

Emne: Submission from Norway to the HNS-LNG correspondence group

Fra: Erik Rosag <erik.rosag@jus.uio.no>

Dato: Tue, 18 Sep 2007 13:59:44 +0200

Til: nifs-hnslng@jus.uio.no

Dear Correspondents,

Please find enclosed a Norwegian proposal on how the draft of the IOPC paper due on Friday should be amended. I will later circulate a new draft for comments, implementing the proposed amendments, in accordance with the procedure helpfully suggested by Spain.

Naturally, all comments, observations, nuances, ideas, proposals for further discussions etc cannot be detailed in a summary paper. I trust that particularly interested readers will look into the correspondence, and that the summary report will be supplemented by additional papers and interventions from the floor in London. But I have tried to reflect any statement in the correspondence that directly relates to the latest draft text. Please feel free to tell me if I have overlooked something.

The deadline for comments at this stage will be Thursday 20 September at 12 noon GMT.

Regards,
Erik Røsæg

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Professor Erik Røsæg (Rosaeg)
Scandinavian Institute of Maritime Law
University of Oslo
POB 6706 St. Olavs plass
N-0130 Oslo, Norway

Tel: (+47) 2285 9752 - (+47) 4800 2979
Fax: (+47) 9476 0573
erik.rosag@jus.uio.no
<http://folk.uio.no/erikro/index.html>

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INTERNATIONAL
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INTERNATIONAL CONVENTION ON LIABILITY AND
COMPENSATION FOR DAMAGE IN CONNECTION WITH
THE CARRIAGE OF HAZARDOUS AND
NOXIOUS SUBSTANCES BY SEA

REPORT OF THE CORRESPONDENCE GROUP
ON ANNUAL CONTRIBUTIONS TO THE LNG ACCOUNT

Submitted by Norway

Summary: This is the report of the informal correspondence group to reflect on and recommend elements that would be helpful in implementation legislation of States Parties to the HNS Convention, in order to ensure as far as possible the payments to the LNG Account as regards contributions for LNG discharged in a State Party, where the contributor (the title holder immediately prior to discharge) is not subject to the jurisdiction of a State Party.

Action to be taken: To adopt the annexed Resolution with recommendations on how State Parties could fulfill their obligations under Article 6 of the HNS Convention with regard to ensuring as far as possible the payments to the LNG Account of the HNS Convention from contributors which are not subject to the jurisdiction of any State Party.

1 Introduction

- 1.1 At its 3rd session held in June 2007, the Administrative Council, acting on behalf of the 12th extraordinary session of the Assembly, decided, on the basis of the proposals in document 92FUND/A/ES.12/9/1/Rev.1 to set up an informal correspondence group to reflect on and recommend elements that would be helpful in implementation legislation of States Parties to the HNS Convention, in order to ensure as far as possible the payments to the LNG Account from contributors which were not subject to the jurisdiction of any State Party, including ensuring that proper reporting mechanisms are in place also with regard to LNG cargoes where the contributor is not subject to the jurisdiction of a State Party. In this document Norway, on behalf of the correspondence group, presents the findings of the intersessional work.
- 1.2 The following submissions have been circulated in the group:

Norway 19 June 07
Romania 20 June 07
Norway 21 June 07

Romania 22 June 07
Spain 20 July 07
Netherlands 20 July 07

Spain 20 July 07
Romania 25 July 07
UK 27 July 07
Romania 31 July 07
Canada 9 Aug 07
GIIGNL 10 Aug 07
Romania 13 Aug 07
UK 13 Aug 07
Norway 15 Aug 07
UK 16 Aug 07
Romania 16 Aug 07

Norway 17 Aug 07
Canada 17 Aug 07
Romania 21 Aug 07
Norway 21 Aug 07
Romania 22 Aug 07
Norway 10 Sep 07
Romania 17 Sep 07
Spain 17 Sep 07
Norway 18 Sep 07

All submissions are available at <http://folk.uio.no/erikro/WWW/HNS/hns.html#NYHET>.

- 1.3 The sponsors of this paper wishes to express great gratitude to the participants in the group for their valuable contributions. The views expressed in this paper should not be taken as representing the formal position of the delegations or their governments who contributed to the work of the correspondence group.

1.4 One correspondent has made the following general observation on the work of the correspondence group:

"... we would like to make note that the discussions have exclusively been developed from a legal point of view. Therefore we consider necessary that security of gas supply, commercial, technical and financial matters are still to be analyzed before being able to come up with an agreed and widely satisfactory position. In our view, any proposed legal development has to take into account the underlying LNG business and its importance for all the parties involved, as it is the case of Spain. It is our position not to undermine the capacity of any nation to guarantee a reliable and competitive gas supply in order to comply with the existing numerous energy and environmental legislation and policies."

