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2010 HNS Convention: Ratification and Implementation Challenges for Malaysia

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Overview of HNS

The chemical trade which is mainly transported by sea in bulk or in packaged form is estimated to reach 215 million tonnes in 2015, according to a report on evolving chemical and product sectors, published by the UK-based independent research company Ocean Shipping Consultants Ltd.

Between 2002 and 2010, 192 reported incidents involving hazardous noxious substances (HNS) costing 185 million SDR (equivalent to RM870 million) were handled by the International Group of P&I Clubs. In addition, 235 maritime incidents involving HNS were reported between 2006 and 2011.

The existing compensation regimes of the International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (Fund Convention) only cover pollution damage caused by spills of persistent oil from tankers. Liability and compensation for loss or damage arising from HNS carriage by sea is to be addressed by the

CLC with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (2010 HNS Convention) which has yet to enter into force.

Malaysia has ratified the CLC and Fund Conventions, the LLMC Convention, the Bunker Convention and the Nairobi Wreck Removal Convention. Ratification of the 2010 HNS Convention would supplement the existing suite of liability and compensation conventions which Malaysia has already ratified.

Malaysia intends to ratify the 2010 HNS Convention by 2015 keeping in mind the importance of the Straits of Malacca as a major conduit for the carriage of HNS. Malaysia acceded to the Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous Noxious Substances, 2000 (OPRC-HNS Protocol) on 28 November 2013.

2010 HNS Convention

HNS is defined as any substance other than oil which can create hazards to human health, harm living resources and marine life, damage amenities and interfere with other legitimate uses of the sea. Specific reference is also made to substances listed in international regulations such as the SOLAS Convention, MARPOL 73/78 Convention and their relevant goods transport codes: the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code); International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code); International Maritime Dangerous Goods Code (IMDG Code); and the International Maritime Solid Bulk Cargoes Code (IMSBC Code).

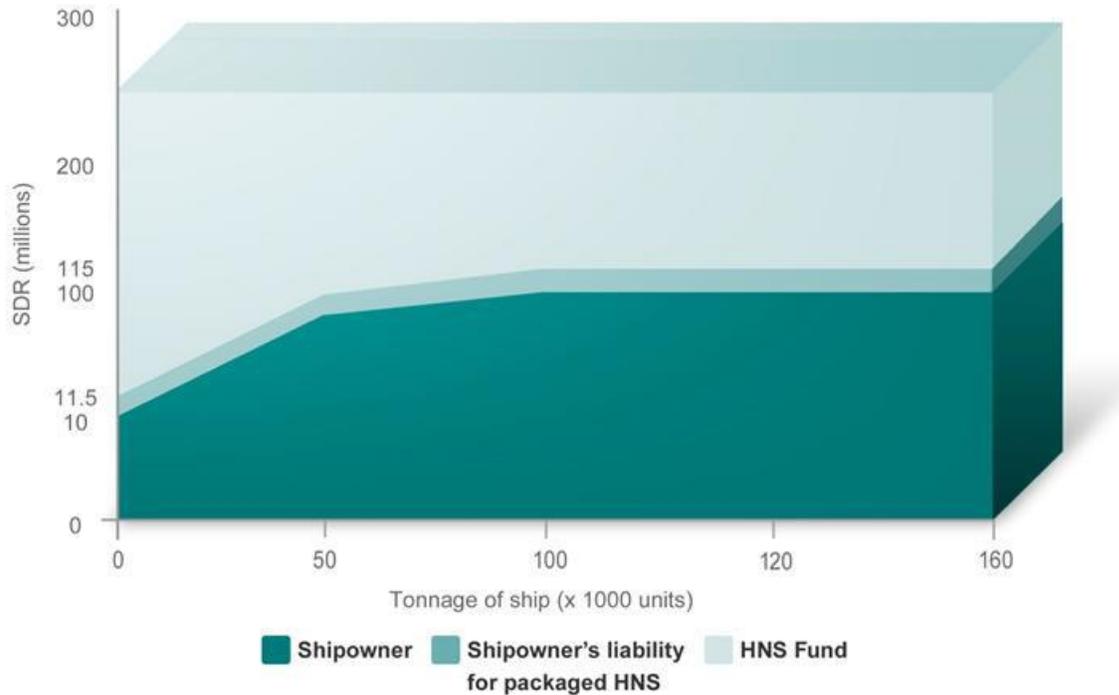
The 2010 HNS Convention covers any damage caused by HNS in the territory or territorial sea of a state party to the Convention. It also covers pollution damage in the exclusive economic zone or equivalent area and damage (other than pollution damage) caused by HNS carried on board ships registered in, or entitled to fly, the flag of a state party outside the territory or territorial sea of any state. The costs of preventive measures are also covered. Oil pollution damage from tankers as defined in the CLC, damage from bunker fuel oil, and damage caused by radioactive materials are excluded from the scope of the Convention, as these are already covered by other Conventions.

Claims for loss of life or personal injury, loss of or damage to property, economic losses arising from contamination, costs of preventative measures and of reasonable measures of reinstatement of the environment due to HNS contamination, and other reasonable costs are recognised by the 2010 HNS Convention. Action must be brought within 3 years from date of damage and within 10 years from the date of the incident. Guidelines on the claims procedures will be developed by the first HNS Assembly when the Convention enters into force.

