

THE HNS AND BUNKERS CONVENTIONS

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AN INTRODUCTION TO THE LIABILITY AND COMPENSATION ARRANGEMENTS

This paper provides a background to the Hazardous and Noxious Substances Convention 1996 (the HNS Convention) and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the 'Bunkers Convention'). It also explains what these regimes will cover, when they will apply and how they will interplay with other international regimes.

Presented by John Wren [¹] on 21 March 2006 at the INTERSPILL Conference held at the ExCel Centre, Docklands, London

(This paper offers practical guidance on how the conventions are expected to operate - it is not a legal interpretation of the conventions.)

SECTION 1 - BACKGROUND

The development of international liability and compensation regimes

- 1.1 The HNS and Bunkers conventions offer a considerable improvement over the present arrangements for dealing with compensation issues following many types of shipping incidents.
- 1.2 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') and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the 'Bunkers Convention') were both developed at the International Maritime Organization (IMO). The IMO is the UN agency with responsibility for protection of the marine environment and safety at sea.
- 1.3 The intention behind these two regimes was to provide an acceptable international means of filling significant 'gaps' in the liability and cost recovery arrangements in respect of damage and loss arising from incidents involving the carriage of dangerous and polluting products and substances or from pollution from fuel oils from ships at sea.

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- 1.4 It is unlikely that these new international regimes would have emerged without the long-standing success of the international CLC and IOPC Fund regimes which have together dealt with many serious incidents involving pollution from oil tankers [²].
- 1.5 Following the *Torrey Canyon* incident (Scilly Isles, UK, 1967) the international maritime community recognised that the liability and compensation arrangements then in force were totally inadequate for the purpose of dealing with the aftermath of a major oil pollution incident from a tanker. This incident quickly galvanised governments, and the industries involved in the international carriage of oil, into setting about finding acceptable arrangements to ensure that when incidents occurred there was a means of ensuring proper recompense would be available to those affected.
- 1.6 Initially, in the immediate aftermath of the *Torrey Canyon*, the shipping and oil industries provided voluntary arrangements which were intended as interim measures. These arrangements provided a basis for ensuring that a level of compensation would be more readily available for pollution from any tankers that were covered by these schemes. This was a significant indication of the willingness of the related industries to recognise that the difficulties in cost recovery and compensation arising from the *Torrey Canyon* should not be repeated. These voluntary arrangements provided a useful foundation on which governments were able to develop the original CLC and IOPC Fund conventions.
- 1.7 Following the adoption of the CLC and IOPC Fund regimes between 1969 and 1971, the intention was that the international maritime community would then quickly develop a regime to deal with products and substances other than oil that could also lead to cost recovery and compensation difficulties following major shipping incidents. While the oil pollution compensation regime thrived (and indeed was revised and improved) over the following years, the progress to provide other liability and compensation arrangements proved to be difficult.
- 1.8 A diplomatic conference in 1984 failed to adopt a draft convention to deal with costs arising from the transportation of hazardous and noxious substances (HNS) by sea. After much work by the IMO's Legal Committee a convention was finally adopted in 1996. The HNS

² Oil pollution damage arising from tankers is presently governed by the International Convention on Liability for Oil Pollution Damage, 1992 (CLC) together with the International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the IOPC Fund). The 1992 CLC and Fund conventions replaced the 1969 and 1971 conventions respectively. A separate paper is being presented on this regime at the INTERSPILL 2006 conference.

Convention has incorporated a number of common features from the CLC/IOPC Fund regime. Many have been concerned that this convention has yet to come into force. The main reasons for this delay will be covered in Part 2 of this paper.

- 1.9 Following the adoption of the HNS Convention the IMO's Legal Committee then set about work to fill other key gaps in the international liability and compensation arrangements. One of the priorities was the need to address liability for pollution from ships' fuel oils – bunkers. Bunker oil pollution is the most frequent and often the most damaging form of oil pollution at sea. Heavy bunker fuel oil is the most damaging but even lighter oils can have damaging effects both on coastal economic interests and on the environment. Over the years the IMO has grappled with many measures to avoid operational and accidental discharges of all forms of oil and other pollutants. It was only in the mid-1990s that a consensus began to build as to how to provide for improved liability and compensation arrangements. Finally, in 2001 an IMO diplomatic conference adopted the so called 'Bunkers' Convention.
- 1.10 The HNS and Bunkers conventions, the CLC, the IOPC Fund (including its Supplementary Fund Protocol 2003) now offer a suite of regimes that together can offer much improved prospects of full cost recovery in the event of pollution from shipping. In addition, it is expected that a number of coastal states will also become parties to the International Convention on Limitation of Liability for Maritime Claims (LLMC) 1976, as amended by its 1996 Protocol. This is the regime which provides for shipping interests to be able to limit their liability for maritime claims from third parties.
- 1.11 The categories of claims allowed under the LLMC regime are quite general but in practise it can be both legally difficult and costly to pursue such claims. In the UK and a number of other coastal states this is, presently, the only available option for pursuing damages which are not covered under the CLC/IOPC Fund regime. Part 3 of this document explains the close connection that will apply in many states between the Bunkers Convention and the LLMC regime
- 1.12 Finally, it is important to note that once the HNS and Bunkers Conventions come into force it will be essential for those involved in responding to incidents to have a clear understanding of the scope of these regimes and how they may inter-relate with the CLC, IOPC Fund and LLMC regimes in any set of circumstances. This is needed if unnecessary problems and delays in the cost recovery processes are to be avoided. It is quite possible that, once all of these conventions are in force, an incident may involve the use of more than one of these regimes. Coastal communities will inevitably look to their Government or local administration to give sound advice as to how to navigate through the claims criteria and

procedures that apply under each convention. Proper contingency planning should be put in place to ensure that reliable guidance will be readily available to potential claimants immediately following and incident.

