a decreasing linear scale, so that the ratio of the relevant year shall have a weight of 10, the year prior to the relevant year shall have a weight of 9, the next preceding year shall have a weight of 8, and so on, until the tenth year has a weight of 1.

8. If the operation of a separate account has been suspended, the relevant sector factor shall be calculated in accordance with those provisions of this regulation which the Assembly shall consider appropriate.