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"Fire on the seas! Fine by me?" Advancing an argument for the reform of the criminal liability incurred by corporates, under South African law, as a result of the misdeclaration of dangerous goods to be carried by sea.

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7 February 2022

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ABSTRACT

The carriage of dangerous goods by sea requires the utmost care and preparation. An essential part of preparing for such operations is a trail of documents evidencing the exact profile of goods to be carried and the hazards they may present. Carriers will generally have to rely on the descriptions of the goods provided by shippers in their preparations, as they are not in a position to have knowledge of the exact nature of the goods. The risks involved with the transport of dangerous goods are greatly heightened when carriers have not provided accurate information about the cargo. In recent years, there has been a steady rise seen in containership fires and incidents, like the Beruit Port explosion, all signifying the risks involved in the carriage of dangerous goods. These incidents often occur due to incorrect or insufficient information regarding the characteristics of the dangerous goods, being provided to carriers, this is also known as the misdeclaration of dangerous goods.

This thesis seeks to serve as a guide to legislators and judicial institutions in South Africa in terms of dealing with the challenge posed by the misdeclaration of dangerous goods. It shall thoroughly examine the current liability incurred for the offence of misdeclartaion and the proposed changes to that liability found in the recently proposed pieces of legislation. The adequacy and proportionality of the current and proposed measures will be critically examined, with a particular focus on the ability of said measures to deter companies from misdeclaring dangerous goods. Companies are dominant in global international trade and regulations must accordingly regulate their activities because of the harm they are capable of causing.

As the country seeks to reinvigorate its Maritime sector, legislation that adequately protects the ports and seafarers is essential. The sector ought to look at the controls adopted in different sectors for the regulation and punishment of dangerous corporate behaviours. This thesis puts forth the argument that the legislature ought to duly recognize the danger posed by misdeclaration and pre-emptively amend legislation, introducing harsher punitive measures aimed at deterring the occurrence of the offence.

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CHAPTER 1

INTRODUCTION

1.1 Background

Approximately 90% of the world's goods are carried by sea and over 70% of these goods are shipped as containerised cargo.[1] A variety of goods are transported as containerised cargo across the seas including, inter alia, paints, adhesives, aerosols and pesticides.[2] The common feature of the mentioned goods is that they pose various hazards whilst in transit, particularly as they remain enclosed in containers, with the documentation provided being the master and crew's only source of information about the goods.[3] The characteristics of such goods make them flammable, toxic, corrosive, radioactive and explosive thus requiring extensive caution when handling and stowing.[4]

The common law recognised and provided for such hazards in transit and the shipper was under an implied duty to not ship any dangerous goods unless notification of the hazards involved was given to the carrier or his agent.[5] Failure to give such notice resulted in all liability for any damage caused by such shipment falling to the shipper.[6] The rationale behind such liability was that the shipper has a relationship with the goods that allows for in-depth knowledge of the inherent characteristics and the dangers posed by the goods.[7] Carriers, in turn, have exclusive knowledge of how a vessel's hold/storage conditions will change over a voyage and can accordingly advise the shipper of what the cargo is likely to be exposed to.[8] Each party is thus in control of a sphere of exclusive influence over the success and safety of ventures, and this should encourage interdependence and transparency.[9]

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[1] S Kallada 'Misdeclared-Undeclared Containerized Cargoes' *IMDG Code Compliance Centre* 15 February 2019 available at www.shashikallada.com/misdeclared-undeclared-containerized-cargoes/, accessed on 12 June 2020.
[2] J Ellis 'Undeclared Dangerous Goods – Risk Implications for Maritime Transport' (2010) 9 *WMU Journal of Maritime Affairs* 5.
[3] ibid.
[4] ibid.
[5] A Letsos 'Do English Law, Hague-Visby Rules and Rotterdam Rules Provide Adequate Legal Frameworks regarding the Carriage of Dangerous Goods' (2014) *Bristol Law Review* 116.
[6] ibid.
[7] ibid.
[8] J Cavanah 'Dangerous Goods Liability in the Age of Containerization -- Warning: This Comment May (or May Not) Self-destruct' (2012) 37(1) *Tulane Maritime Law Journal* 170.
[9] Letsos note 5 above 116.

In an effort to achieve interdependence and transparency, the Visby Protocol,[10] an international regime governing the carriage of goods by sea, gives effect to the implied duty not to ship dangerous goods.[11] Furthermore, in order to address the wide range of goods falling into the category, the International Maritime Organization (IMO) biennially publishes a code to govern the regulation of dangerous goods at sea internationally.[12] This code is intended to appropriately group dangerous goods into classes according to the risk presented and provide instructions for the safe handling for each class of dangerous goods.[13]

The Merchant Shipping Act (MSA)[14] regulates the carriage of dangerous goods in South Africa. The MSA gives effect to a statutory duty to give notice and open-endedly defines the term dangerous goods to encompass the changing definitions found in the latest international codes, such as the International Maritime Dangerous Goods Code (IMDG Code).[15] In terms of the regulations published under section 356 of the MSA, dangerous goods may only be taken on board a ship if the ship in question is compliant and the relevant port officer has been furnished with all the relevant documentation.[16] One of these documents is a dangerous goods declaration.[17] This declaration can either be a certificate or a signed written declaration that verifies that the goods are, inter alia, classified, packaged, marked or labelled or placarded as dictated by international standards and that they are also in proper condition for carriage by sea.[18] The dangerous goods declaration must be provided to the master before any dangerous goods may be loaded onto the ship.[19] The master must then furnish the relevant port officer with the declaration together with documents detailing the handling and proposed stowage plan for the goods.[20]

The failure to properly declare dangerous goods is inclusive of failures to provide documentation that identifies the goods as dangerous goods, incorrectly classifying the

[10] The Hague Rules as amended by the Brussels Protocol 1968 (Hague-Visby Rules). The Hague-Visby Rules have enacted into South African law as schedule 1 to the Carriage of Goods by Sea Act 1 of 1986.
[11] article IV para 6 of the Hague-Visby Rules.
[12] International Maritime Organization International Maritime Dangerous Goods Code 2008 (IMDG Code).
[13] K Brennan 'Up in Flames' (2019) 8(2) *Loyola Maritime Law Journal* 261.
[14] Merchant Shipping Act 57 of 1951.
[15] J van Niekerk 'Statutory Provisions Relating to the Carriage of Dangerous Goods by Sea' (1981) 5 *De Jure* 116-118. See further section 235(2) of the MSA.
[16] regulation 4 and regulation 9 of the Merchant Shipping (Dangerous Goods) Regulations 1997 (Dangerous Goods Regulations).
[17] regulation 4 of the Dangerous Goods Regulations.
[18] regulation 1 of the Dangerous Goods Regulations.
[19] regulation 4 of the Dangerous Goods Regulations.
[20] regulation 4 and regulation 9 of the Dangerous Goods Regulations.

dangerous goods or misrepresenting the quantity of the dangerous goods.[21] An estimate of at least 150 000 containers with misdeclared goods move in the global supply chain annually.[22] This estimation might not seem significant to a layperson. However, incidents such as the 2015 Tianjin explosions, which killed more than 173 persons and left hundreds more injured,[23] put the threat posed by lack of caution when handling or stowing dangerous goods into perspective. That horrific tragedy is a perfect example of how packaging, stowage, heat exposure and the surrounding cargo can all come into play when dealing with the risks associated with dangerous goods.[24]

Cargo that is misdeclared presents additional risks to transport operations as it deprives seafarers and port staff of the opportunity to take the necessary precautions that should be taken when transporting dangerous cargo.[25] If the proper precautions are not made evident by means of the cargo being correctly declared, the dangerous cargo is likely to be improperly handled and stowed.[26] Improperly stowed dangerous cargo may result in fires or explosions in cargo holds, ports or storage facilities.[27] Furthermore, the lack of awareness may also jeopardise the effectiveness of any emergency operations that may be deployed to assist in cases where the possible risk is materialising.[28]

South Africa is no stranger to the materialisation of the risks posed by misdeclared dangerous cargo. In 2003, a Singaporean flagged container ship, the *M/V Sea Elegance*, which was in the process of docking at the Durban harbour was engulfed by a massive fire after an explosion from one of its containers.[29] The crew were unable to douse the fire and abandoned the ship on the captain's orders.[30] During the evacuation, one of the crew members became separated from the rest of the crew and, tragically, was killed by the fire.[31] Misdeclared calcium hypochlorite was determined to be the cause of the explosion after an investigation by the South

[21] Ellis note 2 above 14.
[22] S Kallada 'Dangerous Goods Misdeclaration penalty and responsibilities' *IMDG Code Compliance Centre* 28 August 2019 available at www.shashikallada.com/dangerous-goods-misdeclaration-penalty-and-responsibilities/, accessed on 12 June 2020.
[23]S McGarry et al 'Preventing the Preventable: The 2015 Tianjin Explosions' (2017) 4 *Harvard School of Public Health* 1.
[24] Brennan note 13 above 266.
[25] Ellis note 2 above 6.
[26] ibid.
[27] ibid.
[28] ibid.
[29] Brennan note 13 above 266.
[30] ibid.
[31] ibid.

African Maritime Safety Authority (SAMSA).[32] The misdeclared cargo was stowed near a heat source, rubber, plastics and paper, which all culminated in an uncontrollable fire.[33]

To prevent such misdeclarations from occurring more frequently, international shipping lines have begun to implement measures, such as heavy fines, to deter the behaviour.[34] In the South African context, if found liable for the offence is, offending persons would face imprisonment for a period of up to twelve months or a fine.[35] The efficacy of a period of imprisonment being the only clearly defined deterrent is questionable as maritime trade forms part of commercial activities that are largely influenced by corporations.[36] The ability of a statutory period of imprisonment to deter misdeclaration is greatly hindered by the fact that corporations do not physically exist and cannot serve such sentences.[37] Furthermore, no procedures for identifying individuals who would be deemed to be personally responsible for misdeclarations are identified by statute. Clearly defining which specific individuals within the corporate structure are at risk of being imprisoned as a result of misdeclaration of dangerous goods by the corporate would provide clarity as to whom the legislators intend to hold personally liable.

Whilst the penalty of imprisonment requires clearly directed personal liability in order to effectively punish individuals within a corporate, it is submitted that the same cannot be said in regard to the imposition of a fine as a deterrent or punitive measure. Corporates not only have deeper pockets than individuals,[38] their existence is also primarily dependent on their financial stability.[39] Fines threaten this stability and are thus capable of threatening the corporates' very existence.[40] Although there is no one-size-fits-all rule guiding the fine amounts appropriate in each circumstance where an offence has been committed, heavy fines

[32] Brennan note 13 above 267.
[33] ibid.
[34] H Manaadiar 'Shipping Lines get Tough on Dangerous Goods Misdeclaration' (12 August 2019) *Shipping and Freight Resource* available at www.shippingandfreightresource.com/dangerous-goods-misdeclaration/, accessed on 6 June 2020.
[35] section 313 of the MSA; regulation 21(1) of the Dangerous Goods Regulations.
[36] Multinational corporations dominate international trade accounting for approximately half of global exports as pointed out by In Song Kim & H Milner in 'Multinational Corporations and their Influence Through Lobbying on Foreign Policy' (2019) 2 *Multinational Corporations in a Changing Global Economy* available at www.brookings.edu/wpcontent/uploads/2019/12/Kim_Milner_manuscript.pdf&ved=2ahUKEwiyoICQtPXrAhWRoFwKHQmrCK0QFjABegQIDxAC&usg=AOvVaw3JyC1Jkwx4C1KuHXKrRQfz&cshid=1600526280838, accessed on 27 May 2020.
[37] D Farisani *A Comparative Study of Corporate Criminal Liability – Advancing an Argument for the Reform of Corporate Criminal Liability in South Africa* (unpublished PhD thesis, University of KwaZulu-Natal, 2014) 5.
[38] M Paleker *The Re-engineering of South African Small Claims Courts* (unpublished PhD thesis, University of Cape Town, 2018) 25.
[39] Farisani note 37 above 182.
[40] ibid.

arguably have a greater ability to deter illegal behaviours as potential future offending persons are aware of the financial impact of the offence from the outset.[41] Large fines are also preferred because they serve to ensure that victims are afforded enough compensation to 'make them whole'.[42] With respect to the fine incurred for the offence of misdeclaration in South Africa, the MSA offers no qualification and this indicates that the fine will be determined upon examination of each particular instance.[43] The ability of such an approach to successfully deter the misdeclaration of dangerous goods to be carried by sea remains unclear.

The uncertainty around the deterrent effect of the country's regulation is cause for concern, as the country's own experiences indicate that the safe carriage of dangerous goods is an international concern, made particularly dangerous by the fact that there is often no means of predicting where and when the risk involved may materialise.[44] South Africa has seen dangerous goods related explosions near its harbours[45] and dangerous goods shipped from South African ports have gone on to explode elsewhere.[46] Given that the misdeclaration of dangerous goods is not a new phenomenon and given South Africa's own experiences with dangerous goods, it is submitted that legislative reform that effectively ensures that the liability incurred is clearly directed and sufficiently severe to deter its occurrence is required.

1.2 Aim and Objective of this Study

This thesis highlights recent fires and other serious incidents caused by dangerous goods, as a backdrop to discussing whether administrative fines are adequate to deter misdeclarations. It is argued that the status quo is not "fine" and that additional punitive measures in the form of criminal liability should be introduced.

The thesis also seeks to serve as a guide to South African legislators and judicial institutions on how to deal with the challenge posed by the misdeclaration of dangerous goods. It is aimed at thoroughly examine the current liability incurred as a result of the misdeclaration of dangerous goods and the changes to that liability in the proposed draft Merchant Shipping Bill 2020 (MSB).[47] The types of liability found in the current and proposed laws will be weighed

[41] ibid.
[42] Farisani note 37 above 30.
[43] See row 5 column 2 of the table under section 313(2) of the MSA. No indicative amount is specified for the fine payable for contravention of s235(1) or (2).
[44] Ellis note 2 above 6.
[45] *MV Recife: Control Chemicals (Pty) Ltd v Safbank Line Ltd & others* 2000 (3) SA 357 (SCA) (*MV Recife*) para 6; Brennan note 13 above 266.
[46] *MV Recife* note 45 above para 1.
[47] GN 148 *GG* 43073 of 6 March 2020.

up against the harm that can be caused by the life-endangering corporate behaviour of misdeclaration of dangerous goods to be carried at sea and comments will be made on the sufficiency of existing and proposed measures. The South African maritime industry seems to have been previously neglected,[48] thus as the country shifts towards unlocking the economic potential of its oceans,[49] it stands to reason that the country should be conscious of the measures of regulating corporate behaviour implemented internationally and in some of its own more developed sectors. The extent to which the resultant liability deters the misdeclaration of dangerous goods to be carried by sea in South Africa will be examined under the various research questions within the scope and limitations of the thesis.

1.3 Scope and Limitations of the Study

The scope of this dissertation will be limited to considering the misdeclaration of dangerous goods to be carried to or from a South African port. It is beyond the scope of this dissertation to examine and discuss the effect of third parties providing the shipper with incorrect or insufficient information related to the dangerous goods. The research has been formulated with the wilful or negligent misdeclaration of the shipper in mind and any possible changes in the direction where liability falls, caused by the conduct of any third parties resulting in the shipper's misdeclaration, remains an area for further research.

The research questions dealt with in this dissertation are centred on the carriage of dangerous goods in South Africa. More specifically, the risk involved in the carriage of dangerous goods and the legal consequences of their misdeclaration in South Africa. Thus, only legislation regulating the carriage of dangerous goods will be considered and not legislation regulating the carriage of general goods.

All references to dangerous goods describe goods that are physically dangerous to the ship, crew, ports and surrounding cargo. It is beyond the scope of this dissertation to include a discussion of goods that may be regarded as dangerous in the sense of delaying the ship or the ship being prohibited entry in a particular country.

All references made to the misdeclaration of dangerous goods denotes a situation where a shipper has provided carriers or port authorities with documentation that does not identify the goods as dangerous or misrepresents the quantity of dangerous goods.[50] The misdeclaration

[48] T Mabiletsa 'South African Owned Shipping and Potential Benefit for South Africa: A Ship Owner's Perspective' 512 (2016) *World Maritime University Dissertations* 2.
[49] Mabiletsa note 48 above 29.
[50] Ellis note 2 above 14.

must be material and result in a failure to take necessary precautions when handling or stowing the goods. It is beyond the scope of the dissertation to include instances where the hazard that has materialised is of such a remote possibility that reasonable declaration would not have prevented it. The misdeclaration of dangerous goods to be carried by sea is dangerous corporate behaviour as it could be responsible for severe consequences to the environment, property and human life.[51] It is beyond the scope of this study to comprehensively examine the types of dangerous corporate behaviours in South African industries and their legal consequences. Therefore, the examination of dangerous corporate behaviours is limited to the misdeclaration of dangerous goods in the maritime sector. South Africa's mining industry has enjoyed a major economic presence in the country and is also internationally renowned for its wealth of minerals, that are mostly exported by sea.[52] This dissertation is written in the context of South Africa's national policy aspiration for its maritime industry[53] and will illustrate a few lessons that may be taken from the country's experience with the regulation of dangerous corporate behaviour in the mining industry.