PART 2 - THE HNS CONVENTION, 1996

Introduction

- 2.1 Like the CLC/IOPC Fund regime, the HNS regime will be a two-tier system. The *registered* shipowner's liability will be available in the first instance to meet claims falling within the scope of the convention and this will be on the basis of strict liability for damages governed under the convention. As with the CLC regime, the registered shipowner will be required to maintain insurance which has to be verified by a state certificate and there is a legal right of direct action by claimants against the insurer.
- 2.2 In the event that the limit of the registered shipowner's liability proves to be insufficient to meet the eligible claims then a second level of compensation will be available from an international fund – the HNS Fund. The costs to be met from the HNS Fund will be financed, after incidents have occurred, by those who receive HNS that has been carried by sea in all states that are parties to the HNS Convention.
- 2.3 The logic behind this arrangement is that in the first instance the damages may arise primarily because of a shipping incident. But when the costs exceed the registered shipowner's liability the costs are more likely to be largely attributable to the nature of the cargo. Together the two tiers of the regime are intended to meet the internationally accepted 'polluter pays' principle.

Entry into force issues

- 2.4 Given that the international maritime community had worked for so long to agree the Convention many expected that it would certainly have come into force by now.
- 2.5 The CLC and Fund regimes are governed by two conventions which came into force following, first, the voluntary arrangements provided by industry, then by the 1st tier CLC regime and finally by the 2nd tier IOPC Fund. However, the HNS regime is governed by a single convention and both tiers will come into force at the same time. Nevertheless, the prime reason for the delay has been the complexity of identifying those within industry in each potential state who will be responsible for meeting the cost of the

compensation paid from the 2nd tier and concern to ease the administrative burden of reporting. There are over 6,000 substances that may be covered by the HNS regime.

- 2.6 The IOPC Fund was asked by the IMO to use its expertise to devise a system for identifying the contributors and for recording their receipts of HNS. A database of HNS, which also provides a means of reporting HNS receipts on which contributions may be calculated, has now been completed by the IOPC Fund and has been distributed to interested industry representative bodies.
- 2.7 It should be noted that the European Council agreed a Decision a few years ago that requires all EU Member States to become parties to the HNS Convention and set a target date of 30 June 2006. Progress on implementation by the EU states as a whole suggests that this target may be a bit ambitious. However, the reporting system devised by the IOPC Fund should now provide greater impetus on implementation.
- 2.8 The entry into force requirements will be met when at least 12 states have agreed to become parties, providing there is a contribution base of at least 40 million tonnes of HNS and providing a minimum tonnage requirement (which is not in fact very onerous). Once the entry into force requirements have been met the Convention will enter into force 18 months later in those states that have become parties. At the present rate of progress the earliest date for the Convention to come into operation would appear to be sometime in 2008.

Cargoes covered by the HNS Convention

- 2.9 The HNS Convention establishes liability and compensation arrangements in respect of substances listed in a number of international codes. These codes have been agreed at the IMO to ensure maritime safety and prevention of pollution at sea. The definition of HNS is set out in Article 1(5) of the Convention. The database and reporting system produced by the IOPC Fund will greatly assist in the identification of HNS.
- 2.10 Bulk and packaged HNS cargoes are covered. The groups of HNS substances covered and the currently applicable codes are as follows:

- HNS in Bulk:

- Oils - in Annex I, Appendix I of MARPOL 73/78;
- Liquids - in Annex II, Appendix II of MARPOL 73/78;
- Liquids - in Chapter 17 of the IBC Code;
- Gases - in Chapter 19 of the IGC Code;
- Liquids - with a flashpoint not exceeding 60° C;

- Solids - in Appendix B of the BC Code, if also covered by the IMDG Code in packaged form.

- **Packaged HNS** - as covered by the IMDG Code.

- 2.11 When adopting the HNS Convention the diplomatic conference deliberately avoided providing a definitive list of HNS Substances and products so that account could be taken of future revisions to the above Codes without the need to amend the Convention.
- 2.12 The substances governed fall into the following four broad categories for the purposes of administering the HNS Convention:
- Oils;
 - Liquid Natural Gas (LNG);
 - Liquid Petroleum Gas (LPG);
 - Others, (which includes chemicals).
- 2.13 As will be explained later these four categories are used for the purposes of determining the financial contributions to meet the costs of compensation to be paid from the HNS Fund.
- 2.14 The coverage in respect of oil needs some explanation: the CLC/IOPC Fund regime covers only damage or losses arising from actual or threatened *pollution* from persistent oils (eg crude or heavy fuel oils). The HNS Fund will provide cover in respect of claims for these same oils in respect of claims for death or personal injury to the crew or others, or for damage outside the ship arising from fire or explosion. Therefore, in certain circumstances the CLC/IOPC Fund and the HNS regime may have to operate together to meet the full range of claims that may arise from an oil tanker incident involving both pollution and other damages due to the hazardous nature of persistent oil.
- 2.15 The HNS Convention will also cover all types of actual or threatened damage and pollution arising from *non persistent* oils, such as diesel or kerosene. Liability and compensation for damage from all the other categories of HNS is new.
- 2.16 At present claims for the types of damage caused by HNS cargoes will have to be pursued in court against one of the parties involved in the operation of the ship. It is necessary to prove that the claim arose as a result of their actual neglect or fault – this is explained in more detail in Part 3 of this paper. Because ships will almost invariably be operated as ‘one ship’ companies, it is notoriously difficult to pursue a claim in this way, even when it is possible to bring the responsible party to court.
- 2.17 Owners may be registered abroad and therefore the costs and practicalities of bring them to court will probably be prohibitively high.

