

Whether and where a similar line should be drawn as a matter of European law is unclear, and was not addressed directly by the Court of Appeal. If the court thought such a line existed (which is not entirely clear), it must have felt that, as in English law, the plea of excess of authority by APBW fell on the “wrong” side of it.

The question of which allegations could impugn a jurisdiction clause is fraught with difficulty. If, as the ECJ has repeatedly said, recourse to national law to attack jurisdiction clauses is impermissible, against which legal framework should pleas of, for example, forgery, duress or lack of authority be tested? The likely answer is that the concept of “agreement”, which is regarded as an autonomous concept within the Regulation,²⁷ will need to be fleshed out to encompass certain grounds of substantive invalidity. Whilst one can see that approach working satisfactorily in extreme cases like forgery, or duress to the person (in which cases one assumes that all Member States’ legal systems are likely to hold such agreements invalid), the territory lying beyond these extreme cases is likely to be perilous. Issues of excess of authority are particularly difficult, given the almost inevitable need to have (impermissible) recourse to specific rules of national law; one may speculate that this was one of the reasons the Court of Appeal felt that the certainty the Regulation aims to achieve would be undermined if the jurisdiction clause could be attacked on this basis.

It therefore remains to be seen what position the English courts would take in the event that an art 23 jurisdiction clause were attacked on a more extreme ground, such as forgery, fraud or duress to the person. It is true that, as Longmore LJ pointed out, “someone has to decide whether the signatures were in fact forged”.²⁸ However, one suspects that even as a matter of European law, separability must have its limits; if a party can establish a good arguable case as to forgery or fraud, the injustice of requiring that party to litigate in the forger’s or fraudster’s jurisdiction of choice would be a step too far, considerations of certainty notwithstanding.

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HAZARDOUS AND NOXIOUS SUBSTANCES—IS THE END IN SIGHT?

Proposed Protocol to the HNS Convention 1996

The principal item on the Agenda of the recent meeting of the Legal Committee of the International Maritime Organisation (IMO)¹ was the adoption of a Protocol to the Convention on Liability and Compensation for Damage in connection with the carriage of Hazardous and Noxious Substances 1996 (“the HNS Convention”). At the end of the debates a final text was adopted which will shortly be submitted to a diplomatic conference, hopefully in the spring of 2010. This is a major step in the adoption of a Convention which has had an exceptionally long history.

27. *Powell Duffryn Plc v. Petereit* (Case C-214/89) [1992] I ECR 1745.

28. [2008] EWCA Civ 1091, [24].

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1. LEG 95, which took place from 30 March to 3 April 2009.

There is no dispute that chemicals can cause substantial damage, both to persons and property, and to the marine environment. Following the adoption of the Civil Liability Convention for Oil Pollution Damage 1969 and its partner, the Fund Convention 1971, considerable work was devoted to the production of a comparable Convention governing liability and compensation for damage caused by chemicals. The capacity of such cargoes to cause massive damage was demonstrated by several incidents, most notably the Texas City disaster in 1947, when two vessels loading ammonium nitrate caught fire and exploded, with the loss of over 500 lives and injuries to over 3,500 persons.

A draft Convention was developed by the Comité Maritime International (CMI) in 1981, including the principal elements of the CLC and Fund Conventions, namely strict, but limited, liability of the shipowner, compulsory insurance and direct action by victims against the ship's insurer. This was submitted to a diplomatic conference at the IMO in 1984. However, the delegates were unable to agree on a final Convention.

In 1996 a revised text was submitted to a diplomatic conference at the IMO and the HNS Convention was finally adopted after considerable negotiations. However, this Convention has so far failed to attract the necessary number of ratifications for entry into force.²

Several studies took place in the period after its adoption to bring forward its entry into force, but the most recent, and hopefully the most effective, initiative was that by a "focus group" appointed by the IOPC Fund, with a mandate to identify the reasons why states have been unable to ratify the HNS Convention, and to provide solutions to them.³

An unusual feature of the previous discussions in the IOPC Fund was that HNS was not strictly the concern of the IOPC Fund, which deals with compensation for pollution damage caused by oil. However, the similarity between the two Conventions and the fact that the IOPC Fund Secretariat has already been tasked with administering the HNS Fund mean that the delegates attending IOPC Fund meetings are well informed of the potential problems and are able to draw on their experience to develop practical solutions.