The study will consider the proposed changes to the regulation of the misdeclaration of dangerous goods as a means of gauging the most recent views held by the legislature regarding the offence of misdeclaration and comment on the required actions required for the proposed instruments to enter into force.

There are certain limitations to this study, especially since there is a paucity of South African cases speaking to the legislation and regulations governing the carriage of dangerous goods, with available authorities to be discussed in Chapter 3. The misdeclaration of dangerous goods to be carried by sea presents an interjurisdictional risk to all involved in transport operations.[54] Therefore, whilst primarily concerned with the regulations pertaining to shipments moving and out of the Republic, this these will also refer to incidents outside of the borders of South Africa as examples of the harm created by misdeclaration.

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[51] R Steinbuch 'The Executive-internalization Approach to High-risk Corporate Behavior: Establishing Individual Criminal Liability for the International or Reckless Introduction of Excessively Dangerous Products or Services into the Stream of Commerce' (2007) 10 *NYUJ Legis & Pub Pol'y* 321-322.

[52] S Mthethwa *The Maritime Industry in South Africa: An Opportunity for Logistics Advancement in the Bulk Exports* (unpublished MBA theses, University of Natal, 2003) 17.

[53] South Africa Department of Transport *Comprehensive Maritime Transport Policy (CMTP) for South Africa* available at https://www.transport.gov.za/documents/11623/44313/MaritimeTransportPolicyMay2017FINAL.pdf/4fc1b8b8-37d3-4ad0-8862-313a6637104c, accessed on 26 November 2020.

[54] Ellis note 2 above 6.

1.4 Terms of Reference

Throughout this dissertation reference will be made to the terms carrier, consignee, corporate, shipper/consignor, dangerous goods, declaration, general average and strict liability.

The term 'carrier' is described as "an individual or legal entity that is involved in the business of transporting passengers or goods for hire".[55]

The 'shipper', also known as the consignor, is described as "[t]he individual, company or entity that ships goods, or gives goods to another for care".[56] For the purposes of this dissertation, when any reference to the shipper is made, it is to the company that has shipped the goods.

The 'consignee' is identified as "[t]he person or firm named in a freight contract to whom goods have been shipped or turned over for their care".[57]

The term 'corporate', also known as company, refers to "a juristic person appropriately incorporated in terms of the Companies Act 71 of 2008 (Companies Act) or one of its predecessors."[58] The Companies Act also defines 'person' as inclusive of a juristic person.

According to Burchell,[59] 'corporate criminal liability' stemmed from the realisation of the need for a "comprehensive and coherent theory of corporate liability". Countries became aware of the need after an increase in corporate crimes in the form of health and safety regulation breaches and activities that degraded the environment.[60]

The MSA[61] defines dangerous goods (also sometimes referred to as hazardous and noxious substances) as "goods which by reason of their nature, quantity or mode of stowage, are either singly or collectively liable to endanger the lives or health of persons on or near the ship or to imperil the ship, and includes all substances within the meaning of the expression "explosives" as used in the Explosives Act, 1956 (Act No. 26 of 1956), and any other goods specified falling within the scope of definition of dangerous goods as per the Dangerous Goods Regulations".[62]

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[55] E Hinkelman *Glossary of International Trade* 5 ed (2009) 31.
[56] Hinkelman n 55 above 41.
[57] ibid.
[58] section 1 of the Companies Act 71 of 2008.
[59] J Burchell *Principles of Criminal Law* 4 ed (2014) 448.
[60] ibid.
[61] Merchant Shipping Act 57 of 1951.
[62] section 2 of the MSA.

For the purposes of this dissertation, the term 'declaration' refers to the presentation of a dangerous goods declaration to the relevant port authority. A dangerous goods declaration is a certificate or a signed written declaration that verifies that such goods are, inter alia, classified, packaged, appropriately marked, labelled or placarded, as dictated by international standards and that they are also in proper condition for carriage by sea.[63]

The term 'general average' is described as "a loss that affects all cargo interest on board a vessel as well as the ship herself".[64] The loss is said to result due to "an intentional sacrifice (or expenditure) incurred by the master of a vessel in time of danger for the benefit of both ship and cargo".[65]

The term 'strict liability' is referred to as a theory that holds the defendant/injurer "prima facie liable for the harm caused whether or not either of two further conditions relating to negligence and intent is satisfied".[66]

1.5 Structure of Dissertation

This dissertation consists of five chapters and is outlined as follows:

Chapter 1

The first chapter, inter alia, provides background to the need for reform of the liability incurred for misdeclaration, defines terminology used in the dissertation, describes the limitations of the research, and explains the rationale and purpose of the research.

Chapter 2

The need for reform of South African legislation deterring/punishing the misdeclaration of dangerous goods to be carried by sea stems from the risks created by the carriage of undeclared dangerous goods and the recurrence of misdeclaration observed in maritime trade. Therefore, Chapter 2 will commence with an examination of why proper declaration is important and give a brief overview of the factors leading to misdeclaration.

Chapter 3

The third chapter will include an examination of the current legislation regulating the misdeclaration of dangerous goods to be carried by sea in South Africa in order to determine

[63] regulation 1 of the Dangerous Goods Regulations.
[64] Hinkelman note 55 above 84.
[65] ibid.
[66] R Epstein 'A Theory of Strict Liability' (1973) 2 *Journal of Legal Studies* 152.

the adequacy of the punitive measures imposed upon conviction of the offence. Judicial decisions and academic opinions relating to the issue of how adequate the measures are will be discussed in this chapter.

Chapter 4

In Chapter 4 an analysis will be conducted of recent legislative proposals and commitments made by South Africa in order to determine what transformative effect the new laws will have on the liability incurred for the misdeclaration of dangerous goods to be carried by sea. This analysis will be followed by an examination of the outstanding process for the proposed legislation to enter into force in South Africa.

Chapter 5

Chapter 5 will provide concluding remarks and set out recommendations on further reasonable amendments.

1.6 Research Methodology

The research methodology adopted for this thesis shall be a desktop review of legal materials. The researcher shall critically analyse the 'in force' and proposed legislation regulating the declaration of dangerous goods to and from South Africa. In particular, the sufficiency of the changes to be brought about by the proposed legislation, namely the MSB, will be considered in light of the international measures and proposed international regulations for the carriage of dangerous goods.

1.7 Conclusion

Legislation that promotes the safety of South African seafarers, cargo and ports is a necessity as the country embarks on the journey of reinvigorating its maritime industry. The misdeclaration of dangerous goods poses a threat that cannot be taken lightly. South Africa has been fortunate as there is yet to be a large-scale tragedy involving dangerous goods at its ports or onboard its ships. However, the country cannot afford to wait for such an occurrence before analysing whether its legislation adequately addresses the misdeclaration of dangerous goods to be carried by sea. The country must aspire to align the protection of its seafarers with the protection afforded to other workers exposed to hazards of the same level. What follows in the subsequent chapter is an examination of the duty to declare dangerous goods and the various factors that may cause shippers to misdeclare dangerous goods.

CHAPTER 2

THE DUTY TO DECLARE AND FACTORS LEADING TO MISDECLARATION

2.1 Introduction

The doctrine of freedom of contract serves as one of the founding pillars for laws governing the international carriage of goods by sea.[67] Historically, cargo owners and carriers were always free to agree upon terms with little or no intervention from the state, with various terms and practices repeatedly incorporated.[68] These terms and practices, previously freely agreed upon, resulted in modern day shipping laws being heavily reliant on common-law practices and customary trade usages.[69] To date, a number of these common-law practices and customary trade usages are imposed in all contracts of carriage regardless of the parties' free will.[70] Thus, the will of those who came before can be seen to guide and limit the will of contracting parties in the modern area as the framework has been set.

In order to gain an understanding of the origin of the duty to declare dangerous goods, it is essential to first examine the rationale behind this imposition of common-law practices and customary trade usages in contracts of carriage. This chapter will outline the purpose of implied terms, specifically the obligation not to ship dangerous goods. This chapter will also give an overview on developments that led to the codification of common-law practices and customary trade usages. Finally, the chapter will outline the duty to declare in its modern form and examine factors that may lead to shippers misdeclaring their dangerous goods.

2.2 Implied Terms and the Common Law

The limitation of free will by the imposition of common-law practices and customary trade usages seeks to address the unequal bargaining power between the contracting parties.[71] Without such intervention, carriers, as the service providers, would have been in a position to demand that carriage occurs strictly on their terms.[72] Furthermore, parties are unlikely to be

[67] T Alawneh *A Critical Analysis of the Implied Obligation against Unjustified Deviation: Is the Rule Still Relevant to the Modern Law on Carriage of Goods by Sea?* (unpublished PhD thesis, University of Huddersfield, 2015) 91.
[68] ibid.
[69] ibid.
[70] ibid.
[71] Alawneh note 67 above 93.
[72] Alawneh note 67 above 92.

able to provide for every single eventuality in their express terms and the aforesaid imposition assists the courts in the production of just and fair outcomes.[73] These imposed common-law practices and customary trade usages are deemed to form part of the contract as implied terms and serve to outline some of the rights and obligations of each party.[74]

An example of an implied term is the shipper's obligation to not ship dangerous goods. This term is implied independently of the intention of the contracting parties and forms part of common-law practices that were adopted to promote safety at sea and save lives.[75] The implication of the obligation not to ship dangerous goods further indicates the equilibrium the courts wished to create between the two bargaining parties. Whilst the primary purpose of the implication of such terms may be said to be the prevention of contracts of carriage that heavily favour the service providers (carriers), the courts are also seen to adopt the implication of terms preventing the shipper from unduly burdening carriers and posing threats to their ventures.[76]

In terms of the common law, only in instances where such burden and threat have been clearly and sufficiently communicated with carriers, is the shipping of dangerous goods permitted.[77] The requirement of notice qualifies the obligation and has the effect of shifting the liability stemming from any incident caused by the dangerous goods shipment to the carrier if such carriage is accepted.[78] The rationale behind the obligation and its qualification can be said to rest within the two spheres of separate knowledge that each party holds. On one hand, the shipper has a relationship with the goods that allows for awareness as to the possible effect of exposure to conditions including, inter alia, heat, cold, humidity, air pressure and stowage.[79] The experience of the carrier, on the other hand, allows for awareness as to what conditions may await the ship and the cargo stowed on the ship whilst at sea.[80] Thus, the requirement of notice can be seen as a common-law practice adopted to enforce cooperation between the holders of exclusive knowledge and to promote safe carriage of dangerous goods.

2.3 The Hague Rules and Hague-Visby Rules

In modern-day society, the safe carriage of dangerous goods is of major commercial importance. This is because approximately half of all goods carried by sea can be classified as

[73] Alawneh note 67 above 92-93.
[74] Alawneh note 67 above 92.
[75] Alawneh note 67 above 99.
[76] Alawneh note 67 above 99-100.
[77] Letsos note 5 above 116.
[78] Letsos note 5 above 123-124.
[79] Letsos note 5 above 116.
[80] ibid.

dangerous, potentially dangerous or harmful to the environment.[81] The increase in the shipping of dangerous goods can be traced back to the high demand for basic commodities after World War II.[82] With the supply of certain goods unable to meet the sudden surge in demand, synthetic goods were seen as a viable replacement.[83] Synthetic are either hazardous themselves or the components for their manufacture, necessitate the shipping of goods that are classified as hazardous.[84] Thus, the shipping of greater quantities of dangerous goods initially stemmed from the demand created by the spread of the industrial revolution and carried on with general increased involvement in international trade.[85]

Along with the increased levels of shipping and trade came cause for concern as contradictory interpretations of certain terms, incorporated into contracts of carriage, in different jurisdictions, were thrown into the spotlight. English courts were seen to favour an approach that allowed for carriers to contract out of all obligations, even those imposed by common-law practices and trade usages.[86] Courts in the United States, on the other hand, found such clauses to be against public policy and thus invalidated them.[87] Litigation predominantly took place in England and thus favoured carriers, much to the chagrin of cargo-owning nations and shippers.[88]

As frustrations around this one-sided approach grew, it became apparent that pure reliance on common-law practices and trade usages would continue to fail shippers as they could be evaded easily. This realisation lead to strides being made in the codification of how the contracting parties should split the risks involved,[89] and the adoption of an international regime known as the Hague Rules[90] at Brussels in 1924.[91] The Hague Rules were adopted with the intent of creating uniformity in contracts of carriage and to this end made use of the same

[81] R Bâzâitu & A Nicolae Antohi 'The Impact of Misinformation on Dangerous Goods Operations' (2018) 27 *Constantia Maritime University Annals* 137.
[82] Letsos note 5 above 107.
[83] Letsos note 5 above 108.
[84] ibid.
[85] ibid.
[86] F Reynolds 'The Hague Rules, the Hague-Visby Rules and the Hamburg Rules' (1990) 7 *Australian and New Zealand Maritime Law Journal* 16-17.
[87] ibid.
[88] ibid.
[89] In 1893 the legislature of the United States passed the Harter Act, which established a compromise between the ship-owners and shippers. In terms of this compromise, the ship-owner could not contract out of due diligence where seaworthiness and care of cargo were concerned. In return, the ship-owner was not liable for negligence in navigation and management of the ship; see Reynolds note 86 above 16-17.
[90] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (Hague Rules).
[91] Reynolds note 86 above 18.

compromise employed by the United States' legislature to effectively split the risks between contracting parties.[92] The Hague Rules' success in creating the desired uniformity was then observed over a period of forty years, during which time the regime operated.[93]

The period of observation resulted in the adoption of an amended form of the Hague Rules.[94] This amended form is referred to as the Hague-Visby Rules and, although similar to the Hague Rules, it ensured that the difficulties perceived in the operation of the Hague Rules over the forty-year period were corrected.[95] In this amended form the Hague Rules are the most widely accepted regime and are still in force as there are concerns over proposed changes to the regime.[96] There are further concerns as to losing close to a century's worth of experience in dealing with the Hague Rules and the impact such loss will wreak on the settlement of claims.[97] It is further contended that the use of a new regime would be prejudicial to uniformity in contracts of carriage because of the above loss and the ensuing uncertainty that would flow from the need to interpret the new rules.[98]

Whilst the Hague-Visby Rules are the most successful regime in advancing uniformity in contracts of carriage, arguably very little of this uniformity can be seen to exist currently in regard to the carriage of goods by sea in different jurisdictions.[99] This disparity is said to have come about as a result of the drastic changes to the carriage of goods by sea brought by technological advancements and the impact of each nation having control over the domestic interpretation of legislation regardless of its international roots.[100] In exercise of this control each nation configures its legislation according to its specific agenda and the wording of such national legislation is the court's point of departure when settling claims.[101]

The impact of national control over international rules can be seen in the interpretation of the requisite knowledge that the carrier must possess in order to be said to have accepted the responsibility to carry the dangerous goods. English courts have delved into a consideration of

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[92] See note 89 above for discussion of the Harter Act compromise.
[93] Reynolds note 86 above 19.
[94] The Hague Rules as amended by the Brussels Protocol 1968 (Hague-Visby Rules).
[95] According to Reynolds note 86 above 19-27, the Comité Maritime International amended the Hague Rules to deal with, inter alia, issues regarding the application of the rules in contracting states, the protection of third parties involved in carriage operations and clarity in terms of package/unit limitations.
[96] The Hamburg Rules contain vague phrases and will not effectively reduce cases of double insurance, as issues including, inter alia, establishing proof, reasonableness of measures undertaken by the ship-owner and timing of incidents, will all create doubt as to whom the risk rests with; see Reynolds note 86 above 32.
[97] Reynolds note 86 above 32-33.
[98] ibid.
[99] M F Sturley 'Uniformity in the Law Governing the Carriage of Goods by Sea' (1995) 26(4) *JMLC* 553.
[100] ibid.
[101] ibid.

the extent to which the carrier can be said to be aware of the various dangers that the goods pose, whilst American courts have historically been seen to favour an approach that considers that any knowledge of danger is sufficient for acceptance.[102] It is contended that, in the absence of a regulatory regime that sufficiently guides courts and fits modern-day shipping needs, courts will employ the interpretations and judicial tests which best fit their own nations.[103]

Another example of a determination that has endured various interpretations and judicial tests in different jurisdictions is that on the issue of whether or not a shipper, who has shipped dangerous goods without having knowledge of the hazards they pose, may be held liable for any damage resulting from such shipment.[104] The controversy on the issue stems from the view held by many authors that, in terms of article IV rule 3 of the Hague-Visby Rules,[105] liability on the part of shippers who ship dangerous goods is limited to instances where fault can be established.[106] Conversely, despite convincing arguments having been raised questioning the fairness of applying strict liability to such instances,[107] English courts have consistently stuck with the common-law approach[108] and favoured the view that the shipper's guarantee as to the safety of the goods must be taken to be an absolute one. American courts, on the other hand, have found that article IV rule 6 of the Hague-Visby Rules, which regulates the carriage of dangerous goods,[109] is limited by article IV rule 3 and thus that shippers who are unaware of the dangerous nature of the goods cannot be held liable as they are without fault.[110] These different interpretations of the same set of rules are prejudicial to uniformity in

[102] Cavanah note 8 above 166.
[103] Cavanah note 8 above 167.
[104] *Brass v Maitland* (1856) 6 E & B 470.
[105] Article IV rule 3 of the Hague-Visby Rules provides: 'The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.'
[106] S Panesar 'The Shipment of Dangerous Goods and Strict Liability' (1998) 9(5) *ICCLR* 138.
[107] Crompton J, who delivered the minority judgment in *Brass v Maitland* note 104 above, was of the view that it is harsh to find a shipper liable for not communicating that which he was not aware of. He further argued against the establishment of such a precedent in the absence of an existing absolute duty on the shipper; see Letsos note 5 above 118.
[108] In the leading authority of *Brass v Maitland*, the judge responsible for penning the majority judgment found that as this was a matter of apportioning risk, the liability of the shipper could not be limited to cases where he had knowledge of the dangerous goods; see Letsos note 5 above 117.
[109] Article IV rule 6 of the Hague-Visby Rules provides: 'Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.'
[110] Letsos note 5 above 119.

contracts of carriage as they create uncertainty as to which party is responsible for what risk.[111] It is submitted that such lack of certainty leaves the maritime community prone to arduous litigation to resolve claims, as each party seeks to have the matter heard in the jurisdiction best suited to its case.[112] With knowledge of the above deficiencies relating to the uniform interpretation and application of the international rules regulating the carriage of dangerous goods by sea, it begs the question whether there is in fact any uniformity in the safety measures and processes to be followed prior to and during the carriage of such goods.