Even when it is possible to pursue a claim through the courts against a liable party the limitation of liability rules may mean that full cost recovery is not always possible, especially if there are a range of claims, eg for pollution, possibly death or injury claims and, say, cargo related claims. The HNS Convention will overcome these legal difficulties.

Types of claims covered by the HNS Convention

- 2.18 Once in force the Convention will apply in the territory or territorial sea of a state party and also, if declared by a state party, to any incidents that are likely to affect the Exclusive Economic Zone (EEZ) or the equivalent [³]. The UK has declared a Counter Pollution Zone, which is equivalent to an EEZ and complies with the requirements of Section V of UNCLOS. This Zone extends certain rights and jurisdiction, in particular in respect of protection of the marine environment.
- 2.19 Compensation will be available for potential incidents or damage caused by HNS cargo from a sea-going ship which results in:
- loss of life, both on board or outside the ship;
 - loss or damage to property outside the ship;
 - reasonable response costs, clean-up, and preventive measures or any further loss or damage directly caused by reasonable measures taken to prevent or minimise damage; and for
 - costs arising from damage to the environment, provided that the costs are limited to the reasonable costs of reinstatement actually undertaken; (the regime will not cover arbitrary costs of a general nature for damage to the physical environment, flora or fauna – ie so-called ‘pure environmental damage’. But studies to assess the environmental impact and the scope for reinstatement measures are likely to be eligible in principle as HNS states will probably wish to follow the IOPC Fund approach to such costs).
- 2.20 Coverage under the HNS Convention will include claims directly attributable to economic losses to industries such as fishing, fish farming or processing, or tourism related sectors. Some promotional efforts to restore lost business in these industries are also likely to be acceptable.
- 2.21 The CLC/IOPC Fund regime provides cover for pollution damage from tankers that are carrying, or have residues of, persistent oils. However, it is especially important for governments, coastal administrations and responders to note that equivalent cover is *not* available under the HNS Convention. Unless bunker oil pollution is inseparable from the pollution

³ An Exclusive Economic Zone is an area which may extend up to 200 nautical miles beyond the territorial sea (which may extend up to 12 nautical miles) and measured in accordance with Section 2 of the United Nations Convention on the Law of the Sea (UNCLOS). The UK has declared a Counter Pollution Zone, which is equivalent to an EEZ and complies with the requirements of Section V of UNCLOS.

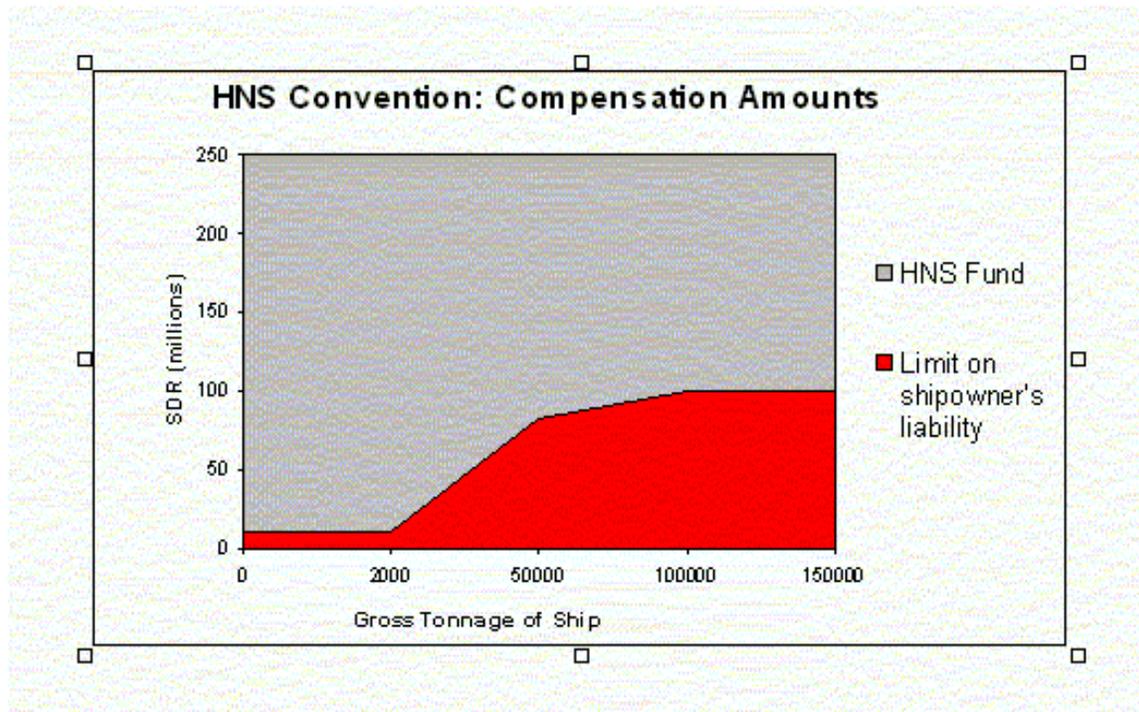
arising from the HNS cargo, there will be no liability under the HNS regime for the damages arising from the bunker oils. Costs relating to actual or threatened pollution from bunker oils would have to be pursued under the Bunkers Convention if it is in force in the state affected. (Further details on the Bunkers Convention are set out in Part 3 of this paper). Alternatively, recourse would have to be sought under existing national liability arrangements, eg LLMC.