The shipowner is strictly liable for the loss or damage up to SDR 100 million (for bulk HNS) and SDR 115 million (for packaged HNS) which is covered by insurance (1st tier). A compensation

fund (the HNS Fund) will provide additional compensation up to SDR 250 million when the victims do not obtain full compensation from the shipowner or its insurer (2nd tier).

Figure 1: Maximum limits of compensation



Source : IMO

The HNS Fund will comprise post-event contributions from companies and other entities which receive HNS after sea transport in a member state in excess of the thresholds laid down in the Convention (contributing cargo). It is emphasised that HNS carried in packaged form need not contribute to the HNS Fund, although compensation for incidents involving packaged HNS will be still be covered. The HNS Fund will have four separate accounts for oil, LNG, and LPG and a general account for bulk solids and other HNS. Contributions by individual receivers to the separate accounts and sectors will be in proportion to the quantities received, provided that they exceed established thresholds. The separate accounts will only meet claims resulting from incidents involving the respective cargoes so as to prevent cross-subsidisation.

Table 1 : Threshold quantities for contribution to and establishment of accounts

	Establishment of account	Contributions to account/ sector
General account	40 million tonnes*	
• Bulk solids		20 000 tonnes
• Other HNS	No minimum quantity	20 000 tonnes
Separate accounts (or Sectors within the general account)		
Oil account	350 million tonnes	
• Persistent oil		150 000 tonnes
• Non-persistent oil		20 000 tonnes
LNG account	20 million tonnes	No minimum quantity
LPG account	15 million tonnes	20 000 tonnes

* Condition for entry into force

Source : IMO

The 2010 HNS Convention will come into force 18 months following the date when 12 States (4 of which with not less than 2 million units of gross tonnage) have ratified it and the volume of contributing cargo for the general account reach at least 40 million tonnes. To-date there are 8 signatories and no ratifications. The Contracting States are putting in place reporting mechanisms which will serve as good case-studies for Malaysia.

HNS Contributing Cargo Reporting Guidelines

A significant element of the 2010 HNS Convention is the reporting. The state has an obligation to report total quantities of contributing cargo to the IMO when depositing a ratification/ accession instrument and every subsequent year until the 2010 HNS Convention enters into force. Contracting states failing to submit such reports will be suspended while those which fail to submit annual reports will be unable to claim compensation (with the exception of claims for death and personal injury).

The HNS Contributing Cargo Reporting Guidelines were developed to assist states in complying with the reporting requirements and highlight requirements for contributing cargo reporting and its relevant processes for receivers, principals, and for LNG receivers and the titleholder, and for

transshipment circumstances. In addition to the guidelines, the IOPC Funds Secretariat has developed the HNS Finder (available at <http://hnsconvention.org/Pages/FinderOverview.aspx>) a dynamic searchable list of HNS as defined in the 2010 HNS Convention which provides information on HNS classification criteria and verifies whether a substance qualifies as contributing cargo.

Ratification and implementation challenges

The state is primarily responsible for reporting contributing cargo and should put in place a mechanism to ensure that the receiver of contributing cargo complies with the reporting requirements and that the maritime administration is able to verify the quantities of contributing cargo reported. It will be inadequate to report on data obtained from the Royal Malaysian Customs alone as not all quantities to be reported will be received in any given year and different modes of transport will be involved (HNS applies only to cargo transported by sea). Further, as the HNS Fund will be funded by post-event contributions, it is imperative that receivers of contributor cargo and the quantities received are properly identified.

The way forward

The effectiveness of existing legislation in addressing liability and compensation for damage caused by oil and HNS is based on awareness of the identity of the polluter and that insurance by shipowners will adequately cover the damages. As shipowner liability is limited, the state will have to bear some of the damages. Ratification of the CLC and Fund Convention addresses this problem in relation to oil pollution from tankers. Malaysia has not ratified the 2010 HNS Convention and will continue to bear damage caused by HNS which cannot be recovered from shipowners' insurance.

The Ministry of Transport is committed to the ratification of the HNS Protocol 2010 by 2015 and hosted a National HNS Workshop in November 2013. The workshop was supported by IMO's Integrated Technical Cooperation Programme and jointly conducted by the Marine Department Malaysia, IMO and the IOPC Fund secretariats. Workshop participants comprised representatives from government agencies, port authorities and the industry. In addition to providing an introduction to the legal framework of the HNS, the workshop also highlighted the contributing cargo reporting obligation under the 2010 HNS Convention.

It was apparent during the workshop that establishing a national reporting mechanism will be challenging as the industry is unfamiliar with the Convention's reporting requirements and is wary of the additional costs of contribution to the HNS Fund. Whilst the workshop addressed

some of the concerns, it is anticipated that a nationwide road show will be beneficial in allaying any residual concerns of the industry as well as creating awareness on the importance of having the 2010 HNS Convention in place.

On the part of the maritime administration, the challenge is to establish a mechanism which will enable collection, analysis and verification of industry data, complying with ratification and reporting requirements and to facilitate decision-making on the prevention, preparedness, and response to an HNS incident.