2.4 The International Framework Guiding the Technical Processes for the Carriage of Dangerous Goods

Some level of uniformity is established through the United Nations (UN), which serves a regulatory function for the transport of dangerous goods, irrespective of the mode of transport in use.[113] Pursuant to that regulatory function, the UN has published several legislative instruments, one being the Recommendations for the Transportation of Dangerous Goods (the UN Orange Book),[114] published in 1956.[115] These recommendations provide for the technical aspects of dangerous goods carriage including, inter alia, classification, numeration, packaging and labelling of hazardous substances.[116] The recommendations are renewed every two years,[117] with the current version being the 21st revised edition, published in 2019.[118] The UN Orange Book is targeted at international regulatory authorities, with the aim of promoting safety measures for transportation of dangerous goods by various modes of transport.[119]

The IMO is the primary international regulatory authority guiding UN member states to adopt measures for the safe carriage of dangerous goods by sea.[120] In addition to biennially

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[111] According to Letsos note 5 above 117, English courts prefer to consider the apportionment of risks involved in the scenario and have primarily avoided the fault-based approach as it may result in instances where neither party can be found to be liable for the damage suffered.
[112] If the law is uniform everyone involved in a transaction will know that liability is the same wherever the dispute may be resolved, thus there will be more predictable results and less litigation; see Sturley note 99 above 558-559.
[113] T Ots *Transport and Handling of Dangerous Cargoes in Port Areas: Weaknesses of Existing International and Estonian Regulations* (unpublished MSc thesis, World Maritime University, 2000) 49.
[114] United Nation Committee of Experts on the Transport of Dangerous Goods *Recommendations on the Transport of Dangerous Goods: Model Regulations* (1956).
[115] Ots note 113 above 49.
[116] United Nations Economic Commission for Europe (UNECE) 'About the Recommendations' available at https://www.unece.org/?id=3598, accessed on 24 November 2020.
[117] Ots note 113 above 49.
[118] United Nations Economic Commission for Europe (UNECE) 'Rev. 21(2019)' available at https://www.unece.org/trans/danger/publi/unrec/rev21/21files_e.html, accessed on 24 November 2020.
[119] ibid.
[120] Letsos note 5 above 109.

publishing the IMDG Code, the IMO is also responsible for introducing precautionary shipping measures that ought to be followed from before a ship is loaded to the completion of the voyage.[121] Through these precautionary measures, along with the recommendations for the handling of cargo under the IMDG Code, the IMO affords UN member states a uniform framework in regard to the physical processes to be followed for the safe carriage of dangerous goods by sea.[122]

The first international instrument adopted by the IMO to regulate some of the technical aspects of preparing dangerous goods for carriage by sea was the third version of the International Convention for the Safety of Life at Sea (SOLAS),[123] which was adopted in 1948.[124] The first version of SOLAS had been adopted in 1914, in response to the Titanic disaster of 1912, with the second version of the convention, adopted in 1929, being the version that came into operation in 1933.[125] Both previous versions of SOLAS also prohibited the carriage of goods in a manner found to endanger the lives of passengers and the safety of the ship; however, they did so without prescribing what goods were to be considered to be dangerous and what precautions had to be taken.[126] Without this clarification, the shipping industry regularly encountered issues with the carriage of dangerous goods, especially once dangerous goods began to be shipped more frequently after World War II.[127]

In order to aid the industry in dealing with these issues, SOLAS 1948 identified goods as dangerous on the basis of their characteristics and encouraged uniform safety precautions, such as the use of clear labels to indicate the danger presented by the specific class of goods.[128] The carriage of dangerous goods was further zoomed in on at the fourth International Convention on the Safety of Life at Sea, which led to the adoption of SOLAS 1960.[129] The provisions focusing on dangerous goods embodied in SOLAS 1960 were simply restated in SOLAS 1974.[130] SOLAS 1974 currently enjoys operation in an amended form and it is chapter VII, stemming from SOLAS 1960, that continues to regulate the shipping of dangerous goods

[121] ibid.
[122] ibid.
[123] IMO International Convention for the Safety of Life at Sea 1948 (SOLAS 1948).
[124] Ots note 113 above 47.
[125] ibid.
[126] ibid.
[127] ibid.
[128] ibid.
[129] Van Niekerk note 15 above 115.
[130] ibid.

in contracting states.[131] To further strengthen its ability to provide advanced guidelines for the safe carriage of dangerous goods, the IMDG Code was incorporated into SOLAS and has had mandatory status, in countries that have signed the convention, since January 2004.[132]

The IMDG Code plays a crucial role internationally as an advanced set of guidelines addressing the fundamental principles of dangerous goods.[133] The code further serves to assist legislators and regulators to define dangerous goods in an open-ended manner that is inclusive of as many goods known to be dangerous as possible.[134] The inclusion of such codes in national legislation allows for quick reference to instruments that extensively cover all 'physically dangerous goods'.[135] The risks involved in the carriage of these goods are well known and they can easily be avoided by compliance with the relevant codes.[136] Where the risks attached to certain goods are not obvious, the courts rely on judicial tests to determine whether those goods are to be considered to be dangerous goods in the specific circumstances.[137]

According to the IMDG Code, the shipping of dangerous goods must be accompanied by the relevant documentation describing the goods as required by the code.[138] A dangerous goods description and a dangerous goods declaration must evidence that the processes have been carried out correctly in terms of the code.[139] As long as such documents provide all the information required by the IMDG Code, they may be in any form.[140] The description must encompass all necessary information about the goods in terms of, inter alia, shipping class, UN number, segregation requirements, radioactive material and explosiveness.[141] The declaration must certify that the shipment is acceptable for transport and that the goods are properly

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[131] IMO 'International Convention for the Safety of Life at Sea (SOLAS), 1974' available at https://www.imo.org/en/About/Conventions/Pages/ International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx, accessed on 26 November 2020.
[132] Letsos note 5 above 109.
[133] ibid.
[134] Although the IMDG Code can be traced back to 1965, it is updated every other year by the Maritime Security Council and is seen to be a necessary addition to SOLAS, thus becoming of greater import; see Letsos note 5 above 109.
[135] The term 'physically dangerous goods' is used to distinguish goods that are, inter alia, explosive, radioactive, chemicals and petroleum, from goods that would not normally be considered to be dangerous if they do not lead to the ships' detention, seizure or forfeiture; see Letsos note 5 above 110.
[136] Letsos note 5 above 110.
[137] In instances where the goods may be physically dangerous but are considered to be safe for carriage or non-physically dangerous yet give rise to economic loss or similar consequences to the carrier and cargo, the courts look at the circumstances holistically to ascertain if they fall into a category of hazardous goods; see Letsos note 5 above 110-111.
[138] chapter 5.4 of the IMDG Code.
[139] Shipping Solutions 'Dangerous Goods IMO' available at https://www.shippingsolutions.com/dangerous-goods-imo, accessed on 25 October 2020.
[140] chapter 5.4.1.2 of the IMDG Code.
[141] chapter 5.4.1.4 of the IMDG Code.

packaged, marked and labelled, and in proper condition for transport as required by the applicable regulations.[142]

Where dangerous goods have been loaded into a container for transport, those responsible for packing the container must provide a container packing certificate.[143] The certificate must specify the container identification number and certify, inter alia, that the container was fit to receive the goods, the necessary segregation procedures for the packages have been adhered to, all goods have been properly loaded and secured, the container and packages have been appropriately marked or placarded, and that there has been a dangerous goods document received for all shipments of dangerous goods.[144] It is submitted that the IMO has put in a place an extensive legal framework aimed at the safe carriage of dangerous goods and this framework, under the auspices of international organisations and conventions,[145] has a wide range of applications that is beneficial for international uniformity in safety measures and processes for the carriage of dangerous goods by sea.

2.5 Factors Contributing to Misdeclaration

Despite the extensive legal framework put in place by the IMO, the level of compliance with regulations leaves much to be desired.[146] Misdeclared dangerous goods have increasingly been identified as the cause of various serious accidents leading to the loss of life,[147] and the rise of containerisation seems to have exacerbated the frequency of such accidents.[148] This rise in frequency indicates that seafarers and logistics workers are constantly being put at risk by having to handle containers and packages which do not comply with the applicable regulations.[149] Non-compliance places dangerous goods operation in jeopardy as accurate information is known to play a vital role in the safe carriage of dangerous goods.[150] It is

[142] chapter 5.4.1.6 of the IMDG Code.
[143] chapter 5.4.2 of the IMDG Code.
[144] ibid.
[145] The IMO operates under the auspices of the United Nations, and the IMGD Code was greatly strengthened by adoption into the SOLAS Convention; see Letsos note 5 above 109.
[146] It is estimated that at least 150 000 containers with misdeclared goods move in the global supply chain annually; see Kallada note 1 above.
[147] Undeclared dangerous goods led to the *Sea-Land Mariner* fire and explosion, the *Sea Elegance* fire and the *Zim Haifa* fire; see Ellis note 2 above 7.
[148] C Holness 'The Dangers of Fires at Sea: Damage to Containerised Cargo' *Norton Rose Fulbright* (July 2017) available at www.nortonrosefulbright.com/en-za/knowledge/publications/686b42ae/the-dangers-of-fires-at-sea-damage-to-containerised-cargo, accessed on 11 June 2020.
[149] Kallada note 1 above.
[150] Information is the most important factor in the carriage of dangerous goods and seafarers ought to be privy to all relevant information in order to ensure that the cargo is protected and that human lives are safe; see Ellis note 2 above 6.

submitted that the factors contributing to such jeopardy, through misdeclaration of dangerous goods, must be recognised and carefully considered if there is to be any effective shift towards safer dangerous goods operations.

The shipping of dangerous goods is only allowed in the manner prescribed by the applicable regulations and thus requires effort from both the shipper and carrier to ensure compliance.[151] The shipper must comply by preparing the goods and relevant documents for transportation and the carrier, on the other hand, must comply by, inter alia, providing a suitable vessel, committing to the necessary routes and avoiding any prohibited accompanying cargo.[152] It is submitted that the above processes though necessary, may be seen to be cumbersome. Unscrupulous shippers, aware of the unlikelihood of checks,[153] might chance their hand with the offence of misdeclaration to avoid this labour.

Apart from the labour required in the preparation of dangerous goods for transport, another reason that may give rise to misdeclaration is the higher freight rates and insurance premiums that dangerous goods demand.[154] These costs flow from the risk posed by the mere presence of the dangerous goods on board the ship to the ship herself, those aboard her, harbours, other ships and the environment.[155] The documentation provided for the goods essentially form the exclusive basis for the determination of adequate costs for the specific situation.[156] Thus, a shipper may be tempted to tip the scales in his favour, downplaying or not declaring the risks posed by the goods in order to procure more favourable insurance and carriage costs.[157]

The misdeclaration of dangerous goods may not necessarily only come about as a result of a fraudulent scheme; the offence may be committed through simple mistake, breach of contract or intervention from a third party.[158] An unfortunate factor that may contribute to mistakes on the part of shippers is that the IMDG Code is complex and may result in confusion

[151] Van Niekerk note 15 above 113.
[152] ibid.
[153] According to reports submitted to the IMO in a 2017 study, inspections on declared dangerous goods represent less than 4 out of every 100 000 containers; see Kallada note 1 above.
[154] Van Niekerk note 15 above 114.
[155] ibid.
[156] O Cachard 'Discrepant Declarations about Containerised Goods "… in the Middle of a Chain Reaction"' in B Soyer & A Tettenborn *International Trade and Carriage of Goods* (2017) 114.
[157] Shipments of calcium hypochlorite that are not properly declared are a known contributor to containership fires. Whilst able to be carried on board ships, there are strict guidelines that need to be adhered to. Less scrupulous shippers may misdeclare it as fertilizer or similar more stable compounds in order to avoid the higher freight rate; see Holness note 148 above.
[158] Cachard note 156 above.

amongst those not well versed in its navigation and application.[159] Whilst at the same time, some of the more unethical shippers may seek to rely on this complexity as a smokescreen to misdeclare their dangerous goods in the hope that no inspections or accidents will occur.[160]

2.6 Conclusion

The above discussion indicates that, although an extensive framework is in place to regulate the safe carriage of dangerous goods by sea, at 'ground' level, more and more problems are being encountered with compliance. A heavy reliance is placed on shippers to do the right thing, and the alarming amount of non-compliant dangerous goods shipments moving through the global supply chain shows that this may not be at the top of their agendas yet. The issue of ignorance is one that the shipping industry as a whole must not view with leniency; personnel involved in the shipment of dangerous goods ought to be adequately trained as their actions may have serious ramifications. Although the IMO's guidelines and recommendations address the issue of uniformity in the handling of dangerous goods, it is the effective application of these international regulations at the domestic level that is required for safe dangerous goods operations.

With major shipping lines taking up a strong stance against misdeclaration of dangerous goods, it is clear that improvement is needed in the domestic application and enforcement of these international regulations. Having a well-written and far-reaching international framework is undeniably a good thing; however, if states are not willing/able to commit the resources necessary for compliance, such frameworks are reduced to mere decorations. Having discussed the regulation of the carriage of dangerous goods by sea at the international level, what is to follow in the subsequent chapter is an examination of the laws currently regulating the carriage of dangerous goods domestically in South Africa and the liability incurred for the offence of misdeclaration under these laws.

[159] Brennan note 13 above.
[160] ibid.

CHAPTER 3

THE CARRIAGE OF DANGEROUS GOODS BY SEA IN SOUTH AFRICA

3.1 Introduction

The foundation of maritime law in South Africa has its roots firmly planted in English law, so much so that provision is made for a portion of its admiralty claims to be decided in terms of English law as it was on 1 November 1983.[161] Old English principles are to be applied to any matters a colonial court of admiralty would have had jurisdiction over in 1890, so long as there is no conflicting South African statute.[162] Due to this great influence that English shipping law has had and still has on South African admiralty law, it is pertinent to make reference to the English position/cases when examining the South African stance.[163] Whilst cognisant of the value of the adopted English principles, South African courts are expected to primarily direct their focus on giving effect to South African statutes through ordinary principles of interpretation.[164]

All of South Africa's statutes and regulation, including applicable international regulations, addressing the carriage of dangerous goods by sea will be outlined in this chapter. The chapter will examine the current statutory requirements for the legal carriage of dangerous goods and the procedures in place to enforce these laws. Finally, the chapter will zoom in on the punitive measures incurred for the offence of misdeclaration of dangerous goods to be carried by sea and critically discuss the efficacy of such measures.

3.2 International Dangerous Goods Obligations Integrated into South African Legislation

South Africa is a UN member state[165] and the carriage of dangerous goods to and from South Africa is thus guided by the codes and conventions that the UN, through the IMO, is responsible

[161] M Wagener 'South African Admiralty and Its Origins -- Will It Jump or Must it be Pushed?' (2005) 36(1) *Journal of Maritime Law and Commerce* 61.
[162] Wagener note 161 above 63.
[163] Van Niekerk note 15 above 114.
[164] *MV Silver Star: Owners of MV Silver Star v Hilane Ltd* 2015 (2) SA 331 (SCA) para 31.
[165] 'Permanent Mission of South Africa to the United Nations' available at https://www.southafrica-usa.net/pmun/index.html, accessed on 17 November 2019.

for publishing.[166] Through reference to these international codes and conventions in its domestic legislation, South Africa fulfils the duties required of it as a member state or convention signatory.[167] Although the international codes may be rendered applicable domestically through reference in domestic legislation,[168] international conventions to which South Africa is a signatory require specific instruments to be drafted and promulgated for the ratification process to be complete.[169]

The fulfilment of these requirements stemming from the international regulatory framework is primarily catered for by the regulations promulgated by the Minister of Transport in terms of section 235(1) of the MSA, known as the Merchant Shipping (Dangerous Goods) Regulations 1997 (Dangerous Goods Regulations). The Dangerous Goods Regulations provide for the technical elements of the carriage of dangerous goods and give effect to various international conventions and codes applicable in South Africa[170] including, inter alia, the 1974 SOLAS Convention,[171] the Bulk Cargoes Code[172] and the IMDG Code,[173] to name a few.

