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Overview of content

Director's preface

During 2011, the Faculty launched a discussion about how the institutes within the Faculty should be organised. Several alternatives were suggested, but the final conclusions were that: 1) the division should remain between the Scandinavian Institute of Maritime Law and the Institute of Private Law, and 2) the Centre for European Law should be included as part of the Scandinavian Institute of Maritime Law. This means that the Institute will continue in existence, now consisting of three different "departments": the Department of Petroleum and Energy Law, the Department of Maritime Law and the Centre for European Law. Furthermore, both the cooperation between the two Departments and the Centre and the EU-law perspective on our research will be strengthened.

Another event of significance for our research was the establishment of the research group for international contracts in cooperation with the Institute of Private Law in Autumn 2011 (see http://www.jus.uio.no/forskning/omrader/internasjonal-kontraktsrett/). The research group will analyse fundamental contract law questions in an international context. A principal focus is on investigating general and special Norwegian contract law in light of the international development of contract law. This research group will influence the direction of the contractual law research of the Institute in the coming years. The research group have planned a 'kick off' work shop on 14 June 2012, with the topic "Flexibility and risk sharing in long term contracts - an international perspective". The work shop is kindly sponsored by the law firm Wikborg Rein.

During 2011, two new assistant professors were appointed by the institute: Ivar Alvik at the Department of Petroleum and Energy Law and Trond Solvang at the Department of Maritime Law. They will both participate in the new research group.

One PhD candidate, Catherine Banet, delivered her dissertation: "Tradable Green Certificates Schemes Under EU Law. The influence of EU law on national support schemes for renewable electricity generati-

on", for evaluation during 2011.

During 2011, the Institute has continued to pursue the research priorities of previous years. The ship safety project continues in cooperation with other research institutions in the fields of law and social sciences in Norway, the Nordic countries, Russia and elsewhere. The project, which is chaired by Professor Erik Røsæg, is currently employing several PhD candidates and research assistants. During 2011, two research assistants were financed from the Norwegian Coastal Administration to write master theses about the Directorate's exposure to risk and liability. Other sources that have participated in the financing of the project include the Norwegian Research Council, the Scandinavian Council of Ministers, the Norwegian Oil Industry Association, and Johan and Mimi Wesmanns Minnefond.

More information about the project may be found at http://www.jus.uio.no/nifs/forskning/prosjekter/sjosikkerhet/index.html.

In the Department of Maritime Law we are also continuing our research into traditional maritime contract law. The focus on multimodal contracts and the newly signed Rotterdam Rules continues, but we have extended the focus on offshore charter parties.

Research during 2011 at the Department of Petroleum and Energy Law has concentrated on energy-market issues (among others, one PhD candidate is working on multi-level governance in the energy sector) and topics related to contract law (including contracts for the removal of decommissioned offshore installations and R&D contracts).

As in previous years, the Institute is partly funded by the Scandinavian Council of Ministers, for which we are, of course, extremely grateful. Our other main sponsors are:

- Research Council of Norway
- the Norwegian Oil Industry Association (OLF)
- the Ministry of Petroleum and Energy (channelled through the Research Council of Norway)
- the Eckbo Foundation
- Johan and Mimi Wesmanns Minnefond
- Anders Jahres Foundation

We are very grateful to all our sponsors.

We would also like to express our gratitude to the numerous practitioners who help us year after year with lectures, student advice, information and examinations, in most cases without any fee. Their contribution is important in making the Institute what it is: a meeting place for young as well as established researchers, practitioners and students, all of whom combine open-minded enthusiasm for new knowledge with penetrating analysis. In particular, we are delighted with the way in which practitioners as well as researchers from other institutions have contributed to our specialised masters programmes. In 2011 these included the North Sea Energy Law Programme, organised jointly by the universities of Aberdeen, Copenhagen, Groningen and Oslo (by our Department of Petroleum and Energy Law), which offered high quality postgraduate level training for legal practitioners in the energy industry.

More than two dozen evening seminars were held during the year, as well as half-day seminars in cooperation with the Norwegian Shipowners' Association. Seminars extending over two or more days, on the other hand, have been less numerous, as these often take place every second year. The second Biannual Colloquium in Maritime Law ("IBCML") took place at the University of Tulane in October 2011 on the topic "Multimodal transports". The seminar was arranged cooperatively by the Institute, the University of Southampton, and the University of Tulane. The annual European Energy Law Seminar ("EELS"), organised by Nederlandse Vereniging voor Energierecht and the University of Groningen in cooperation with the Institute, took place in Noordwijk aan Zee in the Netherlands in April 2011.

We hope to be able to hold further joint seminars in the future.

Trine-Lise Wilhelmsen

Editor's preface

We present the 2011 annual edition of SIMPLY, published by the Scandinavian Institute of Maritime Law. The wide range of topics presented in this yearbook follows the tradition established by the previous editions of SIMPLY and illustrates the variety of research currently being carried out at the Scandinavian Institute of Maritime Law.

This yearbook is distinct from the earlier editions because this year we publish fewer articles than usual for the Yearbook. The articles we present in SIMPLY 2011 address the questions which are both particularly topical at present and which we believe will continue to be so in future. The articles have been reviewed by anonymous referees, except for the master thesis written by David R R Syvertsen, LL.M student in Maritime Law at the Institute (submitted in 2010), which was proposed for inclusion by the supervisor for its high quality.

The Yearbook begins with an article by Philip Linné, Ph.D. Student in Environmental and Maritime Law at the Department of Law, University of Gothenburg (Sweden). The author discusses the international regulation of air pollution by ships in the context of climate change policy and analyses, in particular, reducing climate influencing greenhouse gases from ships and the inclusion of the greenhouse gases as "emissions" into Annex VI of MARPOL 73/78 and related rebuttals. Philip Linné was a guest researcher at the Scandinavian Institute of Maritime Law in the spring of 2011 and also participated in the events arranged by the Institute on earlier occasions.

The next article is written by Stig Andre Kolstad, Senior Adviser at the Norway's Royal Ministry of Trade and Industry, Maritime Department. In September 2011, Stig Andre Kolstad held a guest lecture for students at the Institute's LL.M programme in Maritime Law and he subsequently wrote an article on the topic of Norwegian security regulation of the use of armed guards onboard Norwegian vessels and the use of force. Kolstad's article addresses the issues relating to the use of private armed guards on-board merchant vessels navigating in the Gulf

of Aden off the Somalian coast in order to counter the pirate attacks. The article presents the international regulations concerning piracy, including the UN Convention on the Law of the Sea and Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988. The article also examines in considerable depth the private guards' rights to use force in order to protect the vessel and its crew against piracy under Norwegian rules, such as the Ship Safety Act and the Penal Code.

Professor Knut Kaasen (Petroleum and Energy Law Department of the Institute) contributes an article on Project Integrated Mediation (originally published by the Norwegian Association for Building and Construction Law in På rett grunn – festskrift for Norsk Forening for Bygge- og Entrepriserett, Oslo 2010). Professor Kaasen discusses Project Integrated Mediation ("PRIME") as a dispute resolution system for parties of construction projects, which allows for the handling of conflicts at every stage of the project and is becoming more popular in Norway and internationally.

SIMPLY 2011 contains a master thesis by David R.R. Syvertsen, LLM, who writes on co-insurance of third parties and waiver of subrogation under hull insurance of mobile offshore drilling units. The thesis provides for a comprehensive examination and comparison of Norwegian and English approaches to the rights conferred upon third parties in relation to the hull insurance of these off-shore structures. The author gives an overview over the allocation of liability in drilling contracts in the petroleum sector and the application of the knock-for-knock principle. He also discusses the insurance contract's relation to the petroleum contract and the liability issues, including the position of a party protected against subrogation where the allocation of liability in the contract includes regulations departing from the knock-for-knock principle.

Finally, Professor Trine-Lise Wilhelmsen, Director of the Institute, has written an article on the Norwegian and English approaches to deductibles as self-insurance. The article examines, in particular, the definition of an insured event where several incidents of damage are inter-

connected and how a deductible would be applied in such cases under Norwegian and English law. This article follows on from the discussion in Professor Wilhelmsen's previously published article (SIMPLY 2003), in light of the new judgments of the English courts.

We are grateful for our regular and ad hoc peers for their valuable and timely comments on the proposed article and hope to receive help from them in future.

As the articles presented in this yearbook are independent of each other, there is no common bibliography. Materials referred to are instead cited in footnotes or endnotes or in appendices to the individual articles.

Alla Pozdnakova
Editor

Ships, air pollution and climate change

Some reflections on recent legal developments in the Marine Environment Protection Committee

Philip Linné, Ph.D. Student
Department of Law, University of Gothenburg, Sweden

Content

1 Introduction[1]

1.1 Initial Remarks

Historically, air pollution and climate change have been treated separately in both natural science and law. In recent years, however, researchers in natural science have started to highlight the importance of interlinkages between air pollution and climate change. This in turn seems to have initiated a shift in how the same phenomena are treated in both policy and law.

One expression of the interlinkages between air pollution and climate change can be found in recent amendments to one of the annexes to the International Convention for the Prevention of Pollution from Ships ("MARPOL").[2] For the first time, binding commitments for reducing climate influencing greenhouse gases ("GHG's") from ships were adopted in the form of mandatory energy efficiency requirements by the International Maritime Organization (the "IMO") in July 2011. However, the Marine Environment Protection Committee (the "MEPC") of the IMO settled for regulating GHG emissions in an annex specifically created to regulate *air pollution* from ships: MARPOL Annex VI.[3]

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[1] The author would especially like to acknowledge Mr. Berty Louis Nayna of the IMO for kindly arranging accreditation for participation during MEPC 62. Acknowledgments for valuable comments on natural science aspects of air emissions go to Ph.D. Students Hannes Johnson and Mathias Magnusson, Lighthouse/Chalmers University of Technology. The author would also like to warmly thank Doctor Christina-Olsen Lundh and Ph.D. Student Erik Sandin, both from the Department of Law, University of Gothenburg, for insightful comments improving this article. All errors, omissions, interpretations and possible misinterpretations contained herein however remain the sole responsibility of the author.

[2] See the International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto.

[3] See the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto ("1997 Protocol"). After its addition, Annex VI has been revised. For the sake of convenience, references to MARPOL Annex VI will henceforth mean references to the latest amendments in force unless otherwise indicated, *i.e.* Resolution MEPC.176(58).

1.2 The Problem

During previous sessions and at MEPC 62, several aspects of the topic of ships and climate change where debated. One of these aspects was the appropriateness of including GHG emissions regulation in MARPOL Annex VI. Even though the form of regulating GHG's in MARPOL Annex VI had been agreed as appropriate by a majority at MEPC 60,[4] it was challenged at MEPC 62 on the grounds that GHG's are not usually classified as *pollutants*.

By this token, the question of the definition of GHG's was presented by some delegations as a *legal problem*, potentially blocking the inclusion of GHG regulation in MARPOL Annex VI. The IMO Sub-Division for Legal Affairs was asked for guidance on the matter and it reiterated a delivered opinion from MEPC 60, concluding that there were *no legal barriers* to the inclusion of GHG's in MARPOL Annex VI.[5] However, these conclusions were reached without venturing into any scientific definitions of GHG's or air pollution. Instead, the opinion revolved around other definitions in MARPOL.

The purpose of this article is to offer some additional justifications for regulating GHG's in MARPOL Annex VI against the background of the interlinkages between air pollution and climate change. Departing from definitions of air pollution and GHG's in natural science and law, the question of MARPOL Annex VI as the appropriate legal vehicle for regulating GHG's is revisited, specifically with a view to examining the challenge that GHG's are not usually classified as *pollutants*.