- 2.22 Finally, it is likely that the policies and practices for providing compensation from the HNS Fund will be broadly similar to those adopted by the IOPC Fund and as set out in that Fund's Claims Manual (available on the IOPC Fund's web site – www.iopcfund.org).

Limits of liability and compensation under the HNS Convention

- 2.23 Under Article 9 of the HNS Convention the registered shipowner's liability will be determined by the tonnage of any ship carrying HNS. However, when adopting the convention the diplomatic conference recognised that even a relatively small quantity of some marine pollutants could involve significant costs. The Convention therefore requires that the minimum registered shipowner's limit of liability will be 2 million Special Drawing Rights (SDRs) ^[4] (ie approximately £1.66 million) for ships of up to 2,000 gross tons and rising to a maximum 100 million SDRs (approximately £82.8 million) per incident for ships over 100,000 gross tons – the limit will be calculated according to the tonnage scale laid in Article 9.
- 2.24 Whenever the total of eligible claims exceeds the limit of the registered shipowner's liability the balance of compensation will be met by the HNS Fund *up to an overall limit* of 250 million SDRs (approximately £207 million). This is the maximum available for each incident under the HNS regime for both the first and second tier contributions.
- 2.25 The following graph shows the levels of liability applicable under the first and second tiers of the HNS regime:

⁴ Special Drawing Rights are the 'currency' of the International Monetary Fund and are based of the collective values of major world currencies. As at 3 January 2006 1 SDR = £0.828322 *or* US\$ 1.43258.



Source: UK Department for Transport

2.26 The HNS Convention covers more than pollution damages. Priority will be given *under both tiers* in respect of claims relating to death or personal injury. If needed two-thirds of the overall compensation will be reserved for such claims. In the event that this proves insufficient the unpaid proportion of each claim will then compete equally with all other claims to be met from the remaining third.

The 1st tier - the shipowner's responsibilities and liability

2.27 As under the CLC regime, the HNS Convention applies strict liability on the registered shipowner for damages that fall within the scope of the Convention [⁵] and the registered owner will be required to maintain insurance to meet the liability under the convention. By 'channelling' the liability to the registered shipowner it makes it legally simpler for claimants to recover damages. It is not necessary to show that the damages arose as a result of fault on the part of the registered shipowner, or anyone else associated with the operation of the ship, when the incident occurred. In the event that it proves difficult for the claimant to take legal action for cost

⁵ As with other international liability regimes there are some circumstances when no liability will apply to the registered shipowner, such as when it can be shown that the incident occurred as a result of war, hostilities, a natural phenomenon 'of an exceptional or irresistible character', the fault of a third party, etc. The exceptions are set out fully in Article 7(2).

recovery against the registered shipowner, it will be legally possible to recover damages directly from the shipowner's insurer.

- 2.28 As with the CLC arrangements, it will also be necessary for the registered owner to obtain a certificate to verify that the necessary insurance or financial security is in place. These certificates must be issued by one of the states that are parties to the HNS Convention. As shipping insurance is usually issued annually, a state certificate verifying there is insurance in place will normally have to be obtained by the registered owner each year for a ship that will carry HNS cargo into any state that is a party to the Convention.

The 2nd tier - the HNS Fund

- 2.29 Whenever claims are likely to exceed the registered shipowner's liability the HNS Fund will become involved in the payment of compensation. While the registered shipowner liability will vary according to the tonnage of the ship carrying the HNS, the HNS Fund will meet the balance of compensation payable up to the regime's overall limit of 250 million SDRs. In the rare circumstances where the registered shipowners cannot be identified or brought to account to meet their liabilities (eg an unidentified incident leading to costs arising from pollution) the HNS Fund will meet the entire costs of the incident.
- 2.30 As with the CLC/IOPC Fund regime it is expected that the HNS Fund Secretariat and registered shipowners' insurers will co-operate closely in the payment of compensation following serious incidents governed by the Convention and will each bear an appropriate proportion of each claim. This arrangement will generally avoid the necessity for claimants to pursue their claims through the courts. If, however, a claimant wishes to dispute the proposed settlement they will retain their right to pursue a claim against the registered shipowner, the insurer and the HNS Fund.
- 2.31 The IOPC Fund has a Memorandum of Understanding governing the arrangements for settling joint claims with the member clubs within the International Group of Protection and Indemnity Clubs. The Group's member P&I clubs provide insurance for the vast majority of the world's sea-going fleet. It is likely the HNS Fund would seek to negotiate similar arrangements with ships' insurers.
- 2.32 The types of claims to be covered under both the 1st and 2nd tiers of the HNS regime will be the same. The HNS Convention sets legal time-bars (in Article 37). All claims not agreed within 3 years of the incident, or from the date the damage became evident, will become invalid if they have not been lodged in court. However as with the IOPC Fund there should be nothing to prevent the claimant and the HNS Fund from continuing to try to

reach a settlement after claims are lodged in the courts in order to meet the time-bar provisions. In any event, no claim may be brought later than 10 years *from the date of the incident*.