The IMDG Code is particularly important as it provides guidelines of an internationally accepted standard and strict compliance with such will, in most cases, enable shippers to comply with the South African statutory regulation of the carriage of dangerous goods by sea.[174] Regulations 4 and 9 conjunctively prohibit the taking on board of any dangerous goods without the proper documentation and declarations from relevant persons.[175] In terms of regulations 4(3) and 9(8), if a carrier takes or receives on board dangerous goods contrary to the terms of the regulations, he or she is guilty of an offence.[176] Whilst according to regulation 9(7), if a consigner fails to provide the necessary declaration or produces one that is false or materially misleading, he or she is guilty of an offence.[177] According to the regulations, "a

[166] 'Introduction to the IMO' available at https://www.imo.org/en/About/Pages/Default.aspx, accessed on 18 November 2019.
[167] ibid.
[168] ibid.
[169] Van Niekerk note 15 above 120-125.
[170] G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) 154.
[171] In terms of regulation 1 of the Dangerous Goods Regulations '"1974 SOLAS Convention" means the International Convention for the Safety of Life at Sea done at London on 1 November 1974, as amended'.
[172] In terms of regulation 1 of the Dangerous Goods Regulations '"Bulk Cargoes Code" means IMO *Code of Safe Practice for Solid Bulk Cargoes*'.
[173] In terms of regulation 1 of the Dangerous Goods Regulations '"IMDG Code" means IMO *International Maritime Dangerous Goods Code*'.
[174] Van Niekerk note 15 above 116.
[175] regulation 4(1) and regulation 9(1) of the Dangerous Goods Regulations.
[176] regulation 4(3) and regulation 9(8) of the Dangerous Goods Regulations.
[177] regulation 9(7) of the Dangerous Goods Regulations.

person who is alleged to have committed an offence in terms of these regulations may be punished on conviction to either a fine or imprisonment for a period of up to 12 months."[178]

South Africa's international obligations are further provided for by domestic legislation that specifically deals with the carriage of goods by sea, namely the Carriage of Goods by Sea Act[179] (COGSA). COGSA is responsible for bringing in force the Hague-Visby Rules.[180] The Hague-Visby Rules, attached as a schedule to COGSA, form part and parcel of the provisions of the domestic Act.[181] According to article IV rule 6, "a carrier may, at any given time, land, destroy or render innocuous any goods of an inflammable, explosive or dangerous nature."[182] Whether the carrier has been informed and consented thereto or not has no bearing on the remedial action he is entitled to take.[183] Where the carrier has not consented to such shipment, the shipper is liable for all direct and indirect losses resulting from the shipment.[184] Where the carrier has consented to the shipment, the remedial action taken may open the carrier up to no liability apart from the general average, at most.[185]

The question of what constitutes proper consent, as necessitated by Hague-Visby Rules, came before the South African Supreme Court of Appeal in *MV Recife*.[186] The case involved a ship that had sailed from Durban harbour on its way to several ports in North and South America.[187] Fifty days after departure, an explosion caused a fire to break out in a container stored on deck.[188] The container in question was carrying calcium hypochlorite in tablet form, and the carrier had been made aware of the dangerous nature of the goods.[189] In the court a quo, the first respondent, the carrier, was able to successfully argue that the dangerous goods were defective or improperly stowed and thus that the carriage of dangerous goods was not consented to with true knowledge of the nature of the goods.[190] The Supreme Court of Appeal overturned the ruling, finding that the first respondent's consent was proper, as a result of the first respondent's failure to discharge the onus of proving that the goods were defective or

[178] regulation 21(1) of the Dangerous Goods Regulations.
[179] Carriage of Goods by Sea Act 1 of 1986.
[180] J van Niekerk 'An Introduction to the Carriage of Goods by Sea' (1993) 5 *SA Merc LJ* 89.
[181] ibid.
[182] Van Niekerk note 180 above 95.
[183] article IV rule 6 of the Hague-Visby Rules.
[184] ibid.
[185] ibid.
[186] *MV Recife* note 45 above.
[187] *MV Recife* note 45 above para 1.
[188] ibid.
[189] *MV Recife* note 45 above para 2.
[190] *MV Recife* note 45 above para 16.

improperly stowed.[191] The court found that, once parties begin to speculate and reach for very remote possibilities, it simply means that the answers are unknown and such speculation should not readily be accepted as fact.[192] The Supreme Court of Appeal highlighted that, in such instances, the burden of proof is the determining factor.[193] Due to the respondents' failure to discharge the burden of proof, the respondents' consent was considered to be valid and the court a quo was said to have erred in not granting absolution from the instance on the claim from damages against the shipper.[194]

Outside of judicial interpretation, these international regulatory instruments have been integrated in domestic legislation in a manner that enables them to have a complementary effect to existing laws and confer practical investigative powers. This is evidenced by the Merchant Shipping (Safe Containers Convention) Act[195] which enables SAMSA to authorise suitable persons to conduct enquiries into container-related accidents resulting in death, injury, or damage to property or the environment.[196] The person appointed to carry out such function has all the powers that a court of marine enquiry has in terms of section 9(1) and (4) of the MSA.[197] It is submitted that these international obligations, that have been given effect by the abovementioned Acts and regulations, form the bulk of the South African laws regulating the technical aspects of the carriage of dangerous goods by sea.

3.3 Obligations for Dangerous Goods Carriage Found in the Merchant Shipping Act

Although heavily guided by international legislative instruments in regard to the technical aspects of carriage, the MSA serves as the glue that binds these international duties to the domestic agenda. This is seen by the empowerment of the Minister of Transport to prescribe regulations and to extend the application of those regulations to all South African ships (excluding ships belonging to the defence forces) and any ships within a South African port.[198] Beyond empowering the minister to create regulations, the MSA also expressly provides for the carriage of dangerous goods.

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[191] *MV Recife* note 45 above paras 18-19.
[192] *MV Recife* note 45 above para 24.
[193] ibid.
[194] *MV Recife* note 45 above para 26.
[195] Merchant Shipping (Safe Containers Convention) Act 10 of 2011.
[196] section 9 of the Merchant Shipping (Safe Containers Convention) Act 10 of 2011.
[197] ibid.
[198] Van Niekerk note 15 above 117.

In terms of section 235 of the MSA, all dangerous goods must be appropriately marked, and the carrier ought to be given due notice before such goods are taken aboard the ship.[199] The carrier is entitled to refuse to allow any suspicious (suspected of being dangerous) goods on board the ship and may further request that packages or parcels be opened to prove that they are harmless.[200] Contravention of the provisions of section 235 of the MSA is punishable, upon conviction, by a fine or imprisonment for a period of up to 12 months.[201] Furthermore, all ships and goods handled in a manner contrary to the provisions of the MSA are liable to forfeiture.[202]

The MSA also provides for the detention of any foreign vessel that has caused injury to any citizens or property of the Republic or any treaty country.[203] If such injury includes the loss of life, damage to the ship and damage to other ships, regardless of the flag of the offending ship, section 264 of the MSA entitles SAMSA to appoint a person to conduct a preliminary enquiry.[204] A ship may be detained for this preliminary enquiry so long as it is not unduly delayed.[205]

The Minister of Transport is further empowered by the MSA in his sole discretion to determine when a court of marine enquiry should be convened.[206] The MSA allows a court of marine enquiry to cancel certificates of competency, prohibit persons from acting in stated capacities, and impose fines of up to R2 000 on persons who are found to have been negligent or to have performed acts of misconduct that led to injury or loss of life.[207]

3.4 The Liability Created by the Misdeclaration of Dangerous Goods to be Carried by Sea in South Africa

3.4.1 The Hague-Visby Rules

The above legislation indicates that a breach of the obligation to properly declare goods which are categorised as dangerous good may open a shipper up to two different kinds of liability. The first is dictated by the Hague-Visby Rules – this liability arises where damages result from the dangerous goods shipment.[208] As per the allocations of risk provided in the Hague-Visby

[199] Van Niekerk note 15 above 118.
[200] ibid.
[201] section 313 of the MSA.
[202] section 334 of the MSA.
[203] section 339(1) of the MSA.
[204] section 264(3) of the MSA.
[205] ibid.
[206] section 266(1) of the MSA.
[207] section 269(1) of the MSA.
[208] Hofmeyr note 170 above 155.

Rules, the shipper will be liable arising from such shipment.[209] It is submitted that this type of liability focuses on the breach of the statutory duty not to ship dangerous goods and, although similar in nature to delictual liability,[210] as it is the wrongful conduct of the shipper that causes the harm, it can arise regardless of whether the shipper has innocently shipped dangerous goods (in the absence of intent or negligence).[211] It is further submitted that because this liability is solely focused on any direct or indirect damage occurring from the shipment,[212] it is aimed at compensating any parties that have suffered harm because of the breach of contract. Contractual and delictual damages in South Africa are only compensatory in nature.[213] Considering the compensatory nature of the damages available to parties that have suffered harm, it can be submitted that the liability for the misdeclaration of dangerous goods, incurred under the Hague-Visby Rules, is not inclusive of any punitive damages in South Africa.[214]

Although this liability may not give rise to punitive damages,[215] it is important to remember that the primary function of the Hague Rules and Hague-Visby Rules is to create uniformity in contracts of carriage.[216] Even when regulated by the rules, contracts of carriage are still very much based on the doctrine of freedom of contract.[217] Thus, parties are free to include a penalty provision to apply in instances where there has been a breach of contract.[218] According to the Conventional Penalties Act (CPA),[219] this penalty must be in the form of liquidated damages or an agreed upon penalty amount and it bars the innocent party from making a further or simultaneous claim for damages. The CPA only allows the innocent party to elect to claim damages in lieu of the penalty where the wording of the penalty clause expressly enables this and empowers the court to reduce the damages claimed when they are out of proportion to the harm suffered.[220] In contracts without any penalty clause, it is

[209] ibid.
[210] The elements of a delict to be met, in order for damages to be awarded, are conduct, harm, wrongfulness, negligence and causation; see J Neethling & J Potgieter 'The Law of Delict' (2015) *Annual Survey of South African Law* 816.
[211] Letsos note 5 above 117.
[212] Hofmeyr note 170 above 155.
[213] The aim of a claim in South African delict is not to enrich a claimant that has suffered loss, but to compensate for the loss suffered; see Muller J in *Komape and Others v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC 18 at 67.
[214] Awards for punitive damages do not form part of South African law as they are regarded as against public policy and even where such an award has been obtained in a foreign jurisdiction, it will not be enforced by South African courts; see Corbett CJ in *Jones v Krok* 1995 (1) SA 677 (A) 696C-H.
[215] ibid.
[216] Reynolds note 86 above 18.
[217] T Alawneh note 67 above 91.
[218] R Zimmermann 'Stipulatio Poenae' (1987) 104(3) *SALJ* 399.
[219] Conventional Penalties Act 15 of 1962.
[220] sections 1 and 2 of the CPA.

submitted that no punitive damages will be incurred for the misdeclaration of dangerous goods if a contract of carriage is governed by the Hague-Visby Rules, and any party that has suffered harm may only seek compensation as a result of the misdeclaration, such compensation being restricted by and proportional to the harm suffered.

3.4.2 The Merchant Shipping Act and the Merchant Shipping (Dangerous Goods) Regulations

The second kind of liability that misdeclaration exposes a shipper to is criminal liability under the MSA upon the commission of the offence. Section 313 of the MSA and regulation 21(1) of the Dangerous Goods Regulations render misdeclaration an offence punishable by a fine or imprisonment for a maximum period of 12 months.[221] This liability arises whether or not damage has been caused by the dangerous goods shipment, as it is created by the handling of dangerous cargo in contravention of the provisions of the MSA and the regulations.[222] The prosecuting authority would need to provide evidence proving beyond a reasonable doubt that the offending persons have either negligently or intentionally misdeclared goods, in order to establish criminal liability in the first place. Once liability has been established, the onus would then shift to the accused to appropriately respond to the allegations and raise any defences they may have. In terms of the Dangerous Goods Regulations, any accused would have a good defence to a charge of misdeclaration if they can show that they took all reasonable steps to ensure compliance with the regulations or that they did not and weren't supposed to know nor suspect that the goods in questions were dangerous.[223]

Although legislation contains other provisions to effectively detain and ensure that ships that cause harm face the consequences,[224] the liability outlined above for the contravention of the provisions regarding the handling of dangerous cargo represents the full criminal liability incurred by shippers who misdeclare their goods in South Africa.

3.5 Analysis of the Current Liability Incurred for the Misdeclaration of Dangerous Goods to be Carried by Sea in South Africa

On the whole there seems to be little to no emphasis on punitive damages or punitive measures in the form of serious criminal liability. This lack of emphasis may be a cause for concern as

[221] section 313(2) of the MSA.
[222] section 312 of the MSA.
[223] regulation 21(2)(a) and (b) of the Dangerous Goods Regulations.
[224] See 3.3 above for a discussion on obligations in terms of the MSA.

harsh punitive measures are believed to play a role in deterring potential future offending persons.[225] The only source of liability that to some extent gives rise to liability that is proportional to the harm caused, can be said to be the Hague-Visby Rules as all indirect and direct liability falls on the liable persons.[226] The shortcoming of this liability is that it operates very much in a 'you break it you pay for it' fashion and cannot be regarded to influence the actions of shippers whose misdeclared goods do not cause harm.[227] It is submitted that this compensation-based approach is not optimal for marine safety, particularly when considering the destruction that dangerous goods can wreak to ports and the lives of seafarers.

Such potential for destruction was recently evidenced by the explosions at the port of Beirut.[228] The explosions resulted in more than 200 deaths, 6 500 injuries and 4.6 billion dollars' worth of damage.[229] The explosions have further proved to be prejudicial to the Lebanon's annual revenue, food security and response to the Covid-19 global pandemic.[230] It is submitted that the crippling nature of this dangerous goods incident indicates the need for focus on greater criminal liability in order to attempt to prevent such incidents from happening entirely, as opposed to merely awarding compensation when the harm has already occurred.

The current state of criminal liability for misdeclaration in South Africa can be summarised as follows: convicted persons will be charged a fine or sentenced to imprisonment for a period of up to twelve months.[231] Considering the threat posed by dangerous goods to ports, seafarers, goods and vessels, it is submitted that this liability is not appropriate. Furthermore, when one considers the dominance of companies in international trade,[232] the twelve-month imprisonment aspect of this criminal liability is of questionable utility. There are no guidelines as to whom this liability will fall upon within a corporate structure and it is not

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[225] As stated by G Benson & C Craven 'The Purpose of Imprisonment' (1947) 7(3) *Howard Journal* 162-163: 'Although impossible to make a quantitative assessment of guilt and attach an appropriate punishment on this basis, the revulsion which arises against the offender for the commission of the crime and the ensuing results, have become the benchmark upon which the state regulates punitive measures. The knowledge of such punitive measures may have no impact on offenders committing crimes of gross moral reprehension, but should be a determining factor in the deterrence of trivial offences and offences not immediately considered immoral.'

[226] Hofmeyr note 170 above 155.

[227] As stated by K Cooper-Stephenson *Charter Damages Claims* (1990) 61: '[A]n expanded notion of types of loss, of the legitimacy of claims for non-material loss, and of the availability of aggravated damages will serve some of the objectives of punitive damages just as well; and that, in contrast to the focus of punitive damages on future potential defendants by way of deterrence, compensatory damages focus on the plaintiff as an individual -- which is correct in the context of the Charter since individual interests are very much in the spotlight.'

[228] M Cheatio & S Al-Hajj 'A Brief Report on the Beirut Port Explosion' (2020) 1(4) *Mediterranean Journal of Emergency Medicine & Acute Care*.

[229] ibid.

[230] ibid.

[231] section 313 of the MSA and regulation 21(1) of the Dangerous Goods Regulations.

[232] Kim & Milner note 36 above.

appropriately couched to enable an alternate sentence, for instance a twelve-month suspension of operations for the offending company. This period of imprisonment is the only readily available deterrent for criminal liability created by the MSA and is an anomaly when considering the liability for dangerous goods misdeclaration as a whole, as it is the only liability not requiring payment or compensation sounding in money.

The liability incurred under the Hague-Visby Rules, in the form of damages, is purely compensatory and the liability for convicted persons under the MSA, although currently strictly punitive, should be expanded by the legislature into a blend of punitive and restorative measures, aimed at deterring the offence and catering for the interests of victims.[233] A period of imprisonment achieves no compensatory or restorative purpose for victims and innocent parties, as it is directed at the rehabilitation of the convicted person.[234] This fixed period of imprisonment for 12 months may not effectively match the severity of the harm caused by the misdeclared goods, and this raises further questions as to the suitability of imprisonment as a deterrent and punitive measure for convicted persons.[235] It is submitted that, without further clarity and flexibility provided by the legislature on the period of imprisonment, it cannot effectively serve to deter and punish the misdeclaration of dangerous goods, particularly where the offence can be said to have been committed in the interests of the company.