4 See MEPC 60/22, p. 29.

5 See MEPC 60/22, p. 28-29. The advisory opinion is discussed in more detail *infra*, Section 3.2.

2 Air Pollution and Climate Change

2.1 From Separated to Linked Phenomena in Natural Science

Initially, the question may be raised as to why additional justifications for regulating GHG's in MARPOL Annex VI are looked for in natural science.

Firstly, a detour to natural science is justified because science amounts to more than just an alarm bell for environmental problems: the authority of science generally has important legitimizing functions for possible legal measures to protect the environment.[6] Secondly, as just mentioned, discussions at MEPC 62 concerning the air pollution annex and GHG's revolved around definitions. Thirdly, the perspective of interlinkages between air pollution and climate change is most clearly present in natural science, even though a tendency to shift to this perspective is also discernable in policy and law.

Traditionally, a scientific distinction has been made between air emissions in the form of *air pollution* on the one hand and *climate influencing GHG's* on the other. The label 'air pollution' has been used for short-lived compounds like sulphur and nitrogen oxides ("SO_x" and "NO_x"), that are *directly* toxic to humans, plants or other organisms.[7] Other emitted compounds like carbon dioxide ("CO_2") and nitrous oxide ("N_2O"), that affect the radiation balance of the atmosphere and the Earth's surface temperature, have instead been labelled GHG's.[8]

Although historical divisions between these two categories of *air*

[6] See Holder, Lee; *Environmental Protection, Law and Policy,* 2007, pp. 12-15.

[7] Some main problems associated with these air pollutants include acidification of soil and water, eutrophication, ozone damage on vegetation and human health effects, such as increased mortality and shortened life expectancy due to inhalation of fine particles, see Grennfelt, Pleijel; *Air Pollution – a European perspective* in *Transboundary Air Pollution – Scientific Understanding and Environmental Policy in Europe*, 2007, pp. 15-18.

[8] See Grennfelt; *Common Roots of Air Pollution and Climate Change* in *Air Pollution and Climate Change – Two sides of the same coin?*, 2009 (Grennfelt), p. 7.

emissions have been made for various reasons, recent natural science research has described the difficulty of making clear-cut distinctions between air pollution and climate changing air emissions. Gases that are traditionally known as *air pollutants*, for example sulphur dioxide ("SO_2") involved in the formation of particulate matter, and NO_x, connected to ozone formation, can both have climate influencing effects in that they affect Earth's radiation balance in different ways.[9] Vice versa, GHG's can at least indirectly be considered as pollutants, since they occur in concentrations that are detrimental to ecosystems, human health and prosperity because of how they affect Earth's climate.[10]

Apart from the realization that air pollution and GHG's are linked in the above sense, other reasons exist for considering these emissions together. Since some main air pollutants like SO_x and NO_x and the release of the GHG CO_2 are often caused by the same process: anthropogenic combustion or man caused burning, these air emissions can in many cases be abated simultaneously. Thus, the additional benefits of controlling GHG's in limiting the effects of some common air pollutants have been noted as something positive from economic, human health and ecosystem perspectives.[11]

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9 See Grennfelt, p. 7. These effects have also been studied in the case of air emissions from ships, see Fuglestvedt *et al.*; *Shipping Emissions: From Cooling to Warming of Climate - and Reducing Impacts on Health*, 2009, pp. 9057-9058.

10 See Grennfelt, p. 7.

11 See Holland; *The co-benefits to health of a strong EU climate change policy*, 2008 and Amann; *Air Pollutants and Greenhouse Gases – Options and Benefits from Co-Control* in *Air Pollution and Climate Change – Two sides of the same coin?*, 2009 (Amann), p. 103. However, all GHG abatement measures do not lead to lower air pollutant emissions. It is where GHG's are controlled by energy efficiency measures, co-generation of heat and power and fuel switches from coal and oil to natural gas and other fuels that the main co-benefits are situated, see Amann pp. 101-102.

2.2 Some Examples of Air Pollution and GHG Regulation on Land

2.2.1 Introduction and Some Comments on the Convention on Long-range Transboundary Air Pollution

Although this article principally relates to justifying the regulation of GHG's in MARPOL Annex VI, a quick look will also be taken at some examples of air pollution and GHG regulation for land-based sources.[12] Firstly, this is motivated because the regulation of air pollution and GHG's started on land, targeting land-based emission sources. Secondly, as will be shown below, the regulation of land-based emission sources historically has mattered for the regulatory development in the IMO. Thirdly, a tendency to focus on *air emissions* together and not separately according to historical distinctions seems to have surfaced in the context of land regulation recently. This may in turn explain a change in attitude and a new possibility of regulating them together in the maritime setting.[13]

While the Trail Smelter arbitration of the early 1940's may serve as a classic example, stipulating which obligations states must follow to prevent transboundary air pollution according to general principles of international law,[14] it was not until the end of the 1970's that air pollution was regulated in a multilateral agreement. In the Convention on

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[12] Commenting on the entire regulatory frameworks on regional and national levels mirroring, implementing and going further than the international instruments discussed in the following pages is beyond the scope of the present article. The examples mentioned from regional and national levels rather serve as preliminary observations, seemingly marking a shift in attitude to the separation of air pollution and climate change on more than the international level.

[13] See Christodoulou-Varotsi; *Demystifying air pollution from ships via trading schemes: how far can we go?* 2009, pp. 171-172, who underlines the importance of considering regulation of air emissions from ships in the general regulatory framework of air emissions.

[14] See Trail smelter case (United States, Canada) 16 April 1938 and 11 March 1941, VOLUME III pp. 1905-1982, Reports of International Arbitral Awards, United Nations 2006.

Long-range Transboundary Air Pollution ("LRTAP Convention"), adopted in 1979,[15] a framework containing objectives and general principles for the prevention, reduction and control of air pollution was established.[16] Geographically, this multilateral treaty covers considerable parts of the Northern Hemisphere air mass,[17] but no specific commitments to air pollutant reductions are contained in the convention itself.

Specific commitments have instead been formulated in eight separate protocols extending the convention by regulating *air pollutants* in the form of sulphur and nitrogen oxides, volatile organic compounds, heavy metals, persistent organic pollutants and ammonia.[18] The regulations in the protocols cover air pollutants from various stationary and mobile emission sources.[19]

Looking at definitions, the LRTAP Convention takes a broad approach on air pollution and defines it as:

'… the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment'[20]

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15 See the Convention on Long-Range Transboundary Air Pollution, 1979.

16 See Preamble and fundamental principles in Arts. 2-5 of the LRTAP Convention. See also Art. 6.

17 Sometimes the LRTAP Convention is not only described as a multilateral treaty, but is also labelled as a regional treaty. This appears logical since the participants have agreed on a regional protection treaty of Northern Hemisphere air mass even though some of the participants are not regionally close geographically. For a list of the now over 50 participants, see <http://www.unece.org/env/lrtap/status/lrtap_st.htm>.

18 The eight respective protocols, including the protocol on long-term financing of the Co-operative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP), were negotiated on the basis of Art. 12 of the LRTAP Convention. All protocols are available via <http://www.unece.org/env/lrtap/status/lrtap_s.htm>.

19 See e.g. Annex IV, VI and VIII of the PROTOCOL TO THE 1979 CONVENTION ON LONG-RANGE TRANSBOUNDARY AIR POLLUTION TO ABATE ACIDIFICATION, EUTROPHICATION AND GROUND-LEVEL OZONE, 1999 (1999 Gothenburg Protocol).

20 See Art. 1 (a) of the LRTAP Convention.

Thus, this definition seems to conform with the historical natural science definition of air pollution, in the sense that it refers to something toxic to humans, plants or other organisms. Moreover, the chemical compounds regulated in the protocols to the LRTAP Convention include such 'traditional' air pollutants as oxides of sulphur and nitrogen.[21]

2.2.2 Some Comments on the 1992 United Nations Framework Convention on Climate Change and the 1997 Kyoto Protocol

When it comes to the regulation of climate change and GHG's from land-based emission sources, the central international instruments are the 1992 United Nations Framework Convention on Climate Change ("UNFCCC") and its 1997 Kyoto Protocol ("1997 Kyoto Protocol").[22] The UNFCCC sets out objectives and general principles, including an ultimate objective to:

> 'achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'[23]

Moreover, the UNFCCC defines GHG's in the following manner:

> '"Greenhouse gases" means those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.'[24]

This definition approximately corresponds to the traditional natural science understanding of GHG's, since it focuses on gaseous constitu-

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21 Adams *et al.*; *Development of Greenhouse Gas and Air Pollution Emissions* in *Air Pollution and Climate Change – Two sides of the same coin?*, 2009, p. 26.

22 See the United Nations Framework Convention on Climate Change, 1992 and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997.

23 See Art. 2 of the UNFCCC.

24 See Art. 1 p. 5 of the UNFCCC.

ents of the atmosphere that *absorb and re-emit infrared radiation*; that is to say, they affect the Earth's radiation balance.

In article 17 of the UNFCCC, a mandate is given to adopt protocols to the convention. Under this mandate, the Kyoto Protocol containing quantitative commitments for emission reductions was adopted in 1997. The so-called basket of targeted GHG's, including CO_2, is stipulated in an annex to the protocol.[25] Further, another annex sets quantitative commitments for the reduction of all the six regulated main GHG's.[26]

2.2.3 A Blurring of Distinctions Between Air Pollutants and GHG's

Focusing on pure definitions, both the LRTAP Convention and the UNFCCC broadly seem to echo the distinction in the traditional natural science understanding, separating air pollution and GHG's. However, when put under closer scrutiny, it can be argued that the distinctions in the two legal instruments have started to blur. These instruments are heavily dependent on science and advanced modelling for credibility and formulation of commitments. It is therefore not too bold an assumption to make, that when the orientation of science connected to the instruments starts to change, this may also initiate a re-shaping of thinking in the policy process.[27]

For example, the early simulation tool supporting the formulation of the LRTAP Convention's quantitative commitments: the Regional Air

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[25] See Annex A of the Kyoto Protocol.

[26] The six regulated GHG's included in Annex A of the Kyoto Protocol are: Carbon dioxide, Methane ("CH_4"), Nitrous oxide, Hydrofluorocarbons ("HFC's"), Perfluorocarbons ("PFC's") and Sulphur hexafluoride ("SF_6"). The quantitative commitments are set out in Annex B of the Kyoto Protocol. See also UNFCCC:s homepage: <http://unfccc.int/kyoto_protocol/items/3145.php>.

[27] There is an extensive body of literature regarding science-policy interactions within sociology. This article is not the place to develop on this theme further. However, for a short introduction relating to the European regulation of air pollution and science-policy interactions, see Lidskog, Sundqvist; *Regulating European Air: The Co-Production of Science and Policy* in *Transboundary Air Pollution: Scientific Understanding and Environmental Policy in Europe*, 2007.

Pollution INformation and Simulation model ("RAINS-model"), originally focused solely on different air pollutants.[28] Today, the RAINS-model has developed into a Greenhouse Gas and Air Pollution Interactions and Synergies model ("GAINS-model"), which thus, apart from mapping air pollutants, now additionally incorporates mapping of the six GHG's of the 1997 Kyoto Protocol.[29] Furthermore, background documents to the current revision of the 1999 Gothenburg Protocol to the LRTAP Convention bridge the divide between air pollution effects and climate change.[30] Signs that air pollutants and GHG's are being viewed as linked phenomena can also be found within the UNFCCC regime. For instance, the GHG data that parties are obliged to report under Articles 4 and 12 of the Kyoto Protocol not only contain estimates for direct GHG's like CO_2, but 'traditional' air pollutants like SO_2 and NO_x are also included in the reports as *indirect* GHG's.[31]

The GAINS-model is, moreover, not solely used for purposes of the LRTAP Convention. It is also used in associated EU initiatives like the European Consortium for Modelling of Air pollution and Climate Strategies ("EC4MACS") supporting the revision of EU air policy and air quality legislation.[32] A linking of air pollution and GHG's is therefore not only visible in scientific modelling and regulatory development at the international level, but has also made its way into the regulatory

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28 For a short history of the RAINS-model, see <http://www.iiasa.ac.at/Admin/INF/OPT/Summer98/description.htm#chart>.