Contributions to the HNS Fund

- 2.33 The arrangements for contributions to the HNS Convention differ from those governing the IOPC Fund because the trade in the different categories of HNS cargoes is more complex and therefore special arrangements were needed.
- 2.34 Whereas the person taking delivery of oil covered by the CLC/IOPC Fund regime will always be regarded as the 'receiver' and, therefore, will be responsible for meeting the financial contributions to that Fund, the responsibilities for contributions to the HNS Fund are somewhat different. Under the HNS regime a special provision has been made for the person who, when taking delivery from the ship, is only acting as an agent for a principal. If that principal is in a state that is a party to the regime, and can be properly identified by the agent to the HNS Fund Secretariat, then the principal becomes liable for the contributions to the HNS Fund. Otherwise the initial receiver will be responsible.
- 2.35 The HNS Fund will, if needed, be financed through annual contributions from those receivers and principals who have an obligation to pay *in the preceding calendar year*.
- have received over 150,000 tonnes of crude or fuel oil in a state party;
 - held title to an LNG cargo immediately prior to its discharge in a port or terminal of a state party; *or*
 - were the 'receiver', or liable principal, of any other HNS cargo (including oils other than crude or fuel) in quantities in excess of 20,000 tonnes.
- 2.36 In order to avoid one industry sector having to cross subsidise another, the HNS Fund is divided into 4 'separate accounts' – in effect there are 4 Funds - one for HNS damage arising from oils; one for LNG; one for LPG; and one for all other damages. These arrangements are solely for the purposes of funding the regime and do not make any material difference to claimants. The four separate accounts will be administered by one Secretariat and the overall operating costs of the Secretariat will be shared by contributors to all four accounts.
- 2.37 Because the INTERSPILL 2006 Conference will focus primarily on response to pollution and claim related issues, the above section gives only a brief summary of the contribution arrangements. Anyone needing

full details on the financing arrangements for the HNS Fund should refer to the Convention or go to the IMO Legal Committee's correspondence web site at: <http://folk.uio.no/erikro/WWW/HNS/hns.html>

- 2.38 The UK Department for Transport has issued two public consultation documents which contain a wealth of information on the proposed implementation of the HNS Convention in the UK - go to: www.dft.gov.uk > Shipping/Ports > Consultation documents.

The claims process

- 2.39 The HNS Fund will raise levies to meet costs of compensation as they arise following an incident. The CLC/IOPC Fund regime is the model which will be followed and therefore the settlement process is expected to be relatively quick, especially when compared to the available legal options presently available. It may take claimants some time to submit and substantiate claims, even where it is clear that these will fall within the claims criteria.
- 2.40 The full extent of the level and types of claims may well take more than any one year to fully establish and submission and consideration of individual claims could take yet more time to complete. If there is a clear risk that the level of claims will exceed the 250 million limit of the regime then HNS Fund can be expected to follow the procedure adopted by the IOPC fund and claim payments would be appropriately pro rated, and may be progressively increased, as the overall claims situation becomes clearer. There may also be claims that raise points of principle which have to be considered by the Assembly of the states that are parties to the Convention.
- 2.41 Delays will also occur where certain claims have been disputed or where claimants have failed to provide the information to substantiate their claims in full. The experience of the IOPC Fund suggests that following a major incident involving many claims, or different types of claims, the settlement of all claims can take several years to complete.
- 2.42 The more information that can be provided at the outset by claimants to substantiate their claims the greater the chances they can be settled quickly. In any event, as the CLC/IOPC Fund regime has frequently demonstrated that the process of claims settlement is much faster than would be the case without the regime - the expectation is that the same will apply once the HNS regime is in force.
- 2.43 It will often be necessary to substantiate claims for response costs by providing evidence of the justification for decisions. This is best done by ensuring that full records are kept at the time the decisions were taken.

PART 3 - THE 'BUNKERS' CONVENTION, 2001

Introduction

3.1 Whereas the CLC/IOPC Fund and HNS regimes are two-tier systems, the Bunkers regime will be provide just *one layer* of liability/compensation. Therefore there are no financial implications for other states that are parties to the Bunkers Convention. However, the Bunkers Convention does include some common features with these other conventions, which are as follows:

- the 'shipowner' will be strictly liable for all pollution damages in the territorial sea, the EEZ or equivalent of a state party;
- the limit of liability will be determined according to the tonnage of the ship;
- the registered shipowner is responsible for maintaining compulsory insurance, or another form of effective financial security, for any ship over 1,000 gross tons to meet the limit of liability and this will be subject to a right of direct action by claimants;
- a certificate verifying the insurance or other security is in place will have to be provided by a state that is a party to the Bunkers Convention.

3.2 Apart from the lack of a 2nd tier Fund behind the shipowner's liability, there are other specific provisions which should be noted;

- the definition of the 'shipowner' is different to that used in the CLC and HNS;
- the limit of liability applicable is determined by the applicable national or international rules to allow shipowners to seek limitation of their liabilities to third parties, ie in the UK these would be the tonnage scale under Article 3 of the 1976 LLMC regime, as amended by its 1996 Protocol;
- the compulsory insurance and certification obligations of the Convention only apply in respect of all ship **over** 1,000 gross tons; but it should be especially noted that the
- liability for all actual, or threatened, pollution damages arising from bunker oils will apply to **any** sea-going ship in the territory of a state party (ie not just apply to cargo ships).