With regard to the second punitive measure meted out for the offence, the fine, there is no guidance provided by the MSA or the regulations as to the procedure for the determination of the value of this fine.[236] The determination it therefore in the discretion of the judicial officer adjudicating the specific matter. It is submitted that, whilst this approach allows the judicial officer to tailor each fine to the specific instance, it also fails to appropriately encourage compliance with relevant provisions as potential future offending persons are unlikely to be troubled by a fine.[237]

By way of contrast, any potential future offender, who has knowledge of the costly pecuniary penalty that may follow upon conviction, may reconsider contemplated unlawful

[233] The criminal law route is society's most effective tool to deal with harmful activities by corporates and it is easier to deter corporations by means of prosecuting them, particularly, as the corporate veil may be pierced. Sentencing options make it possible for a corporation to 'remedy harm, make victims whole and prevent future harm'; see Farisani note 37 above 30.
[234] Benson & Craven note 225 above 162-163.
[235] ibid.
[236] section 312 of the MSA and regulation 21(1) of the Dangerous Goods Regulations.
[237] Benson & Craven note 225 above 162-163.

action or take extra precautions to avoid committing the offence.[238] Whilst capable of this deterring effect, large fines often come under criticism for how they may prejudice innocent employees and shareholders within the corporation.[239] In response to such criticism, there is the view that this possible prejudice is merely one of a large number of investment risks and a result of being an agent of a legal entity with "no soul to be damned."[240]

A clear stumbling block to the deterrent effect of a fine, whether the amount is defined or undefined, is that the size or financial status of a corporation may influence whether or not the fine amount represents significant punishment[241] -- whilst some companies may find the fine to be exorbitant and be deterred from committing offences, others will simply regard the fine as a minor inconvenience.[242] Some companies may even adopt the practice of setting aside a budget specifically to cater for their indiscretions against the law and pay no heed to such punishment.[243]

3.6 Lessons to be Learned from the Liability Directed to Owners and Companies in the Mining Sector

In contrast to unclear personal liability, for prison sentences and unqualified fines reflecting the only criminal liability arising out of life-endangering corporate behaviour in the maritime sector, heavy fines and long prison sentences can be seen as punitive measures used to deter corporate behaviour that endangers lives in the mining industry.[244] The South African mining industry is strongly linked to the carriage of dangerous goods by sea as not only is it a sector within an environment that is constantly exposed to the hazards of dangerous goods,[245] it also serves as a major source of potentially dangerous goods[246] to be shipped out of the country.[247] In the mining industry, the hazards more commonly materialise from explosions, chemicals

[238] ibid.
[239] Burchell note 59 above 459.
[240] ibid.
[241] Farisani note 37 above 182.
[242] Farisani note 37 above 183.
[243] ibid.
[244] Farisani note 37 above 177.
[245] Mining environments are challenging as they expose workers to explosions, flammable gases and chemicals; see M Hermanus 'Occupational Health and Safety in Mining – Status, New Developments and Concerns' (2007) 107 *SAIMM* 531-534.
[246] Mined ores and concentrates are complex structures and their hazard potential is largely determined by the extent to which they release metal ions, as pointed out by the International Council on Mining and Metals (Materials Stewardship) *Hazard Assessment of Ores and Concentrates for Marine Transport* (2014) 16.
[247] 'The contribution of mining to South Africa's exports is variable, but large. In the last 20 years, it peaked at 44% in both 1996 and 2010, and hit a low of 31% in 2003. In 2018, the mining sector accounted for 38% of South Africa's total exports, significantly exceeding the country's second-largest export, vehicles, which accounted for

and the use of heavy machinery in the vicinity of flammable substances.[248] The mining industry is one that has previously suffered notable fatalities as a result of a lack of precautions to protect its workers.[249] Although these dangers differ from the dangers of carrying misdeclared dangerous goods by sea, it is submitted they serve to clearly indicate the extensive nature of the hazards of dangerous goods and the need for proper preparation in the handling of dangerous goods in all industries.

In order to address the issue of mining companies not properly preparing to protect mineworkers from exposure to hazards, the legislature called for the criminalisation of activities that threatened the lives of individuals working in mines.[250] The creation of dangerous work environments or situations is now penalised heavily, with prison sentences of five years and fines of up to three million rands applicable to mine owners who fail to comply with the Mine Health and Safety Act.[251] Furthermore, business operations as a whole can be halted temporarily or indefinitely through the withdrawal or suspension of mining permits.[252] It is submitted that similar punitive measures could be useful to the MSA, which has not clearly directed personal liability and indicated the full financial and operational threat to which shippers that misdeclare dangerous goods would be exposed.

3.7 Conclusion

The carriage of dangerous goods in South Africa is regulated by a blend of international and domestic duties that serve to create a coherent framework. As extensive as any such framework may be, it remains highly dependent on the resources that the country is willing to commit to ensure compliance.[253] The South African maritime sector is one that is growing and the country is still in the process of directing more resources towards it.[254] As the country works on increasing the sector's available resources, it is submitted that it would also benefit from promulgating regulations that create sufficient liability in order to deter dangerous goods offences such as misdeclaration.

11% of exports'; see I Vegter 'Why Mining Still Matters: The Socio-economic Importance of the Mining Industry' 2019 *IRR* 6.

[248] Hermanus note 245 above 531-534.

[249] Farisani note 37 above 178.

[250] ibid.

[251] section 92(6)*(b)* of the Mine Health and Safety Act 29 of 1996.

[252] section 92(6)*(a)* of the Mine Health and Safety Act 29 of 1996.

[253] D Langlet *Prior Informed Consent and Hazardous Trade: Regulating Trade in Hazardous Goods at the Intersection of Sovereignty, Free Trade and Environmental Protection* (2009) 9.

[254] Mabiletsa note 48 above 29.

The liability currently incurred for the misdeclaration of dangerous goods discussed above,[255] indicates that the South African dangerous goods laws regulating the offence are far more reactive than pre-emptive. This can be seen from the lack of punitive measures capable of being clear deterrents to the commission of the offence. In the event of any major incident caused by misdeclared dangerous goods, the primary source of liability will seemingly stem from the Hague-Visby Rules and, although this liability may be partially proportional to the harm caused, it might not serve as a clear deterrent.

The secondary sources of liability for any such incident are the MSA and the Dangerous Goods Regulations. The liability created by these sources is identical[256] and of a criminal nature as it stems from the commission of the offence and not the harm caused. It is submitted that the imprisonment element of this liability is deficient in that it is not aptly directed by legislation towards the guilty minds within a corporate body and it is thus not exactly clear on whom this liability falls. Given the dominance of companies in multinational trade,[257] it is submitted that there is a need for liability to be clearly directed in order to bolster the deterrent effect of a period of imprisonment. Once it is clearly established who within a juristic person stands to be punished for the misdeclaration of goods, it is submitted that board members and directors will be more likely to put in place preventative measures in the hope of avoiding any personal liability through their acts or the acts of their servants, performed while serving the interests of the company.[258]

There also remains the question whether a period of imprisonment of 12 months is suitable to encompass all cases of misdeclaration. Considering the crippling effect that the explosion at the port of Beirut had on the Lebanon, it is hard to justify a mere twelve months' detention as the only rehabilitative period to be served by an individual/individuals responsible for a similar disastrous incident. Although the offence itself may not, at first glance, be one that is considered to be morally reprehensible, once the consequences of the crime committed or the extent to which the laws have been breached are shown to be severe, it should follow that the court must be afforded enough leeway by the state to hand down appropriate sentences.[259] It is submitted that the extension of the imprisonment period provided for in the MSA and the

[255] See 3.4 above for a discussion on the liability for misdeclared dangerous goods to be carried by sea in South Africa.
[256] section 313 of the MSA and regulation 21(1) of the Dangerous Goods Regulations.
[257] Kim & Milner note 36 above.
[258] Burchell note 59 above 459.
[259] Benson & Craven note 224 above 162-163.

Dangerous Goods Regulations, if appropriately directed within corporates, will also serve to bolster the ability of the punitive measures to deter persons from committing the offence of misdeclaration in future.

The undefined fine presents its own set of problems because, although it may enable the court to be flexible in its approach to the imposition of a fine, it lacks the requisite finality to strike fear in the hearts of potential future offending persons. Part of this problem stems from the lack of clarity on whether the fine should be focused solely on the extent to which declaration obligations have been breached or whether it could be extended to include reparations for the harm caused by the misdeclaration. Reparations, although they may controversially inflate the fine imposed to an amount far greater than the general fine payable, nonetheless play an important societal role as they are seen to make victims 'whole'.[260] Moreover, there is no indication of the criteria that a judicial officer may consider when evaluating the appropriate fine to be imposed in the particular circumstance of a matter, and it is submitted that the punitive measure is too vague in its current state to aid in the deterrence of misdeclaration.

The above discussion indicates that whilst South Africa relies heavily on international obligations and guidelines in its legislation, there are shortfalls in the domestic punitive measures currently employed to encourage compliance. In comparison, legislation in force in the mining sector relies heavily on punitive criminal sanctions in its efforts to promote compliance and ensure safe working environments. Having explored the liability currently incurred for the offence of misdeclaration in South Africa, the subsequent chapter will concentrate on the proposed changes to this liability to gauge the suitability of the direction that the legislature appears to be taking in regard to the regulation of dangerous goods.

[260] Farisani note 37 above 30.

CHAPTER 4

THE PROPOSED CHANGES TO LAWS REGULATING THE CARRIAGE OF DANGEROUS GOODS BY SEA IN SOUTH AFRICA

4.1 Introduction

The country's laws on the carriage of dangerous goods stand to be changed by the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention)[261] and the Merchant Shipping Bill 2020 (MSB),[262] when the HNS Convention or the MSB comes into force. It is submitted that the published MSB and the HNS Convention that has been acceded to indicate an awareness of the insufficiency of the current laws regulating the carriage of dangerous goods in South Africa. This chapter will explore the aims and relevant provisions of the MSB and the HNS Convention, with a particular focus on the changes to liability incurred by shippers for the misdeclaration of dangerous goods. After these changes have been highlighted, their strengths and shortcomings will be critically analysed with a view of determining whether they would sufficiently bolster shipper liability for misdeclaration, if the relevant steps to give the MSB and the HNS Convention the force of law in South Africa are taken.

4.2 The HNS Convention

The HNS Convention was adopted at a diplomatic conference organised by the IMO in the months of April and May 1996.[263] The conference was held to address international concerns and awareness arising from the maritime pollution caused by a shipping disaster some thirty years earlier.[264] This was the 1967 *Torrey Canyon* oil pollution disaster,[265] which caused a large-scale oil spill resulting in unprecedented levels of pollution.[266] In the aftermath of the *Torrey Canyon* oil pollution disaster a two-pronged approach was adopted; firstly, the

[261] IMO International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (HNS Convention).
[262] Merchant Shipping Bill 2020 GN 148 *GG* 43073 of 6 March 2020.
[263] M Göransson 'The HNS Convention' (1997) 2(2) *Uniform Law Review* 249.
[264] R Balkin 'The Hazardous and Noxious Substances Convention: Travail or Travaux – The Making of an International Convention' (1999) 3(20) *Australian Year Book of International Law* 1.
[265] As pointed out by A O'Sullivan & A Richardson 'The Torrey Canyon Disaster and Intertidal Marine Life' (1967) 214 *Nature* 448-542, on 18 March 1967, the tanker *Torrey Canyon* ran aground on the Seven Stones reef off Land's End. At least 60 000 tons of crude oil were released. In mopping up, large quantities of detergent were used to emulsify the oil. The oil and detergent combination proved to be more toxic to the environment than the oil itself and the consequences were felt by the marine life, fisheries and surrounding beaches.
[266] Balkin note 264 above.

International Convention on Civil Liability for Oil Pollution (CLC Convention)[267] and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention),[268] both of which acted as a model for the HNS Convention, were adopted.[269] Secondly, the IMO was compelled to reassess the nature and extent of the liability attached to ship or cargo owners for the harm suffered by third parties in dangerous goods incidents at sea.[270] In particular, the IMO led an enquiry into whether some form of insurance of this liability should be made compulsory and what arrangements could be made to enable states and injured parties to be compensated for the losses incurred by pollution to the sea and the subsequent cleaning-up activities.[271] The results of the IMO's enquiries were reflected in the first draft convention put forward for consideration and adoption at a diplomatic conference in 1984.[272] Whilst the first draft managed to introduce several of the desired elements for the purposes of securing sufficient compensation for victims of dangerous goods incidents,[273] it simultaneously failed to address four fundamental issues:

(a) Whether or not the limitation of a ship-owner's liability should be led by the provisions of the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC Convention)[274] or should the HNS Convention should simply establish its own separate limit.

(b) Whether a ship-owner's liability should be expressed as a fixed amount or be dependent on the quantity of cargo carried.

(c) The justification for the restriction of the application of the convention to certain substances carried in bulk.

[267] IMO International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC Convention), as amended by the 1992 protocol relating thereto.
[268] IMO International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (Fund Convention).
[269] Balkin note 264 above.
[270] Göransson note 263 above.
[271] ibid.
[272] ibid.
[273] As stated by Göransson note 263 above 250: 'The draft introduced a number of elements which seemed obvious enough given the *raison d'être* of the subject matter, i.e. to secure adequate compensation for victims of HNS incidents: strict liability for the ship-owner for damage caused by HNS cargo, compulsory insurance to cover the ship-owner's liability, and a supplementary source of compensation (in the form of a system of shipper liability to cover damage) in excess of the ship-owner's liability.'
[274] IMO Convention on Limitation of Liability for Maritime Claims 1976 (LLMC Convention).

(d) The extension of a ship-owner's right to limit his liability, as set out by the LLMC Convention, to a charterer, arising out of the definition of shipper set out in the draft convention.[275]

The draft convention is said to have also failed to find a system that gives effect to a balanced system of shared liability between ship-owners and cargo interests.[276] The solution agreed upon to address this failure was to mimic the oil pollution compensation regimes, with the starting point being strict ship-owner liability, that would be supplemented by a fund financed by contributions by cargo interests as and where necessary.[277] Unlike the oil pollution regimes the HNS Convention is said to mimic, the HNS Convention is based on the precautionary principle, meaning that it has been developed in anticipation of future accidents at sea involving the carriage of dangerous goods and, should it enter into force, will be activated only when required.[278] It is submitted that this approach is appropriate due to its 'before the event' nature, which ensures that there is a readily available regime to respond to any hazardous and noxious substance incidents, instead of going through lengthy investigations and litigation arising from the consequences of any such incident, only to respond once findings have been made.

Consideration of and debate on the abovementioned fundamental issues was a lengthy process, and it was only in the months of April and May 1996 that a further diplomatic conference could be convened to consider a new draft HNS Convention.[279] The successful adoption of the 1996 HNS Convention managed to not only save face for the IMO, showing that all the effort and expenses incurred whilst ironing out the terms of the draft convention were necessary, it also solidified the IMO's role as the "body responsible for the development of harmonious international regulations pertaining to liability and compensation in the global maritime community."[280]

4.2.1 Definitions

Most of the abovementioned fundamental issues identified in the first draft of the HNS Convention can be seen to originate from the various definitions that the IMO wished to use to establish the scope of application of the HNS Convention and its desire to incorporate pre-

[275] Göransson note 263 above 250.
[276] ibid.
[277] ibid.
[278] Balkin note 264 above 3.
[279] Göransson note 263 above 251.
[280] Balkin note 264 above 3.

existing terms and/or lists from other conventions and instruments.[281] The terms and definitions included in the HNS Convention definitions reflect the compromises that were necessary for the successful adoption of the HNS Convention.[282]

Article 1(1) to (17) of the HNS Convention provides definitions, with the definition of 'hazardous and noxious substances' – the subject-matter of the convention -- having involved extensive debate before the final version was settled on.[283] The debate stemmed from arguments raised in favour of the HNS Convention consisting of a free-standing list of all hazardous and noxious substances falling within its scope of application, thus ensuring that all parties involved in the transport of these substances had no doubt whatsoever about their duties in terms of the HNS Convention.[284] The practical response that triumphed over the arguments raised was that, through the incorporation of pre-existing lists of hazardous or noxious substances, forming part of other IMO conventions and instruments, the HNS Convention would not be overburdened by a free-standing list spanning several hundreds of pages.[285] Use of the pre-existing lists further allowed for "any substance added to one of the instruments listed in article 1(5) to be automatically included in the HNS Convention as a hazardous and noxious substance."[286] The legal committee noted that parties involved with shipping, loading, carrying and receiving hazardous substances were accustomed to using the existing instruments to identify substances as hazardous and noxious, and consequently found it desirable to utilise this familiarity for the effective implementation of the HNS Convention.[287] According to article 1(5) of the HNS Convention, 'hazardous and noxious substances' mean:

> "(a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:
>
> > (i) oils, carried in bulk, as defined in regulation 1 of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended;
> >
> > (ii) noxious liquid substances, carried in bulk, referred to in appendix II of Annex II to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances

[281] Göransson note 263 above 252.
[282] Göransson note 263 above 251.
[283] Göransson note 263 above 252.
[284] Balkin note 264 above 6.
[285] Göransson note 263 above 253.
[286] Balkin note 264 above 7.
[287] ibid.

and mixtures provisionally categorized as falling in pollution category A, B, C or D in accordance with regulation 3(4) of the said Annex II;

(iii) dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk,1983, as amended, and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.3 of the Code;

(iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, as amended;

(v) liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983, as amended, and the products for which preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code;

(vi) liquid substances carried in bulk with a flashpoint not exceeding 60°C (measured by a closed-cup test);