The four principal areas of concern identified by the focus group were: packaged HNS goods; contributions to the LNG account; non-submission of contributing cargo reports; and definition of "hazardous and noxious substances".

Packaged HNS goods

Article 1(5) of the HNS Convention contains a broad definition of HNS cargoes, including solids, liquids and gases. The final paragraph covers solid HNS cargoes which are subject to the IMDG Code⁴ when carried in packaged form. In practice this means containerised cargo.

The structure of the HNS Convention, based as it is on the CLC and Fund Conventions applying to oil pollution damage, establishes a two-tier compensation framework, with the shipowners (and their P & I Clubs) paying claims up to the limit of the first tier, and a fund

2. See art 46.

3. The prime movers of this initiative were two distinguished Canadians; Jerry Rysanek, Chairman of the IOPC Fund Assembly and Administrative Council, and Alfred Popp QC, former Chairman of the IMO Legal Committee. The evolution of this Protocol can be followed in the reports of the IOPC Fund meetings in October 2007 and March and June 2008 and of the IMO Legal Committee in October 2008.

4. International Maritime Dangerous Goods Code, published by the IMO.

contributed to by cargo interests paying claims in excess of that limit.⁵ The operation of the fund requires Member States to report all relevant cargoes imported into their territory above certain thresholds. The administrative burden of reporting HNS cargoes imported in containers in relatively small quantities (but which may cumulatively exceed the relevant threshold) is very considerable indeed, and detailed studies by the major importers of such cargoes have indicated that this is impracticable.

The focus group draft therefore proposed that packaged HNS cargoes should not be reported, and should not be included in the calculations of contributing cargo on the basis of which contributions to the HNS Fund will be levied. Victims of an HNS casualty, even where it is caused by packaged HNS goods, will still be compensated. This is a revolutionary, but practical, proposal. To meet the concern that the receivers of bulk HNS cargoes may be obliged to make greater contributions to the HNS Fund to make up for the lack of contribution from packaged goods, it was agreed by the shipowners' representatives and the International Group of P & I Clubs that the shipowners' contribution to the first tier will be increased. The exact amount of the increase will be fixed by the diplomatic conference to adopt the Protocol.

LNG cargoes

The present state of the gas industry today was not foreseeable in 1996. The quantities of gas shipped by sea have increased dramatically in recent years, and the development of gas fields, notably in Nigeria, Indonesia and Qatar, has led to the building of a large number of new ships to carry both Liquefied Petroleum Gas ("LPG") and Liquefied Natural Gas ("LNG").⁶

When the HNS Convention was adopted in 1996, the transport of LNG was almost entirely in the hands of governmental organisations and the major energy companies, owing to the enormous capital costs required for the construction of the necessary gas liquefaction plants and the sophisticated ships to carry this product.⁷ When the HNS Convention was under consideration at the 1996 diplomatic conference, the delegates were informed that it would be simpler for the contributions to the HNS fund to be made by the "title holder" to the cargo immediately prior to discharge, and an appropriate wording was adopted in art 19(1)(b).

However, further study has revealed that this arrangement could give rise to considerable difficulty, particularly when the title holder in question is resident in a state which is not a party to the Convention. Moreover, a number of gas-producing countries, notably Algeria, protested that this imposed an unreasonable burden on them that was inconsistent with the overall structure of the IOPC and HNS Conventions, which were based on funds contributed to by the receivers rather than the exporters of the cargoes in question.