The same correspondent recommended that States should ensure that any measure to be implemented in order to guarantee the contribution to the HNS Fund would not interfere with or undermine normal LNG business operations

1.5 Some correspondents called for further discussions on a number of different issues.

2 Making sure payments are made

- 2.1 The contributors to the LNG account of the HNS Fund, (the title holders to the LNG immediately prior to discharge; Article 19(1)(b) of the HNS Convention), are not necessarily subject to the jurisdiction of a State Party. Because of that, there is general consensus that **States Parties must consider special enforcement mechanisms** pursuant to Article 6 of the HNS Convention.
- 2.2 Two options have been developed in the group. However, **there are objections** to both of them. Correspondents point out that the proposals imply obligations and/or costs that do not follow from the text of the Convention. In the view of this delegation, such steps are allowed under the Convention and are necessary in the present situation.
- 2.3 The **objections are significant** in that they demonstrate that several States have not found the solutions they are looking for. However, the objections are not of such a character that they can prevent a State that wishes to do so to take advantage of any of the options.
- 2.4 Some correspondents have put forward **other proposals** that have not been further developed in group correspondence. These correspondents may wish to submit their proposals in a separate paper.

Option A: Security

- 2.5 One mechanism that is readily available is to require that contributors who are not subject to the jurisdiction of a State Party to put up **security** for their potential liability to contribute to the HNS Fund. The objection to this option is mainly that there will be costs for such security.
- 2.6 Some correspondents have suggested that **detailed requirements for the security** must be worked out. Others have pointed out that such requirements may be unnecessary, just as there are no detailed requirements as to what is acceptable security under the first tier (“insurance or other financial security, such as the guarantee of a bank or similar financial institution”) and just as there is no requirement for security at all for contributors to the second tier that are subject to the jurisdiction of a State Party. In any event, no concrete minimum requirements in respect of the quality of the security have been circulated to the correspondence group.
- 2.7 It has, however, been suggested that **the security should be evaluated by the HNS Fund Secretariat** to ensure uniformity. This would also make sense because the security is for claims to be collected by the Fund. The HNS Fund could develop standardized forms for bank guarantees, etc.
- 2.8 Also the **amount of security** has been discussed. A bank guarantee is always limited, while the duty to contribute to the HNS Fund has no specified limit. The solution seems to be to require security for the amount that is likely to be due in respect of the LNG cargo if an HNS event should occur, based on the expected levels of contributing LNG, possible worst case scenarios and the limits of the liability of the HNS Fund. The HNS Fund could decide on the amounts per tonne of LNG that such security should amount to.
- 2.9 The **time span** of the security should in the outset extend to contributions to the Fund the year after the discharge of the cargo (Article 19(1)(b) of the HNS Convention). However the HNS Fund may decide to postpone cash calls after a major accident (“or such other year as the Assembly may decide”). This is similar to the practice of setting up ‘major claims funds’ in the IOPC Fund. In such cases, the security should be automatically prolonged correspondingly.
- 2.10 In some cases, a requirement for foreign entities to put up security could be problematic in relation to **trade agreements** prohibiting trade barriers or in relation to ‘most favored nation clauses. **Many** such provisions would allow well-founded security requirements without a discriminatory purpose, like the ones discussed here.

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Option B: Receiver as surety

- 2.11 It has also been suggested to the group that the receiver, by national law, shall be made the **surety** of the contributor to the LNG account if the contributor is not subject to the jurisdiction of a State Party. This would save the cost of putting up security as well as the bureaucracy associated with making sure that the security, if required, is in place for each consignment.
- 2.12 However, the majority of the submissions to the correspondence group point out that this is not in the **“spirit” of the HNS Convention**. **Accepting that “the spirit of the Convention” could have more than a single interpretation, one correspondent of the majority has stated that**
“we understand that the only not possible interpretation is to consider the exception as a general case. Therefore we would like to emphasize the idea that there is an exception for LNG cargos that has to be considered and accomplished. Otherwise, as several Correspondents have alleged, we might be incurring in fraud.”
- 2.13 Others have felt that it is rather difficult to establish what the spirit of the Convention is, and that one should keep strictly to the methods of interpretation of treaties recognized in the Vienna Convention on the Law of Treaties, 1969, Articles 31 *et seq.* Such methods of interpretation, it is submitted, would allow this option. In any event, there are strong indications that the draftsmen of the HNS Convention positively accepted the possibility that it may be necessary to instigate enforcement measures against others than those made contributors in the Convention. This appears from comparing Article 13(2) of the Fund Convention and Article 6 of the HNS Convention. In the HNS Convention, the proviso that enforcement “measures shall only be directed against those persons who

are under an obligation to contribute to the Fund” has been omitted.

2.14 Although the minority view remains firm that this option is legally available under the Convention, it has not been included in the draft resolution.

Conclusion

2.15 A draft resolution that reflects the discussions above is attached. There seems not to be a consensus in the correspondence group on the proposed measures.