(vii) solid bulk materials possessing chemical hazards covered by Appendix B of the Code of Safe Practice for Solid Bulk Cargoes Code, as amended, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code when carried in packaged form; and

(b) residues from the previous carriage in bulk of substances referred to in (a)(i) to (iii) and (v) to (vii) above". [288]

The definition set out above is said to be expansive enough to cover "nearly all substances that may endanger human life, the environment and property due to their intrinsic toxic risks as cargoes".[289] The HNS Convention expressly covers cargo that is either packaged or carried in bulk.[290] Furthermore, the restriction to only certain substances viewed as particularly hazardous, seen in the first draft convention put forward in 1984,[291] has been done

[288] article 1(5) of the HNS Convention.
[289] R Zhuo 'The HNS Convention: Will It Be a Game Changer for China's Marine Pollution Law?' (2020) 2(60) *Natural Resources Journal* 209.
[290] Göransson note 263 above 250.
[291] ibid.

away with.[292] The definition excludes coal,[293] fishmeal and radioactive materials, because this type of cargo is generally shipped in large quantities with limited risks or is sufficiently catered for in existing treaties.[294]

With respect to the cover afforded to incidents arising out of the carriage of oil in bulk,[295] it must be noted that such incidents will only be regulated by the HNS Convention where the oil has triggered a fire or an explosion, and such regulation operates without any prejudice to the jurisdiction of the CLC Convention 1969, as amended by the 1992 protocol relating thereto.[296] The inclusion of residues from the previous carriage of bulk substances covered by the HNS Convention is also a noteworthy extension of cover, serving to ensure that there is compensation available for fire and explosion damage arising from any leftover liquids or gases in empty cargo tanks.[297]

Other key definitions included in the HNS Convention are:

- Article 1(2) defines a person as "any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions".[298]
- Article 1(3) defines an owner as "the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "owner" shall mean such company".[299]
- Article 1(4) defines a receiver as --

  "(a) the person who physically receives contributing cargo discharged in the ports and terminals of a State Party; provided that if at the time of receipt the person who physically receives the cargo acts as an agent for another who is subject to the jurisdiction of any State Party, then the principal shall be deemed to be the receiver, if the agent discloses the principal to the HNS Fund; or

[292] Balkin note 264 above 5.
[293] As stated by Göransson note 263 above 254, the 'inclusion of only such bulk materials as are subject to the provisions of the IMDG when in packaged form means that coal and other materials of class "MHB" are excluded from the Convention'.
[294] Zhou note 289 above 210.
[295] article 1(5) of the HNS Convention.
[296] Zhou note 289 above 210.
[297] ibid.
[298] article 1(2) of the HNS Convention.
[299] article 1(3) of the HNS Convention.

(b) the person in the State Party who in accordance with the national law of that State Party is deemed to be the receiver of contributing cargo discharged in the ports and terminals of a State Party, provided that the total contributing cargo received according to such national law is substantially the same as that which would have been received under (a)".[300]

- Article 1(6) defines damage as the –

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

  Where it is not reasonably possible to separate damage caused by the hazardous and noxious substances from that caused by other factors, all such damage shall be deemed to be caused by the hazardous and noxious substances except if, and to the extent that, the damage caused by other factors is damage of a type referred to in article 4, paragraph 3. In this paragraph, ''caused by those substances'' means caused by the hazardous or noxious nature of the substances.".[301]

- Article 1(10) defines contributing cargo as –

  "any hazardous and noxious substances which are carried by sea as cargo to a port or terminal in the territory of a State Party and discharged in that State. Cargo in transit which is transferred directly, or through a port or terminal, from one ship to another, either wholly or in part, in the course of carriage from the port or terminal of original loading to the port or terminal of final destination shall be considered as contributing cargo only in respect of receipt at the final destination".[302]

The phrasing of article 1(6)(c) of the HNS Convention is also of particular interest for South Africa, which currently does not have an appropriate regime to ensure adequate compensation for claims of pure economic loss arising out of environmental contamination.[303]

[300] article 1(4) of the HNS Convention.
[301] article 1(6) of the HNS Convention. See section 4.2.3 Exclusions, in respect of passenger and goods carried on the ship
[302] article 1(10) of the HNS Convention.
[303] L Kotze 'The Interpretation of Claims for Pure Economic Loss under Section 1(6)(c) of the Hazardous and Noxious Substances Convention: A South African Perspective' (2003) 67 *Transactions on Ecology and the Environment* 159.

Furthermore, South African courts have a history of restrictively assessing delictual claims for pure economic loss, using various policy considerations to limit the liability of defendants to avoid opening the floodgates and burdening defendants with numerous unforeseeable speculative claims of abstract calculations.[304] Should the HNS Convention come into force, it will be interesting to note how the liability arising from such claims is interpreted by the South African courts.

The damage to be covered under the HNS Convention is also further extended by the 'deeming clause' contained in article 1(6),[305] which allows claimants to regard all damage as being caused solely by the hazardous and noxious substances even where there may be different causes of the damage.[306] This extension will not apply to damage arising from factors referred to in article 4(3), as they are expressly prohibited from giving rise to a claim by the HNS Convention.[307]

4.2.2 Scope of Application

Article 3 of the HNS Convention provides that the convention will cover:

- all damage caused either in the territory of a state party or anywhere, if it is caused by a ship that is registered in a state party or at least eligible to fly the flag of a state party;[308]
- damage by contamination that occurs within the territory, exclusive economic zone or a similar zone established in accordance with international law;[309] and
- the cost of preventative measures undertaken to prevent the damage referred to above.[310]

4.2.3 Exclusions

Article 4 of the HNS Convention stipulates that the convention will not apply:

- "to claims arising out of a contract for the carriage of goods and passengers."[311] The effects of the exclusion are that: any or all passengers on board a ship carrying

[304] Kotze note 303 above 160-161.
[305] article 1(6) of the HNS Convention provides: 'Where it is not reasonably possible to separate damage caused by the hazardous and noxious substances from that caused by other factors, all such damage shall be deemed to be caused by the hazardous and noxious substances except if, and to the extent that, the damage caused by other factors is damage of a type referred to in article 4, paragraph 3.'
[306] Zhou note 289 above 210-211.
[307] ibid. See 4.2.3 for a discussion on applicable exclusions.
[308] article 3(a) and (c) of the HNS Convention.
[309] article 3(b) of the HNS Convention.
[310] article 3(d) of the HNS Convention.
[311] article 4(1) of the HNS Convention.

hazardous and noxious substances will have to seek remedies in terms of the contract and not the convention,[312] and with respect to contracts for the carriage of hazardous and noxious cargo, the exclusion, read with the definition of damage contained at article 1(6) of the HNS Convention, clearly indicates that the loss, damage or destruction of goods will only result in a claim if said goods are outside the ship carrying the hazardous and noxious substances;[313]

- to the extent that its provisions are incompatible with those of the applicable laws relating to worker's compensation or social security schemes;[314]
- "to pollution damage as defined in the CLC Convention 1969, regardless of whether compensation is payable in respect of that damage under the HNS Convention and to damage caused by a radioactive material of class 7 either in the IMDG Code or the Bulk Cargoes Code;"[315] and
- "to warships, naval auxiliary or other ships owned or operated by a state party on government non-commercial service, unless the state party has decided that the convention should apply and has accordingly notified the Secretary-General of the IMO."[316]

The exclusion of radioactive materials was a compromise eventually reached as there were those that strongly argued for the inclusion of categories of radioactive material that were expressly excluded from the existing treaties regulating nuclear liability, due to the lack of any significant risk of nuclear damage.[317] It was eventually decided that the IMO should not get involved with the regulation of nuclear matter for the time being and the exclusion remained.[318]

A further possible exclusion is included in article 5 of the HNS Convention, which provides that a state party may at the time of ratification, acceptance, approval of or accession to the HNS Convention, declare that the convention is not applicable to ships that:

- "do not exceed a gross tonnage of 200;
- carry hazardous and noxious substances only in packaged form; and

[312] Göransson note 263 above 258.
[313] N Dhillon & J Tan 'Will the 2010 HNS Convention ever See the Light of Day, and if so, When?' (24 October 2019) *UK P&I Club* available at https://www.ukpandi.com/knowledge-publications/article/will-the-2010-hns-convention-ever-see-the-light-of-day-and-if-so-when-150576/, accessed on 22 June 2020.
[314] article 4(2) of the HNS Convention.
[315] article 4(3) of the HNS Convention.
[316] article 4(4)-(5) of the HNS Convention.
[317] Göransson note 263 above 256.
[318] ibid.

- are engaged on voyages between ports or facilities of that state."[319]

This allows for owners of small ships to bypass the requirement of compulsory insurance and continue to use small ships effectively within their territory.[320]

4.2.4 First Tier Liability under the HNS Convention

As discussed at 4.2 above, the HNS Convention was introduced with the aim of addressing the gaps that were identified in existing regulatory measures that served to ensure proper compensation for victims of incidents related to the carriage of hazardous and noxious substances by sea.[321]

In order to achieve this purpose, the convention imposes strict liability upon ship-owners for any incidents that occur whilst goods are being carried at sea, including the loading and discharging of such goods.[322] In terms of the strict liability provision under the convention, ship-owners will be liable for all incidents irrespective of whether or not they are at fault, unless they are able to show that they have one of following defences:

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

(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or

(c) the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function; or

(d) the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped either

(i) has caused the damage, wholly or partly; or

(ii) has led the owner not to obtain insurance in accordance with article 12; provided that neither the owner nor its servants or agents knew or ought reasonably to have known of the hazardous and noxious nature of the substances shipped.

[319] article 5 of the HNS Convention.
[320] Göransson note 263 above 260.
[321] Dhillon & Tan note 313 above.
[322] ibid.

3 If the owner proves that the damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from liability to such person."[323]

For the purposes of this dissertation, only the exemption pertaining to misdeclared cargo will be analysed in detail. In terms of the HNS Convention, the ship-owner is exonerated should damage be caused by cargo for which shippers has not furnished information relating to its hazardous nature and this failure has resulted in the ship-owner not acquiring the necessary insurance, no liability will attach to the ship-owner.[324] This exemption is provided for by article 7(2)(d), the wording of which represents a compromise reached at the 1996 diplomatic conference.[325] At the conference, delegates had to weigh up the competing interests of having first tier liability as a source of available compensation against the appropriateness of a ship-owner being held strictly liable in circumstances where he and his servants were unaware of the hazardous nature of the goods being carried.[326] The outcome was that the innocent ship-owner, although entitled to exercise his right of recourse against any third party including the shipper or receiver of the dangerous goods that caused the damage,[327] would be exempt if he or his agents did not have prior sufficient knowledge, and that the HNS Fund could be used to a greater extent in such instances, to cover the compensation that would not be received from the first tier, after exonerating the innocent ship-owner from strict liability.[328]

This strict liability plays an important role in the financing of the compensation available to victims.[329] The first tier imposes liability on the ship-owner (insurer included)[330] and expressly channels liability away from the owner's servants, agents, pilots, charterers of the ship, salvors and persons taking preventative measures.[331] Through this channelled tier of liability, the convention seeks to ensure that there is clear accountability and the party directly involved with the consequences of any dangerous goods incidents is decisively involved in consequent reparations, with ship-owners, who are the sole guardians and custodians of the

[323] article 7(2)-(3) of the HNS Convention.
[324] article 7(2)(d) of the HNS Convention.
[325] Balkin note 264 above 19.
[326] Balkin note 264 above 18.
[327] article 7(6) of the HNS Convention.
[328] Balkin note 264 above 19.
[329] Dhillon & Tan note 313 above.
[330] ibid.
[331] article 7(5) of the HNS Convention.

dangerous goods during carriage, bearing the primary role of providing compensation for first tier liability.[332]

4.2.5 Limitation of Liability

The owners are entitled to limit their liability in respect of any one incident and on a scale based on the gross tonnage of the ship.[333] These limits can be found at article 9(1) and are as follows:

> "1 The owner of a ship shall be entitled to limit liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:
>
> (a) 10 million units of account for a ship not exceeding 2,000 units of tonnage; and
>
> (b) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (a):
>
> for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 units of account;
>
> for each unit of tonnage in excess of 50,000 units of tonnage, 360 units of account;
>
> provided, however, that this aggregate amount shall not in any event exceed 100 million units of account."[334]

The ship-owner will be barred from limiting liability where it is evident that the damage was "the result of his personal act or omission, committed with the intent to cause such damage or recklessly with knowledge that such damage would probably result."[335]

4.2.6 Compulsory Insurance

The compulsory insurance that is required of ship-owners must only be taken out for the sums fixed by applying the limits of liability prescribed in article 9.[336] In order to ensure the availability of adequate compensation for victims, all owners of ships actually carrying hazardous and noxious substances must maintain insurance or some other form of financial security.[337] This requirement is considered to serve as the backbone for effective liability and compensation, as, whilst it may be common practice for most ship-owners to take out insurance for dangerous and normal cargo operations, the danger created by the few who do not cannot

[332] ibid.
[333] Balkin note 264 above 22.
[334] article 9(1) of the HNS Convention.
[335] article 9(2) of the HNS Convention.
[336] article 12 of the HNS Convention.
[337] ibid.

be ignored in the administration of such a regime.[338] In making the insurance compulsory the regime also bolsters the chances of a fair and competitive market for competitors by harmonising the costs involved in the course of doing business.[339]

For practical and regulatory purposes, article 12 also makes it a requirement that each ship-owner who maintains the abovementioned insurance or financial security must have a compulsory insurance certificate issued for his ship or ships, which certificate must set out various details that can be used for verification purposes by officials and authorities.[340] Article 12(11) makes it compulsory for every state party to enact domestic law that requires insurance or financial security to be in place for any ship entering or leaving ports and offshore facilities within its territorial sea.[341]

4.2.7 Second Tier Liability under the HNS Convention

It is said that it would be unjust to place the whole burden of adequately compensating victims of hazardous and noxious substance incidents, in terms of the HNS Convention, on ship-owners alone, particularly as it has been previously indicated that such incidents can arise through no fault of their own.[342] A further need for a second source of compensation is that there are always underlying concerns regarding the sufficiency of the insurance capacity for major hazardous and noxious substance incidents.[343] Thus, the HNS Convention provides for a second tier of liability which is financed by cargo interests.[344] Second tier liability is triggered in instances where the owner is exempt from his strict liability under the convention, or the owner has paid up all that he can/should in terms of his available resources and the maximum limit of the first

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[338] Balkin note 264 above 20.

[339] As stated by Balkin note 264 above 21: "By obliging states to legislate for compulsory insurance, the Convention achieves two ends: the protection of potential victims and a more equitable situation for shipowners in a market where, previously, those shipowners operating according to good practice who took out insurance were at a competitive disadvantage in comparison with their less responsible counterparts."

[340] Article 12(2) of the HNS Convention provides:
"This compulsory insurance certificate shall be in the form of the model set out in annex I and shall contain the following particulars:
(a) name of the ship, distinctive number or letters and port of registry;
(b) name and principal place of business of the owner;
(c) IMO ship identification number;
(d) type and duration of security;
(e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and
(f) period of validity of certificate, which shall not be longer than the period of validity of the insurance or other security."

[341] article of 12(11) of the HNS Convention.

[342] Balkin note 264 above 25.

[343] Göransson note 263 above 256.