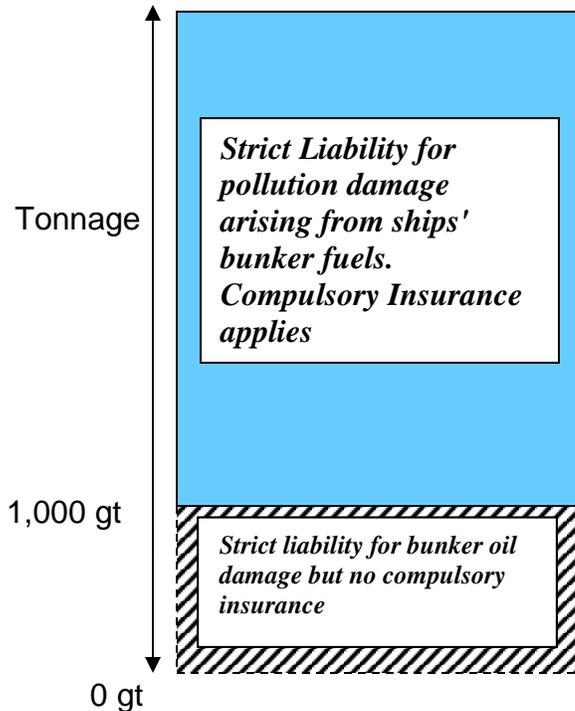
Strict liability and claims process

3.3 The application of the strict liability under the Bunkers Convention is different to the arrangements for the CLC and HNS regimes.

- 3.4 The Bunkers Convention defines the 'shipowner' as "*the registered owner, bareboat charterer, manager and operator of the ship*". One or more of these parties may be held to be strictly liable, (ie the legal basis is "joint and several" strict liability). Nevertheless the responsibility for ensuring there is financial security in place for the potential liabilities under the Bunkers Convention will fall on the *registered owner*. These arrangements should significantly improve the prospects of claimants' cost recovery by placing the liability on a clearly defined group of the persons that will be most closely involved in the operation of the ship.
- 3.5 The right of direct action against the provider of the financial security, (backed by state verification of the provision of security) will greatly enhance the legal position of claimants over the arrangements presently available under the LLMC regime or, where applicable, national limitation rules but, given the lack of a 2nd tier Fund, the claimants may have to pursue their claims through the courts.
- 3.6 However, given that the majority of seagoing ships are insured by the bigger P&I Clubs within the International Group, the expectation is that where claims for bunker oil pollution damage are straightforward they will generally be considered by the insurers without the necessity for court action. Complexities may arise if there are other claims that will also have to be met from the overall limit of the shipowner's liability.

Limit of liability under the Bunkers Convention

- 3.7 The liability for actual, or threatened, pollution damage from bunker or lubricating oils is covered under the Bunkers Convention. The limit of this liability will be determined, either by the applicable limit in the LLMC regime in force in the state in which the damage covered has occurred, or alternatively, under any relevant national rules of limitation. In the UK the LLMC regime (as amended by its 1996 Protocol) provides the basis for determining the shipowner's overall limits of liability for third party claims.
- 3.8 The Bunkers Convention will certainly provide added protection for the bunker related claims. The person held responsible will be strictly liable for the damage covered by the Convention in respect of any ship causing damage in a state party to the Bunkers Convention. However, the compulsory insurance provisions only apply to ships over 1,000 gross tons.
- 3.9 The liability under the Bunkers Convention can therefore be illustrated as follows:



Source: UK Department for Transport

- 3.10 States becoming parties to the Bunkers Convention may consider the possibility of applying a national requirement for the provision of financial security to meet liability in respect of ships of 1,000 gross tons and below.

The LLMC regime

- 3.11 Where the LLMC regime applies the 'shipowner' is entitled to seek limitation of liability in respect of *any* claims from third parties. Once limitation is accepted by the court the shipowner must constitute a limitation fund for the sum equal to the applicable liability limit which is determined according to the LLMC tonnage calculation.
- 3.12 Under the LLMC regime the 'shipowner' is defined as "*the owner, charterer, manager or operator of a seagoing ship*". This is therefore compatible with the Bunkers Convention definition of the 'shipowner'.
- 3.13 The key consideration is that the LLMC regime coverage goes beyond pollution damages and covers claims for death or personal injury onboard, or outside, the ship and for third parties 'property' claims including costs due to delays, infringement of contractual rights as well as claims in respect of, and measures to prevent, pollution.

- 3.14 Costs for wreck removal also come under the rules of the LLMC regime but in the UK, and some other LLMC states, these costs are not subject to limitation.
- 3.15 Liability for claims governed by the LLMC regime is 'fault based'.
- 3.16 The LLMC regime reserves two-thirds of the shipowner's overall limitation sum for death or injury claims *whether there are any such claims or not*. The remaining third is available to meet all other types of claims - including bunker related claims - under the broad category of 'property' claims.
- 3.17 If, however, the claims for death or personal injury exceed the limit of liability established for those claims, then the one third available for property claims can also be used to provide additional compensation for loss of life or personal injury claims, although these claims will have to compete in equally with any other eligible property claims.