29 For further information about the GAINS-model, see <http://www.iiasa.ac.at/rains/gains/model%20description.html>.

30 See Amann *et al.*; *Cost-effective Emission Reductions to Improve Air Quality in Europe in 2020: Scenarios for the Negotiations on the Revision of the Gothenburg Protocol under the Convention on Long-range Transboundary Air Pollution: Background paper for the 48th Session of the Working Group on Strategies and Review*, 2011, pp. 59-61 and 66-67. See also United Nations Economic Commission for Europe; *Nitrogen Management Interactions with Climate Change: A Policy Brief to Inform the Gothenburg Protocol Revision: Informal document to the Executive Body for the Convention (28th Session, 13th-17th December, 2010) from the Task Force on Reactive Nitrogen*, 2010.

31 See http://unfccc.int/ghg_data/ghg_data_unfccc/items/4146.php.

32 For further information about EC4MACS, see <http://www.ec4macs.eu/home/index.html?sb=1>.

and policy context at the EU-level.[33]

Finally, it is noteworthy that the distinction between air pollutants and GHG's has found its way into national courts. In 2003, the United States Environmental Protection Agency ("US EPA") ruled that man-caused CO_2 and other GHG's are not *air pollutants* under the Clean Air Act. This stance was however overruled by the US Supreme Court on grounds that the US EPA lacked the discretion to refuse regulating GHG's as criteria pollutants under the Clean Air Act.[34]

In summary, two central international instruments at first glance seem to follow the historical natural science definition of air pollution and GHG's. Nonetheless, processes connected to both of these strongly science based treaties appear to show tendencies of blurred distinctions. These tendencies moreover reach beyond the natural science related to air pollution and GHG's. Signs of focusing on air emissions together are also present in policy documents connected to the revision of, for example, the 1999 Gothenburg Protocol, central EU regulation on air quality and in national litigation.

3 Air Pollution, GHG's and the IMO

3.1 The Heritage of Regulating Land-based Emission Sources

Having briefly examined some examples of natural science and legal definitions of air pollution and GHG's, it is now time to return to the IMO. First of all, it should be stressed that Chapter 3 must be seen

[33] See e.g. SEC(2011) 342 final, pp. 6-7 and COM(2010) 265 final, p. 10.

[34] In the Clean Air Act ("CAA"), 'air pollutant' is defined as 'any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air', see CAA 42 U.S.C. § 7602(g). The majority opinion of the Supreme Court was that 'greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant"', see Massachusetts v. EPA, 549 U.S. at 528-29.

against the background that regulation of air pollution and GHG's in the maritime setting is more or less a prolongation of or reaction to events on land. Several arguments speak in favour of this standpoint.

Firstly, the creation of early international agreements like the LRTAP Convention led to a focus on air pollution from ships in the IMO.[35] As a result of regulation, land-based emissions have dropped steadily over time, causing shipping's proportion of overall emissions to grow.[36] However, it is not only this relative emission comparison between land and sea that has made air pollution from shipping look larger. Vessel-source air pollution *is actually also on the increase* following the expansion of world trade.[37] What is more, projections of likely scenarios in Europe, presented in connection to the revision of the 1997 Protocol to MARPOL, showed that emissions of SO_2 and NO_x from ships in international trade would surpass or equal the total amount of stationary and mobile land-based emissions of EU-27 in 2020, if the then current legislation remained unchanged.[38]

Secondly, when it comes to climate change, ever since the adoption of the 1997 Kyoto Protocol, the IMO has been held out as being the appropriate organization to limit or reduce GHG's from the use of marine bunker fuels.[39]

Finally, science regarding both groups of air emissions has been

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35 See e.g. MEPC 29/INF.11 and MEPC 30/INF. 17. See also Okamura; *Proposed IMO Regulations for the Prevention of Air Pollution from Ships*, 1995, p. 184.

36 See International Institute for Applied Systems Analysis *et al.*; *Analysis of Policy Measures to Reduce Ship Emissions in the Context of the Revision of the National Emissions Ceilings Directive: Final Draft Report*, 2007, p. 60 and IMO; *WORLD MARITIME DAY 2007 - IMO's response to current environmental challenges: Background paper*, 2007, p. 9.

37 See e.g. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT; *REVIEW OF MARITIME TRANSPORT 2005*, 2005, p. 5, showing the steady growth of international seaborne trade between 1970-2004.

38 See Seas At Risk *et al.*; *Air pollution from ships*, 2008, p. 2.

39 See Art. 2.2 of the Kyoto Protocol. See also MEPC 58/4/20, p. 1, recalling that 'The Committee has been carrying out substantive work on the reduction or limitation of Greenhouse Gas (GHG) emissions from international shipping since 1997, following adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC), and the holding of the 1997 MARPOL Conference'.

important as a driver throughout the regulation process in the IMO.[40] Consequently, what has happened recently in the IMO regarding the regulation of air pollution and GHG's must be seen in the light of past events on land.

3.2 The Legal Basis for Including GHG Regulation in MARPOL Annex VI

As mentioned in the above introduction, the question of the appropriateness of regulating GHG's in MARPOL Annex VI was debated during MEPC 62. Even though the form of regulating GHG's in MARPOL Annex VI had been agreed as legally appropriate by a majority at MEPC 60,[41] it was challenged by some delegations at MEPC 62, on the grounds that GHG's are not usually classified as pollutants.

The IMO Sub-Division for Legal Affairs took the floor in plenary and reiterated the contents of its advisory opinion delivered at MEPC 60 concerning the matter. The purpose of this opinion was to inform the committee as to whether there was 'any legal barrier to the Annex VI Parties agreeing to expand the scope of Annex VI to accommodate the proposed technical measures [inclusion of energy efficiency provisions]'.[42]

As regards legal consistency, the opinion took as its basis the basic amendment procedures of MARPOL. First, it was established that Article 16 of MARPOL allows for amendments to an annex in accordance with the tacit acceptance procedure.[43] Further, it was stated that the support for parties to decide on such amendments in the case of MARPOL Annex VI was found in Article 4 of the 1997 Protocol to

[40] For air pollution, early considerations in the MEPC mention scientific findings about acid rain and forest death, see e.g. MEPC 26/INF.30, p. 2. Lately, science regarding the health impacts of air pollution has become more important as a driving force for regulation, see e.g. MEPC 57/4/15. For the science supporting IMO action on GHG's, reference has been made to the work and guidelines of the Intergovernmental Panel on Climate Change ("IPPC"), see e.g. MEPC 59/INF.10.

[41] See MEPC 60/22, p. 29.

[42] See MEPC 60/22, p. 28.

[43] See Art. 16(2)(f)(iii) of MARPOL.

MARPOL. This article states that 'a Party to the Convention' in the wording of Article 16 of MARPOL shall mean a party bound by that annex, in this case MARPOL Annex VI.[44] Thus, the parties to MARPOL Annex VI would have the exclusive right to decide on any amendments to the same annex.

The core of argumentation in the advisory opinion concerned paragraph 7 of Article 16 of MARPOL, which reads:

> 'Any amendment to a Protocol or to an Annex shall relate to the substance of that Protocol or Annex and shall be consistent with the Articles of the present Convention'

As stated in the advisory opinion, this means a two-part test, which firstly is to decide if a proposed amendment to a protocol or an annex *relates to the substance* of that protocol or annex. Secondly, an amendment shall be *consistent* with *the articles of MARPOL*.

For the first part of the test an assembly resolution was quoted, reminding the committee that the MEPC had earlier been invited to consider CO_2 reduction strategies and their relation to other atmospheric pollutants during the 1997 Air Pollution Conference. Specifically, the quoted resolution noted an inverse relation between NO_x emissions and CO_2 reductions.[45] According to the advisory opinion, the earlier reference to the relation between CO_2 reductions and NO_x was enough to meet the first part of the test, as it appeared to establish 'a sound substantial relationship … between the proposal [to amend MARPOL Annex VI] and the current Annex VI'.[46]

For the second part of the test, it was initially stated that consistency with the articles of MARPOL is to be understood as 'consistency in terms of the objects and purposes of the MARPOL Convention, as measured by such elements as the definitions'.[47] Two examples of con-

[44] See Art. 4 of the 1997 Protocol and Art. 16 of MARPOL.

[45] See Preamble Assembly resolution A.963(23) and Conference Resolution 8 of MP/CONF.3/34.

[46] See MEPC 60/22, p. 29.

[47] See MEPC 60/22, p. 29.

sistency with definitions were given. Firstly, it was held that emissions from inefficient ships' engines using low quality fuel were directly covered by the meaning of 'discharge' in Article 2 of MARPOL, since it covers '*any release howsoever caused from a ship* and includes *any escape*, disposal, spilling, leaking, pumping, *emitting* or emptying'.[48]

Secondly, the term 'harmful substance' was examined. In MARPOL, its meaning is expressed as '*any substance* which, if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life … '[49]. The required harmful impact of GHG's in order to be covered by this article was stated to have been recognized in the IMO during the 1997 Air Pollution Conference. As support for this standpoint, the advisory opinion quoted a conference resolution stating that 'CO_2 emissions, being greenhouse gases, have an adverse effect on the environment'.[50] In addition, it was added that the definition of 'harmful substances', although referring to substances 'introduced into the sea', did not block the regulation of GHG's. If the wording 'introduced into the sea' had indeed been intended to have such a narrow meaning, *MARPOL Annex VI itself* could have been blocked since it likewise regulates emissions that are *not directly introduced into the sea*. Hence, as the definition of 'harmful substances' had not been interpreted this way during the creation of MARPOL Annex VI, the annex could be considered as precedent for the current proposals.[51]

As a final point, the advisory opinion examined the Vienna Convention of the Law of Treaties.[52] It was briefly stated that the 'Convention does not have any provision which prevents Parties from amending a treaty to expand its scope in a way that is acceptable to the Parties concerned'.[53]

In summary, the Legal Office concluded that there was *no legal*

48 See Art. 2(3)(a) of MARPOL, emphasis added.

49 See Art. 2(2) of MARPOL, emphasis added.

50 See Conference Resolution 8 of MP/CONF.3/34.

51 See MEPC 60/22, p. 29.

52 See the Vienna Convention on the Law of Treaties, 1969.

53 See MEPC 60/22, p. 29.

barrier to expanding the scope of MARPOL Annex VI, if the parties decided to accept the proposed regulation of GHG's in the same annex. During the final day of negotiations at MEPC 62, the debate regarding the regulation of GHG's ended in the adoption of amendments to MARPOL Annex VI, but only after a rarely performed voting procedure had been requested in plenary.[54]

4 Conclusions

4.1 Recapitulation

The purpose of this article has been to offer some additional justifications for regulating GHG's in MARPOL Annex VI, against the background of the interlinkages between air pollution and climate change. The question of MARPOL Annex VI as the appropriate legal vehicle for regulating GHG's has been revisited, specifically with a view to examining the challenge that *GHG's* are not usually classified as *pollutants*.

A starting point was made by looking at definitions of air pollution and GHG's. However, before the *legal definitions* in international treaties were explored, a quick look was taken at the *natural science definitions*.