[344] Balkin note 264 above 25.

tier.[345] The importers of these substances will be required to contribute amounts to an HNS Fund, with the contribution amounts to be based on the quantity of hazardous and noxious substances imported by the importer in the preceding year.[346]

The HNS Fund will kick in when there is no clearly liable party or the liable party has exhausted all their means and has still been unable to meet the valuation of appropriate damages and compensation.[347]

Article 13 of the HNS Convention establishes the HNS Fund, sets out its purpose and affords it legal personality in state parties.[348] The HNS Fund aims to "provide compensation for damage suffered from incidents involving hazardous and noxious substances during the carriage of such substances by sea and gives effect to the related tasks set out in article 15."[349] The administration and set up of the fund is similar to that seen with the Fund Convention,[350] which has a consistent and proficient regime for the compensation of injured parties in relation to oil pollution.[351]

In terms of articles 24 and 25, the HNS Fund shall have an assembly, consisting of all state parties and a secretariat headed by a director.[352] The assembly will be responsible for, inter alia, electing the director, updating the definition of contributing cargo, adopting annual budgets in accordance with the convention and giving instructions concerning the administration of the HNS Fund to the director and subsidiary bodies.[353] The director will be the HNS Fund's legal representative and serve as the "chief administrative officer of the HNS Fund", responsible for, inter alia, appointing personnel required for the administration of the HNS Fund, collecting contributions due in terms of the HNS Convention and preparing and submitting financial statements and budget estimates to the assembly annually.[354]

The liability of the HNS Fund is also based on the principle of strict liability, indicating that liability is "solely dependent on causation and not on proof of negligence by the fund itself, provided that such causation can be linked to some form of ship-sourced damage", as damage

[345] Dhillon & Tan note 313 above.
[346] ibid.
[347] ibid.
[348] article 13 of the HNS Convention.
[349] ibid.
[350] Fund Convention note 268 above.
[351] P Wetterstein 'Carriage of Hazardous Cargoes by Sea -- The HNS Convention' (1997) 26(3) *Georgia Journal of International and Comparative Law* 599.
[352] articles 24-25 of the HNS Convention.
[353] article 26 of the HNS Convention.
[354] article 30 of the HNS Convention.

caused by land-based sources is not within the scope of the HNS Convention.[355] The HNS Fund must be administered with proficiency, and must ensure that its processes are expeditiously carried out for the benefit of victims.[356] In terms of article 14 of the HNS Convention, the HNS Fund will only be liable where:

- there is no liability for damage arising under chapter II (first tier liability);
- the owner liable for the damage is unable to meet his liability in full and there is no financial security available; and
- the damage exceeds the owner's liability under chapter II (first tier liability).[357]

The HNS Fund will not be liable if:

> "(a) it proves that the damage resulted from an act of war, hostilities, civil war or insurrection or was caused by hazardous and noxious substances which had escaped or been discharged from a warship or other ship owned or operated by a State and used, at the time of the incident, only on Government non-commercial service; or
>
> (b) the claimant cannot prove that there is a reasonable probability that the damage resulted from an incident involving one or more ships".[358]

If the fund "proves that the damage was caused wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the HNS fund may be exonerated wholly or partially from its obligation to pay compensation to such person".[359]

The liability of the HNS Fund is also subject to certain limitations and, in terms of article 14(5) of the HNS Convention, the maximum aggregate amount that can be payable by the ship-owner and the HNS Fund is 250 million special drawing rights.[360] The overall limit indicates that it is possible that, for a particularly major incident, the two tiers of liability may prove to be insufficient.[361] In such instances, the ranking of claims will come into play with claims related to death and personal injury to be treated preferentially for up to two-thirds of

[355] Balkin note 264 above 29.
[356] ibid.
[357] article 14(1) of the HNS Convention.
[358] article 14(3) of the HNS Convention.
[359] article 14(4) of the HNS Convention.
[360] article 14(5) of the HNS Convention. See International Monetary Fund 'Special Drawing Rights (SDR)' available at https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/14/51/Special-Drawing-Right-SDR, accessed on 24 November 2021: "The SDR is an international reserve asset, created by the IMF in 1969 to supplement its member countries' official reserves."
[361] Balkin note 264 above 29.

the fund,[362] and all other claims ranking equally and settled at a pro rata reduction if necessary.[363]

Article 17 of the HNS Convention provides that the HNS Fund will be financed through the contributions imposed on receivers of hazardous and noxious substances and such contributions are to be dependent on the relevant totals of 'contributing cargo' received in the preceding year.[364] It is thus said that where receivers have barely received any 'contributing cargo' in the previous year, it is possible for them not to be called upon to make any contribution at all.[365]

What is interesting and unique about the HNS Convention is that its second tier is split into four separate accounts, namely, a general account, an oil account, a liquefied natural gases (LNG) account and a liquefied petroleum gases (LPG) account.[366] The decision to split the accounts came about after concerns were raised regarding the calculation of contribution amounts considering that the 'contributing cargo' from certain sectors will undeniably be at a much larger volume than the 'contributing cargo' from other sectors. In such an instance it is undesirable to force a sector with a lower volume of 'contributing cargo' to 'cross-subsidise' the sectors with higher volumes.[367]

Articles 18 to 21 of the HNS Convention set out the manner in which contributions are to be calculated, for the various separate accounts, and place a burden on each state party to ensure that all data on contributing cargo is timeously submitted to the director.[368] Article 21 specifically requires state parties to disclose the names and addresses of potential contributors, along with data on the volumes of contributing cargo that have been received at their ports in the previous year.[369]

Article 22 of the HNS Convention addresses the issue of enforcement of payment of contributions, and empowers the director of the HNS Fund to take any action, including court

[362] As stated in STA Law Firm 'United Arab Emirates: Maritime Claims and Limitation Funds' (25 July 2018) *Mondaq* available at https://www.mondaq.com/marine-shipping/721752/maritime-claims-and-limitation-funds, accessed on 21 December 2021: "The term Limitation of Funds indicates a guarantee or deposit made by a shipowner to meet any damage claim and the shipowner has to calculate it on the irresponsible ship's weight or some tons."
[363] article 14(5) of the HNS Convention.
[364] article 17(1)-(5) of the HNS Convention.
[365] Balkin note 264 above 30.
[366] article 16 of the HNS Convention.
[367] Balkin note 264 above 30-31.
[368] Zhou note 289 above 223.
[369] article 21 of the HNS Convention.

action, for the recovery of contribution amounts in arrears, inclusive of interest up until the date of payment.[370]

Despite numerous states having agreed to join the HNS Convention, there has been very little uptake of the requisite reporting duties mentioned above and this is seen as a serious impediment to the implementation of the HNS Convention, capable of hindering the determination of a commencement date for the convention.[371]

4.2.8 Practical Problems that Prevent States from Ratifying the HNS Convention

Article 46 of the HNS Convention provides:

> "1 This Convention shall enter into force 18 months after the date on which the following conditions are fulfilled:
>
> (a) at least 12 States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it, and
>
> (b) the Secretary-General has received information in accordance with article 43 that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c), have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.
>
> 2 For a State which expresses its consent to be bound by this Convention after the conditions for entry into force have been met, such consent shall take effect three months after the date of expression of such consent, or on the date on which this Convention enters into force in accordance with paragraph 1, whichever is the later."[372]

Following the adoption of the HNS Convention in 1996, the convention failed to garner the requisite number of ratifications from countries for it to enter into force, as required by article 46.[373] Factors standing in the way of such ratification were studied, with a specific study being undertaken by a focus group mandated to do so by the IOPC Fund[374] in the interests of developing suitable solutions.[375] Whilst the IOPC Fund operates separately and incidents caused by hazardous and noxious substances do not fall within the scope of its operation, there

[370] article 22 of the HNS Convention.
[371] R Shaw 'Hazardous and Noxious Substances -- Is the End in Sight? Proposed Protocol to the HNS Convention 1996' (2004) 3 *Lloyd's Maritime and Commercial Law Quarterly* 283. The lack of reporting of contributing cargo remains an issue to date, see note 385 below.
[372] article 46 of the HNS Convention.
[373] Shaw note 371 above 280.
[374] International Oil Pollution Compensation Fund 1992 established by article 2 of the Fund Convention.
[375] Shaw note 371 above 280.

are sufficient similarities between the two underlying conventions[376] for the authorities of the IOPC Fund to play an assistive role in the administration of the HNS Fund.[377]

The findings of the focus group indicated the following factors as the biggest contributors to the resistance seen to widespread ratification of the HNS Convention:

1 The potential administrative burden of having to report all contributing cargoes that are carried in containers in relatively low quantities and are carried so regularly that they meet the contribution and reporting thresholds contained in articles 18 to 21 of the HNS Convention, is not practical for importers of these cargoes.[378] Importers of hazardous and noxious substances were of the view that the increased scrutiny and procedures that would be required to be in place to ensure accurate and consistent reporting of these small quantities of hazardous and noxious substances would simply be far too cumbersome.[379]

2 The requirement that in cases of LNG cargoes the title holder, ie the person who held title immediately prior to discharge, is responsible for making contributions to the HNS Fund,[380] whilst that title holder may or may not be resident in a state party, was seen, by gas producing countries, to be inconsistent with the overall structure of the HNS Convention.[381] This inconsistency was said to stem from: firstly, how the second tier of liability for the HNS Convention was based on contributions levied against importers instead of exporters of contributing cargo, and secondly, the unlikely enforceability of such a provision against any persons who do not reside within a state party.[382]

3 The observed non-submission of data relating to contributing cargo by states that had ratified the HNS Convention.[383] In 2004, it was noted that only two of the thirteen states that had ratified the HNS Convention, had complied with their obligation to submit data pertaining to the received quantities of contributing cargo.[384] To date, there has not been any significant improvement to these figures, with only two of the fourteen states that have ratified or acceded to the HNS Convention, subsequently

[376] Fund Convention and the HNS Convention.
[377] Shaw note 371 above.
[378] Shaw note 371 above 281.
[379] ibid.
[380] article 19(1)(b) of the HNS Convention.
[381] Shaw note 371 above 281.
[382] ibid.
[383] Shaw note 371 above 282.
[384] ibid.

submitting reports on contributing cargo.[385] This lack of compliance presented and still presents an enormous hurdle to the HNS Convention's entry into force, which as per article 46 of the HNS Convention, requires that instruments of ratification be deposited alongside reports indicating at least 40 million tonnes of contributing cargo to the general account.[386]

4.2.9 The Protocol of 2010 to the HNS Convention

The findings of the IOPC study group were considered and, at an international conference in 2010, a protocol, designed to address the factors acting as hurdles to the widespread ratification of the HNS Convention and its entry into force, was adopted.[387] The protocol is the Protocol of 2010 to the HNS Convention (the 2010 HNS Protocol)[388] and it addresses the contributory factors in the following manner:

1 Article 3(3) of the 2010 HNS Protocol replaces the definition of 'contributing cargo' provided in article 1(10) of the HNS Convention,[389] with a new definition that excludes packaged hazardous and noxious substances by specifically referring to bulk hazardous and noxious substances only.[390] Damage arising from packaged hazardous and noxious substances is, however, not excluded from the kinds of damage the HNS Fund may be liable for as there has been no change to the definition of hazardous and noxious substances nor any change to the HNS Convention's application to claims caused by damage arising from the carriage of hazardous and noxious substances by sea.[391] In order to accommodate the exclusion of packaged goods from contributing cargo and to maintain the system of two tier liability, the ship-owner's limitation amount for carrying packaged hazardous and noxious substances has been increased.[392] This increase is effected through article 7 of the 2010 HNS Protocol, which replaces

[385] International Maritime Organization 'Status of IMO Treaties' (2021) *IMO* 508 available at https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%20-%202021.docx, **Error! Hyperlink reference not valid.** accessed on 22 December 2021.
[386] Shaw note 371 above 282.
[387] International Oil Pollution Compensation Funds (IOPC Funds) 'An Overview of the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances By Sea, 2010 (The 2010 HNS Convention)' available at https://www.hnsconvention.org/wp-content/uploads/2018/08/HNS-Convention-Overview_e.pdf, accessed on 22 December 2021.
[388] IMO Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (2010 HNS Protocol).
[389] See the definitions at 4.2.1 above.
[390] article 3(3) of the 2010 HNS Protocol.
[391] article 4(1) of the HNS Convention.
[392] International Oil Pollution Compensation Funds (IOPC Funds) note 387 above.

article 9(1) of the HNS Convention with a new paragraph 1 setting out the ship-owner's limits. The new paragraph provides as follows:

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

(a) Where the damage has been caused by bulk HNS:

(i) 10 million units of account for a ship not exceeding 2,000 units of tonnage; and

(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 units of account;

for each unit of tonnage in excess of 50,000 units of tonnage, 360 units of account;

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

(b) Where the damage has been caused by packaged HNS, or where the damage has been caused by both bulk HNS and packaged HNS, or where it is not possible to determine whether the damage originating from that ship has been caused by bulk HNS or by packaged HNS:

(i) 11.5 million units of account for a ship not exceeding 2,000 units of tonnage; and (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,725 units of account; for each unit of tonnage in excess of 50,000 units of tonnage, 414 units of account; provided, however, that this aggregate amount shall not in any event exceed 115 million units of account."[393]

In terms of the new paragraph, at 1(a), the ship-owner's liability for incidents involving bulk hazardous and noxious substances is identical to that seen in article 9(1) whilst, at 1(b), the ship-owner's liability is now higher.[394]

2 Article 11 of the 2010 HNS Protocol deletes article 19(1)(b), with the former 19(1)(c) becoming the new 19(1)(b);[395] and inserts a new subparagraph that shifts the

[393] article 7(1) of the 2010 HNS Protocol.
[394] article 7(1)(b) of the 2010 HNS Protocol.
[395] article 11(1) of the 2010 HNS Protocol.

responsibility of paying contributions due to the LNG account to the cargo receiver,[396] unless the receiver has concluded an agreement for each contribution to be for the account of the title holder and has notified the state party of this agreement.[397] Should any title holder fail to make the required contribution, in part or in full, in terms of such an agreement with the receiver, then the HNS Fund will be entitled to make arrangements to recover the amount in arrears from the cargo receiver.[398] The compromise achieved by the protocol simply reflects the need for dangerous goods regulations to be able to adapt to the fast developing hazardous and noxious substances industries themselves as, upon adoption in 1996, the transport of liquefied natural gas was almost exclusively conducted by governmental organisations and major energy companies; thus, bestowing the responsibility to pay contributions to title holders, who are known 'high rollers', was said to be the most efficient manner to finance the LNG account.[399] Advancements in the methods of transporting and increases in the quantities of LNG cargoes being transported as well as issues of consistency with the overall structure of the HNS Convention, discussed above, were all motivators for the change achieved by the protocol.[400]

3 The non-submission of the relevant data for contributing cargo is addressed by the addition of further clauses, with article 20(6)-(7) making the submission of contributing cargo data a condition precedent for becoming a state party[401] and indicating that the failure to submit the relevant contributing cargo data will result in a party being suspended as a state party.[402] Any country which has had its status as a state party suspended will not be entitled to claim compensation, with the sole exception being claims for death and personal injury.[403] The need for a clear method for the enforcement of the duty to report overcame the reluctance to adopt a clause withholding compensation in what certain delegates said was quite a 'draconian' way; however, the delegates could not deny that an enforcement tool was required and were cognisant that

[396] article 11(1bis)(a) of the 2010 HNS Protocol..
[397] article 11(1bis)(b) of the 2010 HNS Protocol..
[398] article 11(1bis)(c) of the 2010 HNS Protocol..
[399] Shaw note 371 above 281.
[400] ibid.
[401] article 20(6) of the 2010 HNS Protocol.
[402] article 20(7) of the 2010 HNS Protocol.
[403] International Oil Pollution Compensation Funds (IOPC Funds) note 387 above.

a similar enforcement method had been implemented by the IOPC Fund, which had also been facing a reporting issue to a lesser extent.[404]

The 2010 HNS Protocol also refines the various definitions in an attempt to solve drafting concerns pertaining to whether hazardous and noxious substances had been adequately defined in the HNS Convention.[405] The 2010 HNS Protocol also makes minor changes to the entry into force procedure to reflect the new articles setting out the state party's duty to submit data for its contributing cargo.[406] Despite having addressed the various factors and deficiencies that were noted to have prevented the HNS Convention from entering into force, accession to and ratification of the HNS Protocol has also not been as widespread as anticipated, with only five states having contracted to the protocol.[407] One positive that seemed to have been achieved through the amended form of the HNS Convention is compliance with the reporting duties, as all states are recorded to have received "a total quantity of 15,320,970 million tonnes contributing to the general account" in 2019.[408]

4.2.10 Entry into Force in South Africa

South Africa's progressive attitude towards development was evidenced on the international scene by the country becoming the fifth nation to consent to be bound to the HNS Convention, as amended by the 2010 HNS Protocol.[409] South Africa acceded to the amended version of the HNS Convention on 15 July 2019 and is currently the only state party with less than 2 million units of gross tonnage.[410] Accession on its own is incapable of giving the HNS Convention force of law in South Africa, and it is submitted that, once the amended HNS Convention enters

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[404] Shaw note 371 above 282.
[405] Shaw note 371 above 283-284; see articles 3-6 of the 2010 HNS Protocol.
[406] Article 21 of the 2010 HNS Protocol provides:
'1 This Protocol shall enter into force eighteen months after the date on which the following conditions are fulfilled:
(a) at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it; and
(b) the Secretary-General has received information in accordance with article 20, paragraphs 4 and 6 that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c) of the Convention, as amended by this Protocol, have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.
2 For a State which expresses its consent to be bound by this Protocol after the conditions for entry into force have been met, such consent shall take effect three months after the date of expression of such consent, or on the date on which this Protocol enters into force in accordance with paragraph 1, whichever is the later.'
[407] International Maritime Organization 'Status of IMO Treaties' note 385 above. South Africa is one of the five states that are contracted to the HNS Protocol, see 4.2.10 for a discussion on the status of the HNS Protocol in South Africa.
[408] ibid.
[409] Dhillon & Tan note 313 above.
[410] International Maritime Organization 'Status of IMO Treaties' note 385 above.

into force, when the conditions set out in article 21 of 2010 HNS Protocol have been met, it should be formally incorporated into South African law through enactment in national legislation as required by the Constitution of the Republic.[411]

The three principal methods by which a treaty can be transformed to a domestic law are by embodying the provisions of the treaty in the text of an Act of parliament; including it as a schedule to an Act of parliament; or authorising the executive in an enabling Act to transform the treaty by means of a proclamation or notice in the *Gazette*.[412]

It is submitted that, in the South African context, the most suitable manner to transform the HNS Convention, as amended by the 2010 HNS Protocol, to domestic law is to embody the provisions of the convention in an Act of parliament. This is in line with the practice previously followed by the country for the Fund Convention, which is enacted through the Merchant Shipping (International Oil Pollution Compensation Fund) Act.[413] The HNS Convention similarly represents a new and comprehensive regime that would need to be carefully considered when being enacted, to ensure that it well suited for the South African maritime and legal sector. Enacting the HNS Protocol in its own Act of parliament also affords room for as many amendments as are required, which may be necessary considering that neither the HNS Convention nor the HNS Protocol have entered into force and, should either treaty ever do so, a period of observation is likely to be required to monitor the practical successes and struggles of the regime. South Africa's accession to the HNS Protocol indicates a desire to align its domestic marine laws with international practices and it is submitted that if the HNS Protocol enters into force, the country can implement the treaty into national law as "the Merchant Shipping (International Hazardous and Noxious Substances Compensation) Act".