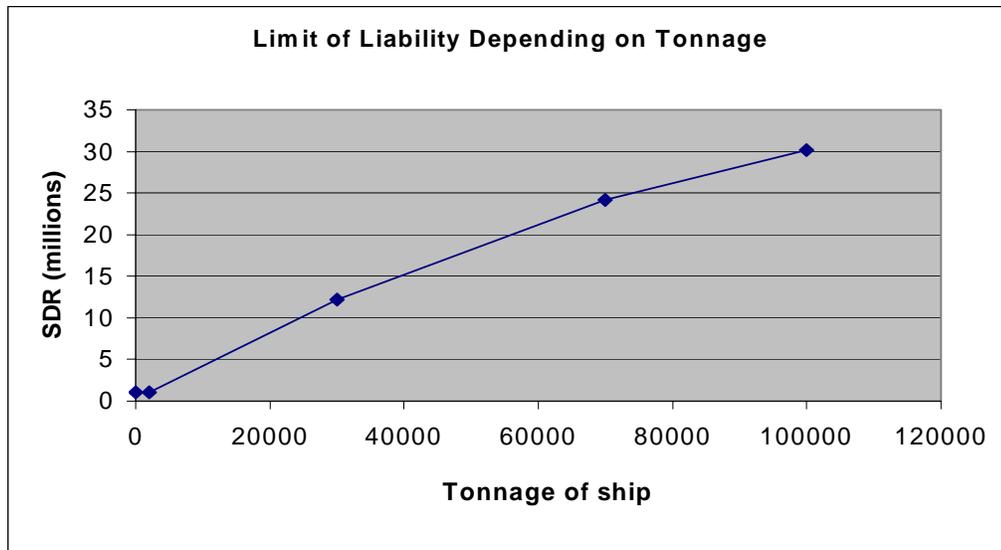
Table showing calculation of applicable limits of liability for claims under the LLMC Convention as amended by the 1996 Protocol in Standard Drawing Rights (SDRs).

Tonnage of vessel	Death or personal injury claims	Property claims
2,000 tons or less	2,000,000	1,000,000
Each ton from: 2,001 to 30,000	800	400
Each ton from: 30,001 to 70,000	600	300
Each ton in excess of 70,000	400	200

*As at 3 January 2006:
1 million SDR =
£828,322 or
US\$1,432,580*

Source: UK Department for Transport

- 3.18 The following chart illustrates the applicable limits of liability for *property claims* under the 1996 LLMC regime based on a range of different sized vessels:



Source: UK Department for Transport
 (As at 3 January 2006: 1 million SDR = £828,322 or US\$1,432,580)

3.19 Once a limitation fund has been established under the LLMC by a 'shipowner' no other assets of the owner may be seized, e.g. legally arrested. Any assets that had been seized before the limitation fund was established must be released. Any other person providing financial security, usually a Protection & Indemnity Club, also has the right to institute a limitation fund.

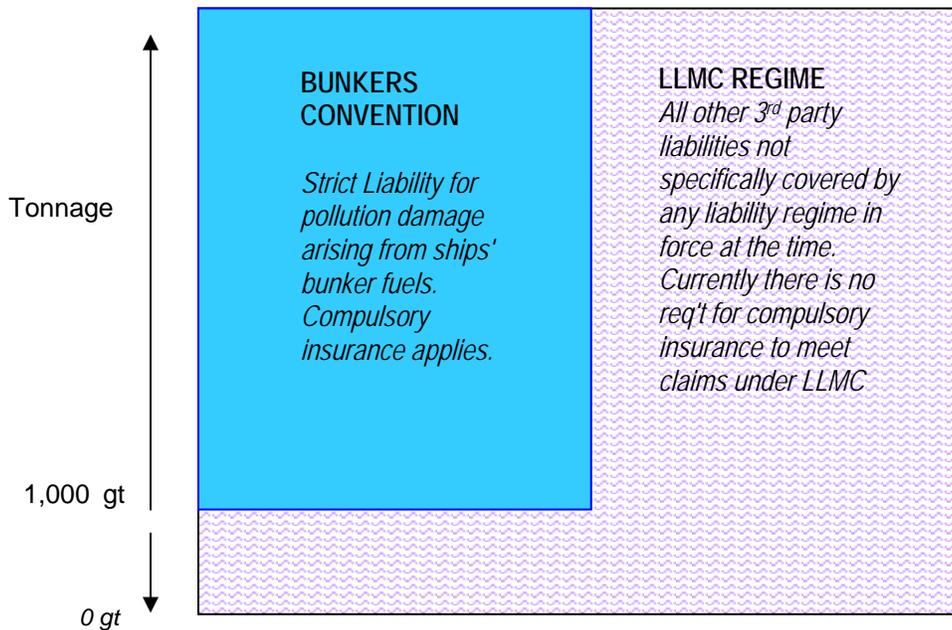
The interplay between the LLMC and Bunkers regimes

3.20 Once the Bunkers Convention is in force, *bunker related claims* **and** *any other claims* arising from a single incident will be met from the overall limitation fund which will be determined in accordance with the limits set by the LLMC.

3.21 Because the LLMC regime covers more than just bunker related claims these claims will have to compete equally with other third party claims that may also be pursued under LLMC rules. In such cases the position of the claims for bunker related damages will be in a stronger position than others because fault will not have to be proved. There will, however, be a risk that full settlement may be delayed until *all* claims are identified against the overall limitation limit in accordance with LLMC rules.

3.22 When no other claims are likely to arise under LLMC in respect of the incident, the strict liability for bunker related claims should greatly simplify the costs recovery process and it seems likely that the P&I Clubs will seek to settle eligible costs quickly without resorting to court actions – see also paragraph 3.6.

3.23 The following diagram illustrates how bunker related claims will be segregated within the overall limitation fund and how these will interplay with any other claims that might arise under the LLMC regime:



Source: UK Department for Transport

3.24 If there are *only* bunker claims then the whole of the applicable limitation fund will be available to meet these claims.

3.25 The above diagram also shows that the position of bunker claims arising from ships of less than 1,000 gross tons may not be improved without the provision of national compulsory insurance requirements. The UK is considering such a proposal.