Historically, air pollution and GHG's have been separated in both natural science and law. Lately, however, in the case of regulation of land-based sources, the separation between these two groups of air emissions has started to become blurred. This tendency is most visible when the development of scientific modelling connected to these instruments is examined, but it can also be noticed in background do-

[54] A roll-call vote in accordance with Rule 29 of the Rules of Procedure of the Marine Environment Protection Committee was performed and resulted in a 49 for and 5 against vote of the members of MARPOL Annex VI present and voting. Brazil, Chile, China, Kuwait and Saudi Arabia voted against the amendments, see MEPC 62/24, p. 57. For the adopted amendments, see Resolution MEPC.203(62), expected to enter into force 1 January 2013.

cuments connected, for example, to the current revision of the LRTAP Convention.

In this article it has moreover been argued that the regulation of air pollution and GHG's in the maritime setting is more or less a prolongation of or reaction to events on land. To this end, it was argued that the regulation of air emissions from land-based sources has put focus on the same emissions in the maritime setting. Furthermore, natural science has mattered as an important driver of regulation in the IMO for both groups of air emissions.

During MEPC 62, the appropriateness of using MARPOL Annex VI for the regulation of GHG's was debated. The definition of GHG's was used to challenge MARPOL Annex VI legally and the matter was discussed in plenary. However, the discussions did not venture into scientific and legal definitions found in international instruments regulating air emissions. Instead, the discussions revolved around definitions in MARPOL. Against this background, a majority of the parties of MARPOL Annex VI voted for amendments of the same annex.

4.2 Final Remarks

Even without looking at natural science and legal definitions of air emissions, more support could have been provided for including GHG regulation in MARPOL Annex VI, than was delivered at MEPC 62. For instance, the release of GHG's must also be said to fit within the broad definition of 'emission' in MARPOL Annex VI, as it states that this means 'any release of substances … from ships into the atmosphere or sea'.[55]

Nevertheless, natural science definitions and legal definitions of air emissions in regulation of land-based sources provide additional motivations as to why it is appropriate to regulate GHG's in MARPOL Annex VI. Although the separation of air pollution and climate changing GHG's still seems to linger when first examined, a closer look at recent science shows that the bivalent view with sharp boundaries between air

[55] See Regulation 2 paragraph 7 of MARPOL Annex VI.

pollution and GHG's has started to turn into a perception of in-betweens. Further, this tendency can also be seen in revision documents to international legal instruments regulating land-based emission sources. Given this tendency, it should not come as a surprise that it is increasingly relevant to discuss air emissions in terms of degree rather than in terms of separated phenomena. To this extent, the claim that GHG's are not classified as (air) pollutants and would therefore not fit within MARPOL in general and MARPOL Annex VI in particular, thus appears as a rather weak legal challenge.

Further, it can be argued that the inclusion of GHG regulation in Annex VI is the only one of the three alternatives discussed in the IMO that reflects current scientific understanding of *interlinked air emissions*.[56] Air emissions are treated in the same annex and are not separated according to historical definitions.[57] Moreover, technologically speaking, *energy efficiency measures* are aptly included in Annex VI, as these measures can often be connected with the co-benefits of abating GHG emissions and air pollutants simultaneously.

Certainly, many obstacles regarding the topic of ships and climate change remain to be surmounted for the IMO. For instance, a key question that pervaded the tabled statements of the states voting against the amendments of MARPOL Annex VI at MEPC 62, was the matter of 'common but differentiated responsibilities'.[58]

Even though further hurdles may await in the future, it can now be hoped that the challenge that MARPOL Annex VI is legally unsuitable

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[56] During sessions preceding MEPC 62, two other alternatives apart from adding new content to MARPOL Annex VI where considered. As mentioned in one submission, one alternative could have been to introduce a new annex to MARPOL, specifically regulating GHG's in an 'Annex VII'. Another alternative could have been the development of a stand-alone legal instrument, which has been created recently in the IMO for other matters relating to marine pollution, such as management of ships' ballast water and ship recycling, see MEPC 58/4/15, pp. 2-3.

[57] Although some separation still exists in respect of a chapter in Resolution MEPC.203(62) devoted to 'REGULATIONS ON ENERGY EFFICIENCY FOR SHIPS', all air emissions are still treated under the common umbrella of MARPOL Annex VI.

[58] See MEPC 62/24/Add.1, Annex 20, pp. 1-3.

for the regulation of GHG's, on the grounds that these are not pollutants, has been finally overcome. This conclusion follows, not only because of the motivations given at MEPC 62, but also from the additional perspectives of natural science and law presented in this article.

Use of armed guards onboard Norwegian vessels and the use of force

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Content

1 Introduction[1]

The global economic development in recent decades has been characterized by a rapidly progressing intensification in world trade. Between 1950 and 2000, trade volume increased at an average of 6 % annually.[2] This positive trend continued until 2009, when the collapse in economic growth and trade resulted in a decrease of 4.5 % in international trade volumes carried by sea compared to 2008.[3] Some global recovery occurred in 2010, and today about 90 % of world trade is carried by the international shipping industry.[4] The Gulf of Aden is one of the world's busiest shipping lanes with about 20,000 ships passing through annually,[5] transporting cargo that includes *inter alia* 12 % of the world's daily oil supply.[6]

According to the CIA World Fact Book, the territorial and offshore waters in the Gulf of Aden and the Indian Ocean remain the regions of greatest risk for piracy and armed robbery against ships, accounting for 50 % of all attacks in 2010, while hijackings off the coast of Somalia accounted for 92 % of all ship hijackings in 2010.[7] During 2010, Somali pirates were responsible for 219 incidents resulting in 49 hijacked ships, and as of 31 December 2010 Somali pirates held 28 vessels and 638 crew

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1 The views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to the Royal Ministry of Trade and Industry.

2 Harald Grossmann, Alkis Otto, Silvia Stiller, Jan Wedemeier, Growth Potential for Maritime Trade and Ports in Europe, Intereconomics Volume 42, No. 4 July/August 2007 p. 1

3 United Nations Conference on Trade and Development (UNCTAD) Review of Maritime Transport 2010 p. xiv (executive summary)

4 Shipping Facts - http://www.marisec.org/shippingfacts/home/ (Accessed 22032012)

5 The Economist, Perils at Sea, April 16 2009 (http://www.economist.com/node/13496719, accessed 22032012)

6 Diplomatic Efforts against the Gulf of Aden Pirates – A Model from the Gulf of Guinea by James Kraska and Brian Wilson, February 19 2009, Harvard International Review (http://hir.harvard.edu/diplomatic-efforts-against-the-gulf-of-aden-pirates, accessed 22032012)

7 CIA World Fact Book on Somalia (https://www.cia.gov/library/publications/the-world-factbook/geos/so.html, accessed 22032012)

members for ransom.[8] This marked a pronounced increase from 2006 when the Gulf of Aden and Somalia accounted for only 8.4 % of all attacks.[9] The trend continued in 2011 with Somali pirates being responsible for 237 incidents resulting in 28 hijacked vessels and 8 seafarers being killed.[10] As of 2 March 2012 Somali pirates hold 8 vessels and an estimated 213 crew members for ransom, plus an unknown number of Dhows and smaller vessels.[11]

The re-emergence of piracy off the coast of Somalia is the result of a number of factors: the massive increase in commercial maritime traffic has provided the pirates with an almost limitless range of high pay-off targets; Bab-el-Mandeb (located north of Somalia, connecting the Red Sea to the Gulf of Aden) is a major regional congested chokepoint which requires the ships to reduce their speed to ensure safe speed (and thus making it easier for pirates to hijack the ship); the global proliferation of small arms provides pirates with cheap and easy to handle weapons suitable for pirate operations;[12] the political environment with the collapse of the Somali state and economy; the geographical location of Somalia adjacent to one of the world's busiest shipping lanes; and the lack of both a national and international legal framework and response mechanism to counter piracy.[13] Since Somalia has no effective government capable of enforcing maritime and criminal law on acts of piracy committed in Somali territorial waters or by Somali nationals, the main

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8 ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships, Annual Report 2010, pp. 8, 19

9 Ibid pp. 5-6

10 ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships, Annual Report 2011, p. 20

11 The EUNAVFOR Stateboard of Currently Pirated Vessels and Where the Pirating Took Place (http://www.eunavfor.eu/ under tags "Press" and "Resources", accessed 22032012)

12 Peter Chalk, Report on the Maritime Dimension of International Security – Terrorism, Piracy and Challenges for the United States (2008), RAND Corporation, pp. 10-14 (http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG697.pdf, accessed 22032012). Also read Joshua Sinai, Future Trends in Worldwide Maritime Terrorism, Connections Volume III, No. 1, March 2004

13 Nicole Stracke and Marie Bos, Piracy: Motivation and Tactics – The case of Somalia (2009), Gulf Research Center, p. 16

responsibility for countering the piracy threat has rested with the international community. The abovementioned reasons for the rise and continuance of piracy in Somalia were also confirmed by the International Expert Group on Piracy off the Somali Coast[14] and highlighted by the United Nations Secretary General in his address to the international community regarding international efforts to fight piracy.[15]

This paper aims at briefly exploring the international efforts made against the re-emergence of the piracy threat off the Horn of Africa; why some Companies have chosen to employ Privately Contracted Armed Security Personnel (PCASP) and the amendment of Norwegian regulations which took effect 1 July 2011 aimed at regulating the use of PCASPs on board Norwegian flagged vessels. "Company" in this context means any company stated as the managing company in the Safety Management Certificate, or the registered owner of the ship (if the ship is registered), or the owner of the ship according to the Act of 16 February 2007 No. 9 relating to Ship Safety and Security (the Ship Safety and Security Act) section 4.

2 The International effort against piracy and reasons for the emergence of private armed security guards

Piracy is criminalized in international law through the United Nations Conventions on the Law of the Sea, 1982 (UNCLOS). According to UNCLOS article 101, piracy is defined as:

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14 The Final Report of the International Expert Group on Piracy off the Somali Coast, Piracy off the Somali Coast cited the following reasons: Poverty, lack of employment, environmental hardship, pitifully low incomes, reduction of pastoralist and maritime resources due to drought and illegal fishing and a volatile security and political situation, p. 15

15 Piracy problem inseparable from overall Somali crisis, Ban warns – UN News Centre, 16 December 2008 (http://www.un.org/apps/news/story.asp?NewsID=29334 accessed 22032012)

i) *any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*

- on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

- against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

ii) *any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;*

iii) *any act of inciting or of intentionally facilitating an act described in subparagraph (i) or (ii).*

The objective of Somali pirates is to hold the ship and the crew for ransom, and hence the requirement that the act of piracy is "committed for private ends" is met. There is a debate on whether Somalis with political motives, as opposed to financial, would be considered pirates under UNCLOS. The general view is that political piracy is probably not considered as piracy within the scope of UNCLOS article 101.[16] Michael Bahar, however, argues that intent, except to distinguish between intentional and accidental attacks, should not matter, and that the opposite of "private ends" must be public ends, and not political. The phrase "for private ends" should therefore be understood as distinguishing between state sponsored piracy or privateering, which could be addressed under the laws of war, and piracy, which could not.[17] This view seems preferable, as acts of piracy in the Report of the International Law Commission to the General Assembly are described as going beyond the "desire for

[16] Robin Rolf Churchill, Alan Vaughan Lowe, The Law of the Sea, 3rd edition (1999) p. 210 and Donald R. Rothwell and Tim Stephens, The International Law of the Sea (2010) p. 162

[17] Michael Bahar, Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations, Vanderbilt Journal of Transnational Law, Vol. 40 (2007), p.1. on pp. 26-37, with further references

[financial] gain" and hence could involve political motives.[18]