4.3 The Merchant Shipping Bill 2020

Alongside the progress South Africa has made towards the adoption of international regulations advancing a new regime for protection against dangerous goods incidents, the country has also, in line with the aims of the Comprehensive Maritime Transport Policy (CMTP) adopted in 2017,[414] published the MSB for comments from interested parties.[415] Amongst the amendments

[411] section 231(4) of the Constitution of the Republic of South Africa 1996.
[412] W Scholtz & G Ferreira 'Interpretation of Section 231 of the South African Constitution – A Lost Ball in the High Weeds!' (2008) 2(41) *Comparative and International Law Journal of Southern Africa* 335.
[413] Merchant Shipping (International Oil Pollution Compensation Fund) Act 24 of 2013.
[414] I Surian 'The South African Merchant Shipping Bill, 2020' (2 July 2020) LexisNexis available at https://www.lexisnexis.co.za/news-and-insights/maritime-law/the-south-african-merchant-shipping-bill,-2020, accessed on 27 June 2020.
[415] ibid.

and replacements to be effected by the MSB once approved,[416] is the repeal of the MSA, with the proposed new laws being said to better align the country with best international practices and to promote the growth and development of the local economy.[417]

4.3.1 Definitions

Section 1 of the MSB provides the following relevant definitions:

- An accident, in relation to a vessel, is inclusive of the following:

  > "*(b)* the explosion, collapse or bursting of any closed container, including a boiler or boiler tube, in which there is any gas (including air), liquid or any vapour at a pressure greater than atmospheric pressure;
  >
  > *(c)* any electrical short circuit or overload resulting in fire or explosion;
  >
  > *(d)* the sudden, uncontrolled release of flammable liquid or gas from any system,
  >
  > plant or pipeline;
  >
  > *(e)* the uncontrolled release or escape of any harmful substance;
  >
  > *(f)* either of the following occurrences in respect of any pipeline, valve or any piping system in a vessel —
  >
  > (i) the bursting, explosion or collapse of a pipeline;
  >
  > (ii) the accidental ignition of anything in a pipeline or of anything which, immediately before it ignited, was in a pipeline."[418]

- Cargo means "any cargo, except liquids in bulk and gases in bulk, that may require special precautions owing to its particular hazard to ships or persons on board".[419]
- Dangerous goods mean "any dangerous goods classified or defined in the regulations as dangerous goods".[420]
- Hazard means "a source of or exposure to danger".[421]
- Marine accident and incident investigation unit means "the marine accident and investigation unit established by the Authority under Chapter 6 of this Act".[422]

[416] ibid.
[417] ibid.
[418] GN 148 *GG* 43073 of 6 March 2020 at 244-245.
[419] ibid.
[420] GN 148 at 249-250.
[421] ibid.
[422] GN 148 at 258.

4.3.2 Dangerous Goods Carriage

The only sections of the MSB regulating the carriage of dangerous goods are sections 241 to 243 and in terms of them sending or carrying any dangerous goods is prohibited unless the relevant notice has been given and the goods are marked, packed and labelled accordingly.[423] Section 375 provides that the shipping of misdeclared dangerous goods will be an offence in terms of the MSB and convicted persons will be liable to a fine or to imprisonment for a period not exceeding 12 months.[424] These provisions are substantially similar to those contained in the MSA.

Where misdeclaration has occurred and results in a dangerous goods incident, the MSB empowers the marine accident and incident unit, established in terms of section 280 of the MSB,[425] with a clear mandate and leadership hierarchy to conclude marine safety investigations efficiently and to report its findings to the Minister of Transport.[426] One of the main considerations for the marine accident and incident unit when making its findings is the prevention of subsequent marine casualties and incidents as well as ensuring the maintenance of standards of safety and competency.[427] The unit is afforded powers to board ships, to access documents and to request all-around compliance with its investigations.[428] The unit may detain ships involved in pending investigation (but not unduly so).[429]

4.3.3 Promulgation of the Merchant Shipping Bill 2020

The MSB was published in the *Government Gazette* on 6 March 2020, with all interested parties being afforded 60 days to submit their comments in response thereto.[430] Due to Covid-19 interruptions and the nationwide lockdown, extensions were granted up until the end of May 2020 for members of the general public, and the end of June 2020 for members of the Maritime Law Association of South Africa.[431] The next step in the process is for the comments to be reviewed during the month after the deadline for comments, and thereafter, once the process of review has been completed, these comments, together with a revised bill, will be sent to the

[423] GN 148 at 457-458.
[424] GN 148 at 552.
[425] GN 148 at 493.
[426] ibid.
[427] ibid.
[428] GN 148 at 492-496.
[429] GN 148 at 497.
[430] Surian note 414 above.
[431] ibid.

state law advisors.[432] The MSB will then need to be reviewed by the state advisors before being submitted to the Director-General Cluster and, thereafter, to Cabinet.[433] The current status of the MSB as per a meeting held by the South African Department of Transport on 26 May 2021 is as follows: after a study on the economic and social impact of the MSB was conducted by the Department of Transport, the MSB was thereafter submitted to the state law advisors on 31 March 2021, who were yet ready to certify the MSB at the time of the meeting.[434]

[432] N Smuts 'South Africa aligning its maritime industry with the globe through the Merchant Shipping Bill, 2020' (2021) February *De Rebus* 16 available at https://www.derebus.org.za/south-africa-aligning-its-maritime-industry-with-the-globe-through-the-merchant-shipping-bill-2020/, accessed on 23 December 2021.
[433] ibid.
[434] Parliamentary Monitoring Group 'Economic Regulation of Transport Bill; DoT Quarter 4 Performance; Moloto Corridor; with Minister' (26 May 2021) available at https://pmg.org.za/committee-meeting/33050/, accessed on 16 January 2022.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The aim of this dissertation was firstly, to assess the criminal liability incurred by corporates for misdeclaring dangerous goods to be transported to or from South Africa by sea, and thereafter, to advise legislators on the adequacy of the current and proposed laws regulating the declaration of dangerous goods. This specific issue has been receiving attention internationally and has resulted in some of the largest shipping lines taking it upon themselves to react to the harmful practice in attempts to deter it.[435]

Chapter 2 provides an analysis of why dangerous goods need to be declared and thereafter considers the various factors contributing to misdeclaration despite the comprehensive international frameworks in place to try to safeguard against it. Avoidance of higher tariffs, ignorance and simple plain mistakes are all prevalent causes of misdeclaration.[436] This chapter evidences that, although the rules may be formulated and distributed globally, all may be for naught as there needs to be adequate levels of checks and balances in place at ground level to ensure actual implementation.

Chapter 3 examines the provisions currently in force in South Africa regulating the carriage of dangerous goods and discusses the different types of liability as well as the ability to direct liability in order to deter persons from misdeclaring dangerous goods in future or at all in the first place. The various international codes and conventions South Africa has enacted as part of its domestic laws to make use of the extensive lists providing classifications and inherent characteristics of hazardous and dangerous substances are discussed in this chapter and so are the domestic powers afforded to the Minister of Transport to instruct his officials to investigate dangerous goods incidents. The liability seen in the Hague-Visby Rules is not punitive or criminal whatsoever and the only criminal liability stems from non-compliance with the MSA or the Dangerous Goods Regulations. The heavy criminal sanctions in force in the mining sector are briefly explored to evidence previous methods resorted to in the industrial world to promote compliance with regulations and safety in dangerous working environments. Criminal liability is favourable initially because of potential to deter and also because of how alternate

[435] H Manaadiar note 34 above.
[436] Cachard note 156 above.

sentencing options could be utilised to direct any fines towards reparations aimed at making victims whole again.[437]

Chapters 4 and 5 focus on laws that South Africa has shown an inclination to enter into force within the Republic, with a specific focus on the changes these laws will bring about to the regulation of the carriage of dangerous goods and how the proposed instruments will be entered into force. Accession to the HNS Convention is a very positive act by South Africa and represents a willingness to be prepared for dangerous goods incidents and to react appropriately with clear lines of liability being drawn by the regime. The HNS Convention is notably not aimed at creating any criminal or punitive liability and must consequently be assessed in the light of the treaty's own aims.[438] The final proposed instrument considered in chapters 4 and 5, is the MSB, which, when entered into force, will repeal the MSA. The punitive and criminal liability for misdeclaration of dangerous goods is almost identical to that in the MSA, with no advancements being included in the proposed instrument. The MSB does, however, introduce investigatory units that will be responsible for spearheading enquiries into marine incidents. Chapter 5 provides concluding remarks and recommendations based on the proposed laws that have been analysed.

5.2 Concluding Remarks

5.2.1 The HNS Convention

It is submitted that the HNS Convention represents an international response to the risks posed by dangerous goods operations at sea, and these risks are exacerbated by the misdeclaration of dangerous goods. The convention accordingly directs liability primarily to carriers, who are deemed to reconcile themselves to the involved risks. Where carriers are deprived of an opportunity for such reconciliation, the convention directs liability away from them and this is solely catered for by the second tier of liability. The focus of the convention seems to be on the timeous compensation of the victims, hence some of the rights formerly enjoyed by carriers in limiting their liability are forfeited in favour of strict liability. This is an approach that not only favours efficiency, as it minimises the disputes that may potentially arise from investigations into liability after incidents, but also puts the needs of the victim first.

Despite having addressed all the factors noted to be the main causes of resistance to ratification, there is still a lack of uptake of the HNS Convention, even in its amended form

[437] Farisani note 37 above 30.
[438] Dhillon & Tan note 313 above.

that sought to address the main causes of resistance. It is submitted that the similarity observed between the operation of the HNS Fund and the IOPC Fund[439] is possibly a factor contributing to this hesitancy, as the envisioned operation of the HNS Fund may not adequately cater for the dynamics and split risks system that the parties involved in the carriage of goods by sea have become familiar with, having relied for so long on the compromises contained in the Hague Rules and Hague-Visby Rules.

The practical consequences of certain amendments to the HNS Convention remain unclear; for example, the exclusion of packaged hazardous and noxious substances from the definition of contributing cargo raises the following questions: Is the burden of reporting considered to be impracticable simply because of the eventual increased costs that may arise from the requisite reporting? Has this redefinition in any way lowered such costs? The redefined definition of contributing cargo has no effect on the requirement that the carrier ensure that the relevant financial security is taken out for hazardous and noxious substances, including packaged goods.[440] It is submitted that carriers will require a clear profile of those packaged goods in any event, for the purposes of securing financial security. This indicates that a paper trail in respect of the volume and characteristics of the goods is already being generated, and from the time of implementation of the new definition, a carrier would in effect be simply required to continuously improve his standards of recording and reporting the volumes of dangerous cargo transported using these profiles of the goods, regardless of whether the goods are packaged or carried in bulk. Another question that arises is, should monetary concerns be the issue, how exactly will the increased limits, adjusted to cover the lessening of contributing cargo with unchanged liability for the excluded dangerous goods, be applicable to carriers for these limits to be palatable to ship-owners?

Beyond monetary concerns, there also seems to be a general consensus between major exporters that the reporting of hazardous and noxious substances is no easy feat.[441] To assist with these difficulties, the secretariat of the IOPC Fund introduced an electronic calculating system, called 'the HNS Contributing Cargo Finder and Calculator' (the calculator), and made it available to the public.[442] The calculator is guided by the input of the user as to the name,

[439] Shaw note 371 above.
[440] International Oil Pollution Compensation Funds (IOPC Funds) note 387 above.
[441] Zhuo note 289 above 224.
[442] ibid.

quantities and mode of carriage, whilst it computes the classification criteria and confirms whether substances are hazardous and noxious cargo.[443]

One thing that is clear from the formulation of the HNS Convention and the amendments thereto, is that the convention was not formulated to direct any liability towards any shipper which has deprived the carrier of the opportunity to reconcile himself with the risks of carriage, through prior knowledge of the goods' inherent characteristics, and thereafter take the necessary precautions. This is evidenced by the fact that the provisions themselves make reference to instances where there has been a misdeclaration of hazardous and noxious cargo,[444] with the HNS Convention's visible response thereto simply being to exclude one tier of liability (the carrier's) in lieu of another to reach an equitable result, in the interests of ensuring adequate compensation.[445] It is submitted that true equity could be far easier to achieve by having any shipper that has exported misdeclared dangerous goods, being held liable in place of the carriers with an increased limitation amount as a consequence of their conduct. It is submitted that drafters of the convention indicate that they are cognisant of the role of juristic persons in the global carriage of dangerous goods by sea and would thus be able to effect an amendment that would include an appropriate substitution clause, directing liability towards shippers that misdeclared dangerous goods, in the event that their misdeclaration has resulted in damage as defined by the HNS Convention. If the observed trends of major shipping lines heavily fining shippers and even including them in 'blacklists' as a result of misdeclaration are anything to go by, deterrence of the offence requires clear and harsh economic and operational punitive measures. It is submitted that the threat of possibly being exposed to the various claims for damage that may arise in dangerous goods incidents could serve as a deterrence achieved by amendments to South African legislation aimed at ensuring that dangerous goods are declared properly for their safe carriage.

Whilst it has been mentioned that the convention truly seems to minimise the role of the shipper in the creation of dangerous goods incidents, it must be remembered that the HNS Convention is aimed at reducing dangerous goods incidents and the HNS Fund is aimed at making victims 'whole' in the unfortunate event that such incidents do occur.[446] The HNS

[443] ibid.
[444] See article 7(2)(d) of the HNS Convention set out at 4.2.4 above.
[445] Balkin note 264 above 19.
[446] Dhillon & Tan note 313 above.

Convention holds great promise and will hopefully register the requisite ratifications and contributing cargo sometime in the near future.

5.2.2 The Merchant Shipping Bill 2020

In respect of the changes proposed in the MSB, although progressive in some senses, it is submitted that the establishment of well-functioning investigatory units will not be a strong deterrent, as such investigations are all reactive post-incident measures. In the interests of general safety at sea, the grave dangers that are faced by cargo-carrying vessels and seafarers require solutions that can serve as effective 'before-the-event' measures.[447] It is submitted that for such well-established investigatory units to be able to play a strong role in the deterrence of the misdeclaration of dangerous goods, they must be supported by legislation directing suitable punitive measures at convicted offenders.

The liability under the proposed MSB is identical to the liability seen in the MSA and progress has not been made in refining the punitive measures employed to deter the misdeclaration of cargo. It is submitted that the past experience with dangerous goods and the progressive act of being one of the first states to ratify a convention dealing with the compensation of dangerous goods incident victims, indicate that South Africa is more than aware of a need for legislative reform that curtails the occurrence and effects of such incidents.

In the mining sector, after numerous incidents and growing public outcry, the legislature responded, the dangers and lack of compliance with safety measures, by introducing harsh criminal sanctions that are clearly directed to promote and attempt to enforce regulations enacted for safer working environments. With this knowledge, it is submitted that the country would be better served by going beyond the international conventions for regulatory assistance, and the legislature should look to the measures adopted to deter dangerous corporate behaviour in South Africa's own industries, such as those seen in the mining industry.

5.3 Recommended Amendments to the Merchant Shipping Bill 2020

The MSB would be well served by an amendment to section 375, the draft of which makes absolutely no change to the criminal liability that would be incurred by a shipper that has misdeclared dangerous goods, in terms of section 313 of the MSA. It is submitted that the proposed amendment could be formulated as follows:

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[447] Y Yang 'Obligations and Liabilities for Consigning Dangerous Goods' (2007) 2 *China Oceans Law Review* 515.

Row 4 of column 2 of Table 2 in section 375 Table 2 should be amended to read:

> '*(a)* withdrawal or suspension of such person's registration as an exporter; or
>
> *(b)* a fine of up to three million rands or a period of imprisonment not exceeding five years or to both such fine and imprisonment;
>
> *(c)* the applicable fine shall be treble the value of the received goods up to a limit of three million rands and the court may use its discretion to make findings as to which controlling mind within the corporate shall be liable to serve any period of imprisonment handed down, based on the facts of each circumstance; and
>
> *(d)* any alternative sentence that a court may find just and equitable for the environment, communities and victims that have suffered as a direct result of the misdeclaration.'

By enacting such an amendment, the MSB would introduce needed elements of criminal liability that can be equally effective against an individual or a corporate. The compensatory and restorative measures encompassed in the existing and proposed laws are an indication that the South African legislature is aware of the harsh consequences that can arise from dangerous goods incidents. However, South Africa should be cautioned from expended all its energy in establishing teams to respond when available measures aimed at preventing the harm are not being introduced or implemented. Shippers serve as the river source, consistently feeding various types of cargo with various dangers, which they are best placed to know,[448] into our oceans. Therefore, it would be in the best interests of South Africa to transform the amended HNS Convention into a domestic bill at the soonest opportunity and appropriately amend either the MSA or the MSB, which contain the same liability, to reinforce the necessity to properly declare all cargo received and dispatched at our ports.

[448] Letsos note 5 above.

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