PART 4: HNS and BUNKERS – CONCLUSIONS

4.1 The entry into force of the HNS and Bunkers regimes should greatly improve the position of those with claims falling within the scope of each of these regimes. In the future the best possible financial protection will be provided for the coastal interests in those states that are parties to the:

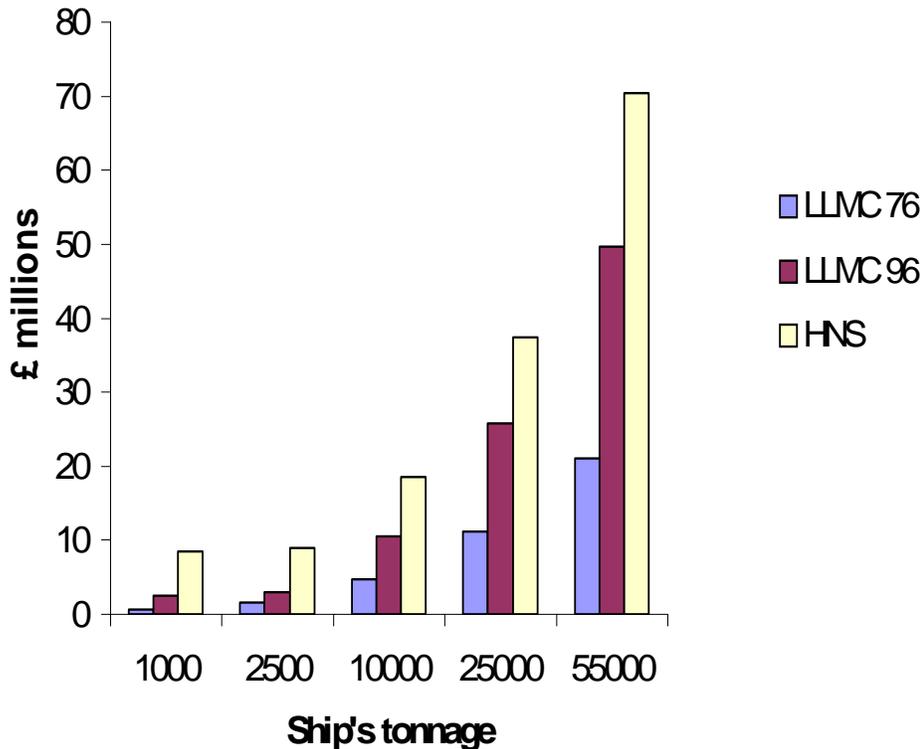
- CLC 1996;
- IOPC Fund 1996;
- IOPC Fund Supplementary Fund Protocol, 2003;
- HNS Convention, 1996;
- Bunkers Convention 2001; and
- LLMC regime, as amended by the 1996 Protocol.

This suite of regimes should enhance states' efforts to protect both safety at sea and prevention of pollution at sea through the appropriate international Conventions and for effective response to pollution. The prospects of effective cost recovery arrangements should also be a major boost to the contingency planning arrangements under the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), 1990 and the OPRC (Hazardous and Noxious Substances) Protocol, 2000.

- 4.2 The higher levels of shipowner liability under **the HNS Convention** should cover most incidents in the foreseeable future. In the event that the costs begin to fall short of the overall 250 million SDR limit there is a mechanism within the Convention to allow for the limits in the first and second tiers to be increased. The HNS Convention should provide a viable long-term solution for meeting the needs of both coastal states and industry in dealing with major HNS incidents in the future.
- 4.3 Similarly **the Bunkers Convention** should provide an effective means of ensuring full cost recovery for many of the incidents involving all types of ships' fuel oil – from accidental or deliberate discharges. This regime therefore addresses the liability in respect of the most frequent form of marine pollution from ships.
- 4.4 The interplay between the Bunkers Convention and **the LLMC regime** has to be acknowledged as a complication. It must also be accepted that full cost recovery and the speed of final settlement may depend on the nature of the incident and whether a number of other types of claims may arise. The Bunkers Convention, nevertheless, promises to be a major step forward and will be of particular importance for those closely involved in response to coastal pollution. In the event that claims for bunker oil damage are shown to be falling well short of the costs arising from incidents, it should be possible for the states that are parties to the LLMC to use this as an argument to use the mechanism in the 1996 LLMC Protocol to press for an increase in the amounts of shipowner limitation.
- 4.5 The following chart gives a comparison between the levels of liability under the HNS Convention, the LLMC regime 1976 and the LLMC 1996 regime. The LLMC limitation limit is in effect limit of liability under the Bunkers Convention too. It illustrates very clearly the significant additional cover that would be available to those states that are still parties to the LLMC 1976 regime if they were to become parties to the 1996 regime [6]. Note that the chart shows the overall limits under the two LLMC regimes and property claims will be eligible for only one third of these limits (see para 3.18):

⁶ The 1996 regime applies in the UK.

Shipowner's limit of liability under the HNS, Bunkers and LLMC regimes



Source: UK Department for Transport

- 4.6 All those involved in national and local contingency arrangements, will need to have a clear understanding of the interplay between all of the available international liability and compensation regimes. When incidents occur, the claims against the appropriate regime need to be pursued effectively by all concerned so as to avoid unnecessary delays in the settlement of all claims.
- 4.7 Finally, the local industries and other coastal interests that are affected by a major shipping incident will need to be properly advised from the outset regarding the coverage of the regimes and the claims procedures. Explanation of the liability and compensation arrangements under the various regimes in force will, therefore, need to form an essential part of the contingency planning arrangements.