It should also be noted that the geographical scope of the piracy definition under the UNCLOS article 101 is limited to the "high seas" or outside the jurisdiction of any state. By "high seas" is understood "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State" (see UNCLOS article 86). The rationale behind this division may be explained by the fact that the coastal state, with certain exceptions, enjoys complete jurisdictional and enforcement rights in its territorial waters.[19] This means that an equivalent act of violence which happens within the territorial waters of a state will not be tried as an act of piracy in accordance with UNCLOS, but as robbery and kidnapping in accordance with the criminal law of the coastal state.[20] Equivalent acts of violence which occur within the exclusive economic zone may be considered as acts of piracy in Somalia, given that no exclusive economic zone is established under Somali law, [21] and provisions related to piracy may apply to acts occurring within the exclusive economic zone in so far as they are not incompatible with the sovereign rights and duties provided for the coastal state with regard to the exclusive economic zone.[22]

The high seas are open to everyone and no state may enforce its jurisdiction over nationals onboard a vessel flying the flag of a third country (see UNCLOS article 92 paragraph 1).[23] The exclusiveness of the said ju-

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18 Report of the International Law Commission to the General Assembly, U.N. Doc. A/3159 (1956), p. 282 (http://untreaty.un.org/ilc/documentation/english/a_cn4_104.pdf, accessed 22032012)

19 Robin Rolf Churchill, Alan Vaughan Lowe, The Law of the Sea, 3rd edition (1999) pp. 95 and 98

20 Donald R. Rothwell and Tim Stephens, The International Law of the Sea (2010) p. 162

21 See e.g. report from Special Adviser Jack Lang, UN Document S/2011/30 p. 30 (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/206/21/PDF/N1120621.pdf?OpenElement, accessed 22032012)

22 Dr. Douglas Guilfoyle, Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes, p. 2 (http://ucl.academia.edu/DouglasGuilfoyle/Papers/116803/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes, accessed 22032012)

23 Robin Rolf Churchill, Alan Vaughan Lowe, The Law of the Sea, 3rd edition (1999) pp. 205 and 208

risdiction is not absolute.[24] In order to suppress acts of piracy on the high seas, third party states share legislative and enforcement jurisdiction with the flag state or the state of which the seafarer is a national (see UNCLOS article 105). This involves the right to board and inspect a ship suspected of piracy as an exception to the ordinary exclusive jurisdiction (see UNCLOS articles 98 and 110).[25] This right is only provided to warships, or ships clearly marked and identified as being on governmental service and authorized to that effect (see UNCLOS article 107). The shared jurisdiction means that any seized pirates may be tried by any state in accordance with the criminal law of that adjudicating state.[26]

The UNCLOS articles on piracy are supplemented by the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 (1988 SUA Convention) and the 2005 Protocol to said Convention (2005 SUA Protocol). The 2005 SUA Protocol is, however, not yet in force. Since the crew of hijacked ships are taken hostages for ransom, the International Convention Against the Taking of Hostages of 1979 (Hostage Taking Convention) is also relevant. For the purpose of this article I will, however, not explore the abovementioned conventions further – suffice to say that the 1988 SUA Convention contributes to the criminalization of piracy.

The UNCLOS articles on piracy are also supplemented by the United Nations' Security Council resolution which provides the legal framework for taking military action. As noted above, a piracy incident within the territorial waters of Somali is subject to the territorial sovereignty of Somalia.[27] Due to the lack of capacity of the Somali Transitional Federal Government (TFG) to interdict pirates or patrol and secure the international sea lanes off the coast of Somalia or Somalia's territorial waters, States cooperating with the TFG in the fight against piracy off the coast of Somalia may enter and use all necessary means to repress

[24] Ibid p. 209

[25] Donald R. Rothwell and Tim Stephens, The International Law of the Sea (2010) pp. 162-163

[26] Robin Rolf Churchill, Alan Vaughan Lowe, The Law of the Sea, 3rd edition (1999) p. 210

[27] Convention on the Territorial Sea and the Contiguous Zone, Geneva 1958 article 1

acts of piracy within Somalia's territorial waters.[28]

Multinational naval coalitions,[29] operating under the legal framework established by UNCLOS, 1998 SUA Convention and United Nations' Security Resolutions, have established naval patrols around the Horn of Africa to improve security, as well as to escort ships affiliated with the World Food Programme (WFP). At any given time there can be as many as 30 naval vessels participating in anti-piracy operations off the coast of Somalia.[30] The anti-piracy operations off the coast of Somalia have had some success. The ICC International Maritime Bureau has stated that "attacks in Gulf of Aden have dropped more than 50 per cent due to the international naval patrols and positive actions of the seafarers".[31]

Somali pirates have however proven very adaptable to the tactics enforced by the multinational naval coalitions against them. Squeezing the pirates hard in the Gulf of Aden has meant that the pirates have shifted their focus out to the middle of the Indian Ocean using "mother ships".[32] By mother ship is meant a hijacked oceangoing ship that the Somali pirates use to extend their operations into the Indian Ocean, independently of the monsoon seasons off the Horn of Africa, while holding the original crew as hostages onboard. According to the ICC International Maritime Bureau the pirate attacks in parts of the wider Indian Ocean have gone up substantially.[33] The Somali pirates are now using hijacked mother ships both as a pure support platform as well as

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28 See United Nations Security Council Resolutions 1816, 1838, 1846, 1851 (all 2008). The authorisation to intervene in acts of piracy by Somali pirates were extended for a further 12 months through Resolution 1897 (2009), 1950 (2010) and 2020 (2011)

29 The naval coalitions comprise of the EU Naval Force under the operation name Atalanta, NATO under the operation name Ocean Shield, Combined Task Force (CTF) 151 (an international naval force) and navies of other nations who are not part of any of the abovementioned coalition forces, e.g. the People's Republic of China, Japan, Russia

30 http://www.fco.gov.uk/en/global-issues/piracy/naval-operations, accessed 22032012

31 ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships, Annual Report 2010, p. 19

32 No Stopping Them, The Economist, 2/5/2011, Vol. 398, issue 8719, p. 69-71

33 ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships, Annual Report 2010, p. 19

taking part in the actual hijacking attempts.[34] The use of mother ships has brought with it a series of new challenges for the multinational naval coalitions. Firstly, it has increased the operational area considerably. According to the EUNAVFOR Media Information Guide the operational area is estimated to be 1.5 times the size of the European mainland.[35] Secondly, it is inherently difficult to distinguish a hijacked mother ship from a legitimate commercial vessel.[36] Thirdly, the naval forces are normally very reluctant to engage in rescue operations, since an attack on the mother ship could cause the crew to be harmed. As a consequence, naval vessels would probably refrain from engaging with identified hijacked mother ship unless a commercial vessel, or the naval vessel itself, is under direct attack from the pirates.

Adding to the woes described above there is a large impunity gap for Somali pirates captured by naval vessels. Nine out of ten captured Somali pirates are released due to human rights considerations, e.g. are the evidentiary requirements met, or lack of jurisdictions willing to try the pirates before their national courts.[37] [38] The average ransom payments have also risen sharply since 2007, and were estimated to reach USD 5.4 million in 2010.[39] The practical reality is that piracy may be committed with relative impunity off the Horn of Africa and in the

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34 Ben Arnoldy, India pushes back on Somali pirate's new 'mother ship' offensive, Christian Science Monitor, 2/7/2011

35 See http://www.eunavfor.eu/ under tag "Press" and "Resources" (accessed 22032012)

36 Piracy Attacks off the Horn of Africa: Motives Tactics and International Response, International Debates, January 2010, Vol. 8, Issue 1, pp. 15-20

37 The Economist, Piracy Off the Coast of Somalia is Getting Worse. Time to Act, February 3rd 2011 (available at http://www.economist.com/node/18070160, accessed at 22032012)

38 EU, Norway and United Nations Office on Drug and Crime (UNODC) is working on regional criminal justice capacity building so that pirates are prosecuted and detained in the region, see e.g. http://www.unodc.org/easternafrica/en/piracy/index.html, accessed 22032012. It is believed that the maximum sentencing for deprivation of someone's liberty in accordance with the Norwegian Criminal Code 1902, combined with the standard of Norwegian jail facilities, would not work as a deterrent for Somali pirates

39 GIRO: Sanders, David et al, *Marine Piracy*, The Actuarial Profession, 11 October 2010, at para 7.35 (available at http://media.tmmarket.com/marex/media/pdf/Piracy_Report_v6.pdf, accessed 22032012)

Indian Ocean, and that the reward for those who succeed is substantial. The presence of naval forces is important, but no real deterrent, as long as the pirates are not brought to justice on a far grander scale.

In order to defend the vessel and its crew from being hijacked by Somali pirates many States have allowed shipowners to employ PCASPs. No ship employing PCASPs has been successfully hijacked.[40]

3 Short introduction to the amendment in the Norwegian Security Regulation

Apart from the international effort against piracy, the maritime industry has developed passive security measures found in the Best Management Practices (BMP). Despite the presence of naval forces and successful implementation of passive security measures on board ships, the crew and Companies have experienced steadily increasing and extremely violent acts of piracy off the coast of Somalia and in the Indian Ocean. This has resulted in tremendous human costs on seafarers employed on ships that transit high risk waters.[41] Consequently, to ensure the safety of the crew and the vessel, an international change of position on the use of PCASPs occurred around mid-2011 with, *inter alia*, the United Nations' International Maritime Organisation (IMO) issuing Guidelines for the use of PCASPs.[42] The guidelines were issued, not to endorse the use of PCASPs, but to guide the Companies in identifying

40 Shapiro, Expanding Private Setor Partherships against piracy (available at http://www.state.gov/t/pm/rls/rm/185697.htm, accessed 22032012).

41 For more see Kaija Hurbort et al, The Human Cost of Somali Piracy, 6 June 2011 (http://oceansbeyondpiracy.org/cost-of-piracy/human-cost-somali-piracy, accessed 22032012)

42 Interim Guidance to Shipowners, Shipoperators, and Shipmasters on the use of Privately Contracted Armed Security Personel on board Ships in High Risk Areas, issued by the IMO Maritime Safety Committee at its 89th session in May 2011 (IMO MSC.1/Circ.1405/). These were revised in an intersessional meeting of the Maritime Security and Piracy Working Group in September 2011 (IMO MSC.1/Circ.1405/Rev.1)

reliable, professional providers of armed security services.[43]

The Act of 5 January 2001 No. 1 relating to security guard services (The Security Guard Services Act) ensures that the private guard services in Norway are of a high standard, but it does not apply to PCASPs on board Norwegian vessels certified for international trade (ISPS certified vessels).[44] In the absence of a regulatory framework for the employment of PCASPs onboard Norwegian vessels, the Regulations of 22 June 2004 No. 972 concerning security, anti-terrorism and anti-piracy measures and the use of force on board ships and mobile offshore drilling units (the Security Regulations) were amended to ensure that the highest possible professional and ethical standards are followed in connection with the use of PCASPs onboard Norwegian vessels.[45] The legal basis for the issue of such regulations is found in the Ship Safety and Security Act section 40, fourth paragraph. The Norwegian legislation is in compliance with and was based on the IMO Guidelines.[46]

The geographical scope of the relevant provisions in the Security Regulations on the use and selection of Private Maritime Security Companies (PMSCs) and PCASPs is set to ships sailing in, to or from an area subject to alert level 2 or higher, as specified by the Norwegian Maritime Directorate in accordance with SOLAS XI/2 and the ISPS Code part A, article 4.1, but only when they are sailing south of 46 degrees north latitude (see Security Regulation § 1 third paragraph).[47] At the moment, the alert level 2 covers an area bounded by the Suez Channel and the Strait of Hormuz to the North, 10 degrees south (Ma-

43 IMO MSC.1/Circ.1405/Rev.1, p. 1

44 Proposition to the Odelsting No. 49 (2008-2009) p. 11, and the commencement regulation 1 April 2011 nr. 342

45 See Provisional Guidelines – use of armed guards on board Norwegian ships, p. 1, available at http://www.sjofartsdir.no/ulykker-sikkerhet/pirater/, accessed 23032012