The focus group encountered very considerable difficulty in finding a solution to this problem, despite the good intentions of all concerned. The differences between the positions adopted by various states were of a political, economic and policy nature, and not just a matter of drafting. At the June 2008 meeting of the IOPC Funds it was agreed that the Malaysian delegation would coordinate an informal correspondence group during

5. Up to a maximum of SDR 250 million.

6. LPG is principally propane and butane, and LNG principally methane.

7. LNG is transported at a temperature of minus 169°C.

the summer to attempt to resolve the problem, and this led to the presentation to the Legal Committee of a paper⁸ containing revised wording. This provided that the duty to report on receipts of LNG, and to make contributions to the HNS Fund, should lie with the physical receiver, but that the Convention (as amended by the Protocol) should allow the parties to an LNG contract the flexibility to determine by agreement the person liable to make contributions to the LNG fund. To cover the possibility of non-payment by a titleholder liable under such an agreement who is resident in a state not party to the HNS Convention and Protocol, the Fund will be able to invoice the receiver of the cargo in question for the appropriate contribution.

The delegates to the Legal Committee have approved the proposed provisions, although some expressed difficulty in understanding the intricacies of the proposed arrangements. It seems that these had been worked out with the close cooperation of the gas exporting and importing industries as well as the governments concerned, and demonstrated how the IMO and the IOPC Fund can solve difficult technical and legal problems.

Non-submission of contributing cargo reports

The functioning of the HNS Fund, like the IOPC Fund, requires the reporting by Member States of the quantities of the relevant cargo imported through their ports and terminals during the preceding year, in order to apportion the burden of the financial contributions to the fund. The IOPC Fund has a proud record of collection of such contributions, which has enabled it to make prompt payments to the victims of major oil pollution incidents.

However, it has encountered persistent problems with some Member States in collecting the statistical data of the tonnages of relevant cargoes imported by receivers in those states. In theory no apportionment of any distribution of funds to victims of pollution can be made until all Member States have made their oil reports for the year in question. In practice the system has been made to work, partly because the quantities of unreported cargoes are relatively very small, and partly by making, in the case of some states, estimated figures based on statistics for previous years.⁹

Considerable concern has, however, been expressed at the failure of the IOPC Fund system to solve this problem;¹⁰ and, when the Supplementary Fund Protocol was adopted in 2003, a provision was included¹¹ which enables the Fund to withhold payment of compensation for pollution damage in a state party which has not complied with its reporting obligations.

The HNS Convention contains no such provision, but it is the view of many governments that a provision to this effect should be included in the Protocol. An eloquent demonstration of the need for such a provision is the fact, confirmed by the Director of Legal Affairs of the IMO,¹² that, of the 13 states which have deposited instruments of ratification of the HNS Convention, only two have submitted data on the relevant

8. LEG94/4/1. A further paper, LEG94/4/2, was put in by the IOPC Fund suggesting minor improvements to the draft text.

9. The oil industry is no longer dominated by the "Seven Sisters", but is still a coherent body. No doubt the major contributing oil companies will be aware of any large imports of oil which a Member State had failed to declare. This is less likely with HNS cargoes.

10. See the papers submitted by the Audit Body to the October 2007 and March 2008 IOPCF meetings.

11. Art 15.

12. The depositary of ratifications of the HNS Convention.

quantities of contributing cargo as required by art 43. Article 46 of the HNS Convention provides that the Convention will enter into force 18 months after consents to be bound have been expressed by at least 12 states, including four states each with at least two million units of gross tonnage, and instruments of ratification have been deposited (with the IMO), accompanied by details of at least 40 million tonnes of contributing cargo to the general account. Without the relevant information it is simply impossible for the ratifying states, or the IMO, to establish whether or not the required tonnage level of contributing cargo has been reached.

Despite the persuasion of these arguments, there was at the October 2008 meeting a marked reluctance by some delegations to accept the need for the proposed provision, which they perceived as being draconian in nature. One delegate in particular suggested that the IMO secretariat would in such circumstances be “judge, jury, and executioner”.

Such remarks represented the views of a very small minority, however, and at the end of the debate on this topic the Chairman concluded that the Legal Committee had reached agreement on the need for some sanction to ensure that states complied with their obligation to report tonnages of contributing cargo. The proposed clauses in the draft Protocol to give effect to this were approved. As a gesture to those states whose delegations claimed that they did not fully understand the proposal, a resolution was adopted urging that further technical cooperation and assistance in capacity-building should be offered to such states.