3 Reporting

3.1 Questions have been asked in the correspondence group whether the State Party in which the LNG is received is required to report the name and address of the contributor to the HNS Fund in respect of that cargo, even if the contributor is not subject to the jurisdiction of that State Party.

3.2 The **principle** in the HNS Convention is that all cargo received in a State Party shall be accounted for by that State by annual reports. It is envisaged that the contributors will fill in the cargo data in the Contributing Cargo Calculator at <http://www.hnsconvention.org/en/hnscccc.html>. The report of the State Party will then be generated automatically from those data, and submitted by the State Party electronically after the scrutiny it deems necessary. The role of the State Party is then mainly to make sure that all cargoes received or discharged in that State are entered in the Contributing Cargo Calculator.

3.3 This principle applies for all cargoes, regardless of whether the contributor (that is, *eg*, the title holder of a cargo of LNG) is subject to the jurisdiction of that State Party, the jurisdiction of another State Party or the jurisdiction of no State Party. The basic rule is set out in Article 21 of the Convention:

“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” (emphasis added).

3.4 It is not self evident which contributors as liable to pay “in respect of” a specific State Party. But this is clarified in **Article 19**. The person who shall make “contributions ... in respect of each State Party” as far as LNG is concerned is “any person who ... held title to an LNG cargo discharged in a port or terminal of that State.” The decisive factor to determine whether a contribution shall be made “in respect of” a certain State Party is therefore where the cargo is discharged. The same applies for reporting.

3.5 If the contributors not subject to the jurisdiction of any State Party would be required to put up security towards the fund for their eventual liability to contribute (see above in 2), then **the security would serve the purpose of reporting.**

3.6 Several correspondents point out that it would **not be difficult to ascertain who the contributor in respect of an LNG cargo would be.** The correspondence group agrees that the authorities in the State where the LNG is discharged will usually be able to obtain information from the buyer or receiver on who was the title holder immediately prior to discharge. Therefore, unless there is a security that serves the purpose of reporting, the State should require the buyer or receiver to report the identity and address of the titleholder as well as the quantities that were discharged.

3.7 After some discussion, there is consensus in the group that the reporting obligations under **Article 43** as well as Article 21 include cargoes in respect of which the title holder is not subject to the jurisdiction of a State Party.

Conclusion

- 3.8 Altogether, the HNS Convention requires that LNG Contributors who are not subject to the jurisdiction of a State Party (as well as LNG contributors subject to the jurisdiction of other State Parties) should be included in the summary reports of the State Party where the LNG has been discharged. The State Party may obtain these data from the contributors or from others, such as the buyers or receivers of the cargo.

4 Shortfalls

- 4.1 There appears to be a general consensus that cross-subsidization absolutely should be avoided, and that shortfalls in the LNG account clearly should be borne by LNG contributors alone.

5 Developing Countries

- 5.1 The correspondence group has not identified any effects of its proposals that may adversely affect the position of developing countries.

ANNEX

DRAFT RESOLUTION ON CONTRIBUTIONS TO THE HNS
FUND IN RESPECT OF LNG CARGOES

WHEREAS the IOPC Fund has been entrusted with the task to prepare the implementation of the HNS Convention;

CONSIDERING the importance of ensuring that all contributions to the HNS fund are paid when due;

BEING CONSCIOUS that there may be problems collecting contributions when payable by persons not subject to the jurisdiction of a State Party;

NOTING that the contributions to the LNG account of the HNS Fund according to Article 19 of the HNS Convention are payable by the person who immediately prior to its discharge held title to the LNG cargo, even if that person is not subject to the jurisdiction of a Contracting State;

BEING ALSO CONSCIOUS that the efficient collection of contributions to the HNS Fund depends on correct and complete reports according to Articles 21 and 43 of the HNS Convention;

FURTHER NOTING that there may be a need to clarify the reporting obligations of States Parties in respect of contributors to the LNG account that are not subject to the jurisdiction of a State Party;

EMPHASIZING that the LNG account should neither subsidize other accounts or sectors nor be subsidized by them;

RECOMMENDS:

1. that all States Parties to the HNS Convention should ensure that all contributors in respect of cargoes of LNG discharged on their territory are collectable, in particular if the contributors are not subject to the jurisdiction of a State Party, *eg*, by requiring the receiver to obtain from such contributors a security for a limited amount to the satisfaction of the HNS Fund Secretariat
2. that the same reporting routines pursuant to Articles 21 and 43 of the HNS Convention should be maintained whether or not a contributor in respect of an LNG cargo is subject to the jurisdiction of a State Party, and that the reports of the States Parties may be based on information submitted by the contributors or by others if believed to be correct.
3. that other accounts should never cover, partly or in full, non-collectable contributions in respect of HNS Cargoes.
4. that all States Parties should collaborate for harmonized national legislations.

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- making the receiver of a cargo of LNG the surety of the obligation to pay contribution