46 This view is highlighted throughout the Provisional Guidelines, e.g. see pp. 7-10

47 On 1 May 2012 the geographical scope of the Security Regulation was amended from "(…) south of 30 degrees north latitude" to "(…) south of 46 degrees north latitude" so that Companies may employ PMSCs that are based in or around the Mediterranean Sea.

dagascar) and 78 degrees east (south tip of India).[48] This corresponds to the geographical scope of the firearms permit that the Company needs to obtain in order to employ PCASPs (see Regulations of 25 June 2009 No. 904 concerning firearms and ammunition (the Firearms Regulation) section 23a.[49]

According to the Security Regulation, the Company is under stringent reporting obligations.[50] The Company is first and foremost under an obligation to notify relevant insurers so that they may assess any additional exposure the employment of PCASPs brings with it (see the Security Regulation section 21). The outcome of this notification could possibly be that the relevant insurance company maintains the cover, withdraws the cover if the suggested PMSCs or PCASPs are not considered qualified by the insurer, or increases the premium. Moreover, the Company is under an obligation to notify the Norwegian Maritime Directorate prior to taking any PCASPs onboard (see the Security Regulation section 20). The obligation to notify the Norwegian Maritime Directorate is intended to *inter alia* ensure that the Company undertakes a quality assessment of the PMSC and PCASP in question.[51] The notification obligation involves providing documentary evidence showing the PMSC's "satisfactory procedures" for *inter alia* recruitment and training of personnel and procurement, use, maintenance, storage

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48 See Best Management Practices (BMP) version 4 paragraph 2.4 (available http://www.shipping.nato.int/SiteCollectionDocuments/BMP4_web.pdf, and ISPS notification by the Norwegian Maritime Directorate on 8 June 2011 (available https://www.warrisk.no/filestore/Lover_og_forskrifter/Expansionofsecurityrev.1.pdf), both accessed 23032012.

49 The Company may apply for and be granted a general and time-limited (six months) firearms permit for holding of firearms on behalf of the PMSC and PCASPs for protection of ISPS-certified vessel (and crew) against a piracy threat in high risk waters (defined as alert level 2 or higher) south of 46 degrees north latitude. The firearms permit may include weapons which the public is prohibited from acquiring and using, e.g. fully automatic rifles with caliber not exceeding 7.62 mm, or semi-automatic, anti-materiel rifle with caliber not exceeding 12.7 mm

50 See Provisional Guidelines – use of armed guards on board Norwegian ships, pp. 9, 10 and 13-14

51 Ibid p. 1 on the purpose of the amendment Regulation, i.e. " to ensure that the highest possible professional and ethical standards are followed in connection with the use of such services on vessels registered in Norway"

and transportation of mission relevant equipment (see Security Regulations section 20 second paragraph, letter b, sub-paragraphs 1 and 2). The duty to quality assess the PMSC is on the Company alone (see the Security Regulation section 20 second paragraph, letter b and third paragraph). Finally, the Company is under an obligation to report any weapons and ammunition brought onboard and taken off the vessel. Any discrepancy between the number of weapons or amount of ammunition brought on and taken off the vessel also needs to be explained (see Security Regulation section 23, second paragraph). This latter reporting obligation should be read in conjunction with the reporting obligation of the Company under the Security Regulation section 18. Under this provision, the Company is under an obligation to report to the Norwegian Maritime Directorate any use of force employed to repel a pirate attack on the vessel. The provision requires a detailed description of the incident causing the use of force, the people involved and, if possible, documentation of the incident by means of sound and video recording, see first paragraph. However, if there is reason to believe that the use of force has resulted in personal injury or death, the Company is required to report the incident immediately to the Norwegian National Criminal Investigation Service (Kripos), see second paragraph.

Furthermore, the Security Regulation highlights that the Company is under an obligation to document why implementation of the industry's passive security measures (BMP) is not sufficient to repel possible pirate attacks and to carry out a risk assessment on the use of PCASP onboard the vessel (see Security Regulation section 20, first paragraph and second paragraph, letter a). The rationale behind this obligation is to force the Company to actively consider the need for PCASPs onboard the vessel so that PCASPs are not used unnecessarily onboard Norwegian flagged vessels.[52] The Company is also under an obligation to take account of the relevant IMO Guidelines when selecting the PMSCs (see the Security Regulation section 20 third paragraph). A comprehensive examination of the criteria for selecting PMSCs and PCASPs is found in the provisional guidelines on the homepage of the Norwegian Maritime Directorate.

[52] Ibid pp. 2 and 8

The Company is best advised to seek professional assistance in the quality assessment of the PMSC. Negligence on behalf of the Company in this instance may lead to criminal prosecution or financial liability, as will be discussed below.

In addition to the satisfactory procedures on the use and storage of firearms provided by the PMSC, the Company is also under an obligation to establish similar procedures, as well as to establish procedures for the use of PCASPs under the Security Regulation section 22. Compliance with this requirement does not prevent the Company from consulting with the hired PMSC and copying the procedures already established by the PMSC on use of force. However, since the rationale behind this requirement is to ensure that both the Company and, more crucially, the master has an understanding of the limits of use of force under Norwegian and international law, the Company would be best advised to seek assistance from external advisors as well.[53] The next chapter examines in more detail the extent of the PCASPs' legal authority to use force.

During the public hearing it was suggested that the PMSCs and PCASPs should be subject to a flag state certification process, similar to the one found in the Danish system. This specific application process involves sending the application to the Danish Ministry of Justice which, in cooperation with the Danish Maritime Directorate and Danish Ministry of Defence, evaluates whether the applicants are fit to use and arm themselves with firearms in accordance with the Danish Firearms Act. This involves *inter alia* obtaining certificates of good conduct from the country of the individual PCASP's nationality, and the application process may take as long as 2 weeks to complete.[54] A flag state certification process of international PMSCs and PCASPs presupposes that the relevant governmental agency has the necessary information resources available to ensure up-to-date information on the PMSCs and PCASPs operating in the area. However it is highly unlikely that such information is readily available to the flag state. The most ap-

[53] See Provisional Guidelines – use of armed guards onboard Norwegian ships, p. 11

[54] See the homepage of the Danish Ministry of Justice http://www.justitsministeriet.dk/civilevagteransoegning.html, accessed 23032012

propriate solution would probably be an approval from the state where the security company is established. To ensure the overall quality of the PMSCs and PCASPs this procedure would, however, require the presence of an international standard on PMSCs, which is expected to be fully developed by the International Organization for Standardization (ISO) in the near future.[55]

4 Use of force under Norwegian law

As a starting point Norwegian law and jurisdiction applies to vessels registered in Norway (see UNCLOS article 92). In a situation where the vessel is under unlawful attack from armed pirates, the master may implement measures and use force in accordance with the Act of 16 February 2007 No. 9 relating to ship safety and security (the Ship Safety and Security Act) section 40, first and third paragraphs with further reference to section 39, first paragraph.[56] The wording of the said provisions is as follows:

The Ship Safety and Security Act section 39 first paragraph:

> *"Measures shall be taken in order to prevent and protect the ship against terrorist acts, piracy, stowaways and other illegal acts"*

The Ship Safety and Security Act section 40 first and third paragraphs:

> *"When necessary in order to prevent or protect against actions as mentioned in section 39, first paragraph, the ship may implement measures and use force.*

[55] http://www.imo.org/MediaCentre/PressBriefings/Pages/17-msc-90-piracy.aspx, accessed 28062012.

[56] The Ship Safety and Security Act Chapter 6 on Protective Security Measures is partly based on the ISPS Code and EU Regulation 725/2004 on enhancing ship and port facility security. The provisions have, however, a broader scope since they also regulate ship safety measures and the use of force

> *(…)*
>
> *The right to implement measures and to use force shall lie with the master. All persons on board shall be obliged to give assistance and to respect the measures that are taken."*

The use of force in accordance with the Ship Safety and Security Act section 40, first paragraph includes the use of firearms.[57]

The master may also be authorised to use force in accordance with the self-defence provision in the Act of 22 May 1902 No. 10, the General Civil Penal Code section 48. The wording of the relevant paragraphs in this provision is as follows:

> "*(1) No person may be punished for an act committed in self-defence.*
>
> *(2) It is a case of self-defence when an otherwise criminal act is committed for the prevention of or in defence against an unlawful attack if the act does not exceed what appeared to be necessary for that purpose, and it must not be considered absolutely unfitting to inflict so great an evil as is intended by the act in view of the dangerousness of the attack, the guilt of the assailant, or the legal right assailed.*"

Acts committed in self-defence are considered to be exonerating in the sense that no criminal liability has incurred,[58] herein including exonerating the victim from liability for any damages caused.[59] According to the preparatory works to the Ship Safety and Security Act, the legal authority for the use of force in accordance with the Ship Safety and Security Act section 40 first paragraph is an independent alternative to the legal authority to use force in accordance with the General Civil

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[57] See the preparatory works of the Ship Safety and Security Act, Proposition to the Odelsting No. 87 (2005–2006), page 125

[58] Johs. Andenæs, General Civil Penal Code, 5th edition by Magnus Matningsdal and Georg Fredrik Rieber-Mohn, 2004 pp. 152-153

[59] See Act of 13th June 1969 No. 26 relating to compensation in certain circumstances section 1-4. The obligation to pay damages is limited to situations where the act is not committed in self-defence

Penal Code section 48, with the effect that acts of force in compliance with the abovementioned provisions may be made with impunity.[60] Moreover, the legal authority provided to the master is parallel to the authority to use force provided to the police in accordance with the "Police Act" 4 August 1995 No. 53, section 6 fourth paragraph.[61] In order to fully understand the scope of the master's right to use force in accordance with the Ship Safety and Security Act section 40 it will be beneficial to explore both the General Civil Penal Code section 48 and the Police Act section 6.

The wording of the Police Act section 6 second and fourth paragraphs is as follows:

> *"(2) The police shall not employ stronger means unless weaker means are presumed to be inadequate or inappropriate, or unless such means are to no avail. The means employed must be necessary and be commensurate with the gravity of the situation, the purpose of the action taken and the circumstances in general*
>
> *(…)*
>
> *(4) The police may apply such force as is necessary and appropriate during their performance of their duties."*

5 Requirements for use of force in accordance with the General Civil Penal Code and the Police Act

The requirements for use of force in accordance with the General Civil Penal Code section 48 first and second paragraphs can be divided into the following three categories: the unlawful attack requirement discussed in paragraph 5.1, the necessity requirement discussed in paragraph

[60] Proposition to the Odelsting No. 87 (2005-2006) p. 124

[61] Ibid p. 124

5.2 and, lastly, that the act is morally justifiable which is discussed in paragraph 5.3. The requirements under the Police Act section 6 will mostly be discussed in paragraph 5.2.

5.1 Unlawful attack requirement

In order for the act to be deemed committed in self-defence, the pirates have to launch an "unlawful attack" against the vessel and the self-defence action must be committed for the "prevention or defence" against that unlawful attack (see the wording in the General Civil Penal Code section 48 second paragraph). In order for the attack to be "unlawful" it must be directed against an interest protected by law – such as someone's liberty, life or health – and in the absence of any particular reason rendering it lawful to take the law into one's own hands.[62] By "attack" is meant a tortious act or an interest violating act.[63] The definition of "unlawful attack" will probably cover acts of piracy as defined in chapter 2 above. A natural understanding of the wording "unlawful attack" furthermore indicates the presence of an emergency situation. In this respect it should be noted that the General Civil Penal Code section 48 and the Police Act section 6 have two very different starting points. Whereas the General Civil Penal Code section 48 requires the presence of an emergency situation, the Police Act section 6 is a more general provision that provides for the legal authority to act even if there is no emergency situation. This difference will probably be most noticeable with respect to the necessity requirement discussed below.