Drafting matters

Several drafting points in the proposed Protocol were discussed in the Legal Committee. The most difficult concerned the wording of art 1(5)(vii), which contains a reference to both Appendix B of the Code of Safe Practice for Solid Bulk Cargoes as amended and also to the IMDG Code. It was explained by several delegates who had been present at the 1996 Diplomatic Conference that the purpose of this paragraph was to ensure that certain bulk cargoes which can be hazardous in certain limited circumstances, notably coal, fishmeal and woodchips, should not be included in the definition of Hazardous and Noxious Substances to which the HNS Convention will apply. Although those cargoes are not without hazards, it was accepted by the 1996 Diplomatic Conference that the very large tonnages of those materials carried by sea would unjustifiably distort the fair sharing of the burden of contributions to the HNS Fund in the light of the low risk of damage associated with them.

The fact that the words “as amended” do not appear after the mention of the IMDG Code indicated, they said, that this was a reference to the 1996 edition of the IMDG Code, and not to any subsequently amended version. Much discussion on the margins of the October 2008 meeting failed to produce a solution to this problem, and it was left to the IMO Secretariat to try to develop a drafting solution which achieved the objective of which there is no real doubt. This matter was therefore the focus of considerable debate at the March/April 2009 Legal Committee meeting.

An example of the technical and drafting problems encountered can be seen from a comparison of the proposed revised wording of paragraph 5(a)(vii) of art 1, as set out in art 3 of the Protocol, with the equivalent paragraph in the 1996 Convention. The original

1996 wording refers to “solid bulk materials possessing chemical hazards covered by Appendix B of the Code of Safe Practice for Solid Bulk Cargoes, as amended . . .”. The copy of the draft Protocol prepared by the IMO Secretariat in January 2009¹³ refers to the 2004 version of the Code of Safe Practice for Solid Bulk Cargoes, which contains no Appendices.

Moreover, in December 2008 the Maritime Safety Committee of the IMO adopted the International Maritime Solid Bulk Cargoes (IMSBC) Code, which will become mandatory on 1 January 2011 and will replace the Code of Safe Practice for Solid Bulk Cargoes. A working paper prepared by the Secretariat in March 2009¹⁴ suggested amendments to paragraph 5(a)(vii) to cover this.

The Head of the Cargoes Section of the Maritime Safety Division of IMO gave an explanation of the position, and suggested a simplified wording which would include all solid bulk materials possessing chemical hazards covered by the IMSBC Code as amended, to the extent that these substances are also covered by the IMDG Code as amended when carried in packaged form, but with the specific exclusion of coal, woodchips and fishmeal. However, this was not accepted by the delegates to the Legal Committee.

For the moment, therefore, the wording of the Protocol as adopted by the Legal Committee remains as set out in the original document LEG95/3, including a reference to the version of the IMDG Code in effect in 1996. It seems regrettable that the HNS Convention as amended by the Protocol, when they enter into force, will contain a reference to a Code which is nearly 20 years old, but it is to be hoped that the *travaux préparatoires* of the HNS Convention and its Protocol, and possibly this report, will assist those who have to give effect to them.

This evolution demonstrates the challenge of the IMO Conventions to adapt to changing practices in the shipping industry, but also demonstrates the difficulty of drafting suitable wordings which can adjust to those changes but still be understood and applied by seagoing personnel and maritime administrations alike.

After the lengthy debate on this provision, the substantive provisions of the HNS Protocol concerning packaged HNS goods, contributions to the LNG account, and non-submission of contributing cargo reports were adopted by the Legal Committee without further discussion.

Conclusion

It is hoped that a diplomatic conference to adopt the HNS Protocol can be convened in the spring of 2010, and that this will lead to early ratification of the HNS Convention, as amended by this Protocol, by a sufficient number of states to satisfy the requirements of art 46 for entry into force. Only then will governments be able to feel confident that there is in place an international regime to guarantee prompt and effective compensation to the victims of a marine casualty involving hazardous and noxious substances.

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13. Document LEG95/3.

14. Document LEG95/WP.1.

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