Given that the legal authority to use force is connected with the protection of the vessel and the crew against *inter alia* acts of piracy, it could be argued that the presence of an emergency situation is also presupposed under the Ship Safety and Security Act section 40, and that with respect to the first requirement the Ship Safety and Security Act section 40 is more similar to the General Civil Penal Code section 48 than with the Police Act section 6.

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62 Johs. Andenæs, General Civil Penal Code, 5th edition by Magnus Matningsdal and Georg Fredrik Rieber-Mohn, 2004, p. 163

63 Ibid p. 161

5.2 The principles of necessity, proportionality and minimum use of force

The second requirement is that the action committed for the prevention or defence against the unlawful attack was "necessary". The "necessary" requirement (hereinafter referred to as the "necessity requirement") may be sub-divided into the principles of necessity, minimum use of force and proportionality. The Police Act section 6 is a codification of these principles,[64] which are similar to those found in the General Civil Penal Code section 48.[65] These principles are also mirrored in the Regulation of 22 June 1990 No. 3963 Concerning the General Code of Practice for the Police ("Code of Practice for Police") section 3-2 first paragraph. For the sake of completeness, the relevant wording of the Code of Practice for Police section 3-2 first paragraph is as follows:

> *"The police may use force in relation to the effectuation and implementation of a police action in so far as this is in accordance with a law or customary law, and is considered clearly to be necessary and appropriate taking into consideration the gravity of the situation, the consequences the use of force has on the individual and the circumstances in general (…)"*

The necessity principle is first and foremost a reference to the need to apply force and limits the extent to which force may be applied in intensity as well as in time.[66] With respect to the General Civil Penal Code section 48, the necessity principle limits the use of force to situations where it is necessary and appropriate to prevent or defend against "the

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64 Ragnar Auglend, John Henry Mæland and Knut Røsandhaug, Police Law, 2nd edition, 2004 pp. 413-414. See also e.g. Norwegian Supreme Court 2003 p. 948 at paragraph 17 where both the necessity principle and the principle of proportionality are identified

65 That a similar necessity requirement to that in Police Act section 6 is found in the self-defence provision of the General Civil Penal Code is confirmed inter alia in the preparatory works to the General Civil Penal Code 2005 (not in force) section 18 on self-defence; see Proposition to Odelsting No. 90 (2003-2004) p. 420

66 Johs. Andenæs, General Civil Penal Code, 5th edition by Magnus Matningsdal and Georg Fredrik Rieber-Mohn, 2004, p 166.

unlawful attack". In a situation that may be described as an emergency situation, it would presumably be easier to conclude that the necessity principle is met compared to a situation which may not be described as an emergency situation. However, in deciding the extent of which force may be applied, it will be necessary to look at the principles of minimum use of force and proportionality as well.

As mentioned earlier, the necessity requirement may also be subdivided into the minimum use of force principle, which limits the use of force to situations where a resolution is not possible through the use of lesser means.[67] This principle is highlighted in *inter alia* a Norwegian Supreme Court case from 1984 where the Supreme Court found that extraordinary police investigatory methods were necessary to build a criminal case on drug trafficking to Norway. In its deliberation the Supreme Court highlighted the seriousness of the criminal act, and that other, lesser means was considered but found to be of no avail.[68]

The principle is also codified through the Police Act section 6 second paragraph, see the wording "[t]he police shall not employ stronger means unless weaker means are presumed to be inadequate or inappropriate (…)". This principle prohibits the police from using force prior to first testing out other, less harmful means, and may only be deviated from if "weaker means are presumed to be inadequate or inappropriate, or unless such means are to no avail". The minimum use of force principle applies to the consequences of the force applied, and dictates the level of force applied.[69] The wording "presumed" indicates the possibility of immediately employing stronger means if lesser means are considered, but found inappropriate or inadequate.[70] The wording "inappropriate" indicates situations where the use of lesser means would endanger the lives or health of the police or other innocent third parties,

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67 Public Hearing Document (NOU 1992:23 New General Civil Penal Code) p. 96. In describing the necessity requirement there is also reference to the minimum use of force principle and the principle of proportionality

68 Supreme Court case 1984 p. 1076 at p. 1080

69 Ragnar Auglend, John Henry Mæland and Knut Røsandhaug, Police Law, 2nd edition, 2004 pp. 414-415

70 Public Hearing Document (NOU 2004:6) p. 226

so that stronger means may be applied from the start.[71]

The minimum use of force principle is also highlighted in the self-defence provision in the General Civil Penal Code, see the wording "does not **exceed** what appeared to be necessary" (my bold). In Norwegian Supreme Court cases from *inter alia* 1992 and 1996 the Supreme Court, in its deliberation of the self-defence provision in the General Civil Penal Code, highlighted that the defendant had other, less harmful options and that the use of force therefore exceeded what was necessary.[72] This indicates that the principle of minimum use of force in both the General Civil Penal Code section 48 and the Police Act section 6 have similar legal meaning.

Lastly, the necessity requirement may be sub-divided into the principle of proportionality, see the wording "(…) commensurate with the gravity of the situation, the purpose of the action taken and the circumstances in general" in the Police Act section 6 second paragraph; and the wording "(…) in view of the dangerousness of the attack, the guilt of the assailant, or the legal right assailed" in the General Civil Penal Code section 48 second paragraph. While the principle of necessity refers to the need of the police to use force, the principle of proportionality refers to the needs and interests of those affected by the use of force.[73] The principle of proportionality is closely connected with the principle of necessity in that the use of force needs to be commensurate with the gravity of the situation.[74] In a Norwegian Supreme Court case from 1993 both the proportionality and the minimum use of force principles were relevant when finding that the shooting and killing of a fleeing burglar could not be classified as an act of self-defence.[75] In this case a burglar was shot and killed by the shop owner when fleeing from the crime scene. The shop owner was safe inside of the building, and

71 Ibid pp. 191 and 226

72 Supreme Court 1992 p. 679 and Supreme Court 1996 p. 141, see pp. 681 and 142 respectively

73 Public Hearing Document (NOU 2004:6) p. 192

74 Ibid pp. 128 and 192.

75 See e.g. Supreme Court 1993 p. 1197. See also Public Hearing Document (NOU 2004:6) p. 52

although he expected other burglars to be outside the house, he did not feel personally in danger. In deciding against the shooter, the Supreme Court found that he had not exercised proper attention to the life and health of the fleeing burglar, see p. 1199. Here the Supreme Court assessed and balanced the interests of the shop owner and the burglar respectively, and found that the scenario did not warrant an action resulting in someone's death.

The proportionality assessment is difficult since it naturally wary from one situation to another. On a general note it can however be said that the dangerousness of the attack and the intensity of the actions are weighty factors. In a Norwegian Supreme Case from 1978 a brawl between two persons was deemed to go beyond the scope of the General Civil Penal Code section 48 since the attack continued after the person who had started the brawl by attacking the other person with scissors was knocked unconscious, and unable to defend himself. Once the attacker was knocked unconscious the presence of danger seized to exist.[76]

5.3 Morally justifiable act

The third requirement under the General Civil Penal Code section 48 is that the act is not "considered absolutely unfitting", i.e. that the act is justifiable in a moral sense.[77] This requirement may be characterized as a legal standard, i.e. that the interpretation of this requirement may vary over time and depends on social norms governing what is considered to be acceptable behavior in emergency situations.[78] The wording requires that in order for the action not to be considered an act committed in self-defence there must be objectively no doubt that the action taken was unfitting, see the wording "absolutely unfitting".[79] Not only does this requirement confirm that the principle of proportionality is relevant in assessing the appropriateness of the action taken, but it also

[76] See Norwegian Supreme Court 1978 p. 77

[77] Johs. Andenæs, General Civil Penal Code, 5th edition by Magnus Matningsdal and Georg Fredrik Rieber-Mohn, 2004, p. 166

[78] Supreme Court 2007 p. 1172 on paragraph 34

[79] Public Hearing Document (NOU 1992:23 New General Civil Penal Code) p. 96

highlights that the proportionality of response is a key principle in the self-defence provision in the General Civil Penal Code. This is not to say, however, that the principles of necessity and the minimum use of force are not relevant in this assessment. This was confirmed in a Supreme Court case from 1992.[80] In this case, the aggrieved party was stabbed and killed after first having physically assaulted the defendant. In its deliberation of whether the use of force was an act committed in self-defence, the Supreme Court highlighted that other people were present in the building and that they had stopped the physical assault; that the defendant was under no threat when he pulled out the knife, and that nothing prevented him from walking away from the situation; and that the knife in the given circumstances was perceived as provoking and that it fuelled the second attack resulting in the aggrieved party's death. Even though the defendant probably felt threatened, it was "absolutely unfitting" to use a knife in this situation for the reasons described above.[81] A similar situation was discussed in a Norwegian Supreme Court case from 1996, where a victim of severe bullying used a knife on the victimizer. In this situation the Supreme Court found that the use of knife was "absolutely unfitting" and highlighted the lethal potential use of a knife may have.[82] This result could also be explained in that principles of proportionality and minimum use of force were not met, i.e. that the situation did not warrant the use of force and in no circumstances did it warrant the use of potentially deadly force.

There is no similar requirement under the Police Act section 6, and as we will see below, the Ship Safety and Security Act section 40. In determining the effect of this I will refer the reader to the chapter below.

80 Supreme Court case 1992 p. 1154

81 Ibid at p. 1155

82 Supreme Court case 1996 p. 141

6 The master's right to use force in light of the General Civil Penal Code section 48 and the Police Act section 6

In this section I will examine the scope of the authority to use force in accordance with the Ship Safety and Security Act section 40, in light of the two abovementioned provisions on use of force.

There is little legal theory on the content of the Ship Safety and Security Act section 40 first paragraph,[83] and at present time no case law. According to the preparatory works to the Ship Safety and Security Act section 40, the use of force is limited to situations where it is "necessary, justifiable and proportionate", and the use of force must be "reconciled with the seriousness of the situation".[84] These are similar requirements to those described above, a conclusion supported by the preparatory works, which state that the said section 40 is, to a great extent, a "parallel" provision to the Police Act section 6 fourth paragraph.[85] As mentioned earlier, there is no "absolutely unfitting" requirement under the Ship Safety and Security Act section 40 or the Police Act section 6, similar to that in the General Civil Penal Code section 48.

The consequence of this difference was elaborated in a Norwegian Supreme Court case from 2008 regarding the question of use of force during a difficult apprehension of a suspect.[86] In this case, the Supreme Court held that the legal authority to use force in accordance with the General Civil Penal Code section 48 third paragraph cf. second para-

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83 Hernes Pettersen and Bull, Ship Safety and Security Act, Commentary edition, 2010, pp. 586-590 states that the master is authorized to implement measures to protect the vessel against unlawful attacks, but does not provide any in-depth analysis on this right

84 Proposition to the Odelsting No. 87 (2005-2006) pp. 124-125

85 Ibid p. 124

86 Supreme Court 2008 p. 696

graph exceeds that of the Police Act section 6.[87] In assessing whether the action was "absolutely unfitting" in accordance with General Civil Penal Code section 48, second paragraph, the Supreme Court highlighted that the use of force is sometimes necessary in order for the police to fulfill its duties, and that in situations where the courts, in retrospect, is scrutinizing such decisions, the police should be allowed considerable discretion.[88] This cannot be the decisive factor, however, since the master is, in circumstances where the situation is unclear and seemingly precarious, given a considerable degree of discretion in deciding whether use of force in accordance with the Ship Safety and Security Act section 40 is necessary, justifiable and proportionate.[89] Similar discretion is also afforded to the police in accordance with the Police Act.[90] Furthermore, the Norwegian Supreme Court accepts that decisions on the use of force may take place under difficult circumstances which may result in error of judgment.[91]

The decisive factor probably lies in the fact that the said provisions focus on different motives. In the Police Act section 6 second paragraph the focus is on minimum use of force, whereas in the General Civil Penal Code section 48 the focus is more on the principle of proportionality and the justifiability of the action taken. Moreover, said two provisions regulate two distinctly different legal situations; i.e. the latter regulates the use of force in emergency situations, while the former regulates the use of force on a general basis. It could be argued that the courts recognize that this influences how normal and prudent persons in similar situations would react.[92]

The conclusion that the right to use force in accordance with the Police Act is more narrow than the right to use force in accordance with

87 Ibid paragraph 24 where the Supreme Court states that the use of force may be done with impunity even if the action exceeds what is allowed in accordance with the Police Act section 6

88 Ibid paragraph 36, with further references to Supreme Court 1995 p. 661

89 Proposition to the Odelsting No. 87 (2005-2006) p. 125

90 Public Hearing Document (NOU 2004:6) p. 52

91 Supreme Court 2003 p. 948 see paragraphs 18-19 on the use of force in accordance with the Police Act section 6

92 See the preparatory works to the General Civil Penal Code 2005 – Proposition to the Odelsting No. 90 (2003-2004) p. 228 on negligence

the General Civil Penal Code could also be derived from the preparatory works to the former act as well. In the preparatory works to the Police Act section 6 it is stated that use of force should only be allowed in situations where it is "clearly necessary and appropriate".[93] However, in the hearing before the Norwegian Parliament's Legal Committee, the scope of the right to use force was narrowed in further without any explanation. The Legal Committee stated that the use of force should be "clearly and reasonably be connected with the crime committed", and only when "public interests dictates [the use of force]".[94] These arguments were however not used by the Supreme Court in the above case from 2008, which indicates that the Supreme Court probably did not find this difference to be relevant for its conclusions. Regardless of this, there is, based on the 2008 Supreme Court case, a strong argument that the legal authority to use force in the General Civil Penal Code section 48 exceeds that of the Police Act section 6.

Given that the Ship Safety and Security Code section 40 is a "parallel" provision to that of Police Act section 6, it could be argued that similar conclusions with respect to the relations between the Police Act section 6 and the General Civil Penal Code section 48 may also be drawn with respect to the relationship between the Ship Safety and Security Act section 40 and the General Civil Penal Code section 48. This conclusion is however not compatible with the preparatory works to the Ship Safety and Security Act, which states that the relatively strict balancing of interests requirement found in the General Civil Penal Code section 48 is not required.[95] It is however my opinion that this statement cannot be understood to mean that the legal scope to use force in accordance with the Ship Safety and Security Act section 40 exceeds that of the General Civil Penal Code section 48. This conclusion would first of all not correspond with the strict policy on the use of firearms in

[93] Proposition to the Odelsting No. 22 (1994-1995) p. 18
[94] Recommendation to the Odelsting No. 44 (1994-1995) p. 4
[95] Proposition to the Odelsting No. 87 (2005-2006) p. 124

Norway.[96] Secondly, this would also correspond badly with the statement referred to above on the Ship Safety and Security Act section 40 being a parallel provision to that of the Police Act section 6. In any case, assuming that the legal authority to use force in accordance with the General Civil Penal Code section 48 for all practical purposes is aligned with international (customary) law on the use of force, a conclusion on the abovementioned is not necessary. The legal authority to use force in accordance with the Ship Safety and Security Act section 40 will, for all practical purposes, be limited by international (customary) law on the use of force, since there is a prevailing principle that Norwegian law should be read in conformity with international conventions ratified by Norway,[97] or international customary law by which all States are bound.[98] Although the impact of this principle is relative to the nature of the relevant international obligation,[99] in this instance this requirement is met, since Norwegian law for all instances is presumed to be in conformity with international human rights law.[100] According to the European Human Rights Convention the use of force is limited to what is "absolutely necessary" in the defence of any person from "unlawful violence" (see European Human Rights Convention article 2 number 2, sub-letter a). Moreover, according to international customary law, the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the

96 See e.g. the Act Relating to Security Services section 12 where it is clearly indicated that private security guards shall perform their services unarmed, and that their right to use force is limited to the General Civil Penal Code section 48. See also Proposition to the Odelsting No. 49 (2008-2009) on the Amending Act to the Act Relating to Security Services of 2004, p. 39-41

97 See e.g. Norwegian Supreme Court 2000 p. 1811 at p. 1829. This may result in Norwegian law having to yield to international binding law in cases where the conflict is clear, or Norwegian law being interpreted narrowly to harmonize with international binding law in cases where the conflict is not clear, (see Norwegian Supreme Court 2000 p. 996 at p. 1007)

98 See Proposition to the Odelsting No. 79 (1991-1992) p. 3

99 See Norwegian Supreme Court 2000 p. 1811 at p. 1829

100 This would in any case follow from the Norwegian Constitution which states that human rights are lex superior, i.e. that Norwegian authorities are obliged to respect and ensure human rights, cf. Article 110 c

circumstances. The firing of shots may only be used as a last resort and all efforts should be made to ensure that life is not endangered.[101]

Based on the abovementioned, I find it hard to conclude that the legal authority to use force in accordance with the Ship Safety and Security Act section 40 exceeds that of the General Civil Penal Code section 48. A more reasonable conclusion would be that the Ship Safety and Security Act section 40 equals, or even is inferior, to that of the General Civil Penal Code section 48. However, since the PCASPs for all practical purposes may base their legal authority on the use of force in both sets of provisions, I find that there is no real urgency in exploring this difference further.

7 Conclusions – When can private armed security guards (PCASP) use force and what are the consequences of wrongdoings?

In the abovementioned sections, I have examined more closely the limits for using force in accordance with the Ship Safety and Security Code section 40 and the General Civil Penal Code section 48. In this section I will look at some typical scenarios that might arise and to what extent PCASPs could use force to deter a piracy attack in accordance with Norwegian law. In such situations the PCASPs should act in the knowledge that their role is to prevent illicit boarding of the vessel, only using force which is within the scope of the two abovementioned provisions. Failure to do this may not only be a breach of contractual terms with the Company (provided that the Company is diligent in contractually defining *inter alia* the roles and the responsibilities of the PMSC

[101] See the International Tribunal for the Law of the Sea, 1 July 1999 – The M/V SAIGA (No. 2) paragraphs 155-156. The case is available at the homepage of the International Tribunal for the Law of the Sea http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf (accessed 23032012)

and the PCASPs), but may also open a "can of legal worms" for the Company. In a situation where shots have been fired resulting in injury or possibly death, the vessel and its crew may be detained pending necessary criminal investigation of the incident, and, moreover, the deceased's family may claim for civil damages on the basis that he was a fisher/taken hostage by the pirates, etc.[102]

The *modus operandi* of the pirates is to approach the vessel in fast moving, smaller boats (skiff) shooting *inter alia* Rocket Propelled Grenades (RPG) into the superstructure of the vessel in order to force the master to slow down or stop the vessel. This makes it easier for the pirates to hijack the vessel. Actions to that effect would fulfill the "unlawful attack" requirement in the General Civil Penal Code section 48 as well as trigger the right to implement measures and use force to prevent and protect the vessel against piracy (see Ship Safety and Security Act section 40 first paragraph and section 39 first paragraph). The question arises, however, as to whether the PCASPs may use force prior to the pirates firing their firearms. According to the Security Regulations section 17 second paragraph, the use of force should be limited to where there is a "threat which is direct, immediate, significant and otherwise unavoidable". In situations where a pirate attack is underway, but the pirates have not yet fired their firearms, the Security Regulations section 17 second paragraph should not be read as limiting the PCASPs' option to fire e.g. warning shots, since under the General Civil Penal Code section 48, there is no requirement that the attack has actually started, or that the attack is imminent. Future unlawful attacks may in other words also be covered by the General Civil Penal Code section 48.[103] This could also be understood from the phrase "otherwise unavoidable". Even if the words "direct" and "immediate" have an impact on

[102] Dr. John AC Cartner, Do Armed Guards Have the License to Kill?, Lloyd's List, 9 March 2011

[103] Johs. Andenæs, General Civil Penal Code, 5th edition by Magnus Matningsdal and Georg Fredrik Rieber-Mohn, 2004, p. 162. It must however be more than a theoretical possibility of a future attack. In this assessment it will be relevant to look at the likeliness of an attack, the estimated time before the attack commences, naval presence etc., see Norwegian Public Report NOU 1992: 23 p. 95

the interpretation of the phrase "otherwise unavoidable", they will not render it completely superfluous. Even in circumstances where there are multiple other possible targets in the close proximity, the presence of armed persons in skiffs approaching the vessel may be considered to qualify as an unavoidable piracy attack. However, the PCASPs should beware, since according to Norwegian case law it is difficult to succeed with such arguments. The reason for this is that when the threat or danger is not imminent, the PCASPs have more options available to them to respond and resolve the situation without having to resort to the use of force. This in turn influences *inter alia* the assessment of the principles of minimum use of force and proportionality in that scenario.[104] A kill shot will therefore most likely not be deemed an act committed in self-defence in accordance with the General Civil Penal Code section 48 or an action necessary in accordance with the Ship Safety and Security Act section 40 first paragraph.

The extent the master may authorize the PCASPs to use force in order to protect the vessel and its crew against piracy in accordance with the Ship Safety and Security Act section 40 first paragraph and section 39 first paragraph will depend on whether the use of force is "necessary". The principles of necessity, proportionality and minimum use of force will require the PCASPs to take reasonable steps to avoid the use of force. As mentioned above, the purpose of the PCASPs is to prevent illicit boarding of the vessel. Provided that other less harmful means are not presumed to be inadequate or inappropriate, the principle on minimum use of force limits the use of force to warning the pirates by light or sound signals, and the firing of warning shots is subject to these means proving unsuccessful first. The Security Regulation section 24, third and fourth paragraphs establish a gradual response plan which the master is required to implement. The purpose of this is to reflect that the use of force should reflect the seriousness of the situation.[105] Failure to comply with this requirement, and subject to the

[104] See Norwegian Supreme Court 1996 p. 141 at p. 142. The point is that the defendant has more options to avert or prevent the situations without using force

[105] Provisional Guidelines – use of armed guards on board Norwegian ships, p. 13

action not being deemed an act of self-defence, may jeopardize a personal injury lawsuit or even criminal lawsuit on the Company.[106] Section 24 fourth paragraph moreover clearly states that firing against soft targets should be the last resort, and must be subject to other, gentler means first being tried unsuccessfully or clearly having no chance of success. In practice, this means that dependent on the pirates only being armed with short to medium ranged weapons, firing on soft targets presupposes that the pirates are so close to the vessel that it represents imminent danger of death or serious injury to those onboard, see *inter alia* a Norwegian Supreme Court case from 1992, where the Supreme Court found the shooting and killing of an unarmed intruder to go beyond an act of self-defence. In its deliberation, the Supreme Court emphasized that the defendant was not in an imminent danger at the time of the shooting.[107] With respect to what constitutes imminent danger of death or serious injury to those onboard, emphasis should, however, not be placed on the fact that the business model of the Somali pirates is to take the crew hostage for ransom since the business model presupposes a *modus operandi* involving firing *inter alia* RPGs in the superstructure of the vessel to force the master to slow down. The *modus operandi* furthermore presupposes that the pirates are somewhat close to the vessel prior to firing their weapons since the effective range of a RPG is limited to 500 meters.[108] The dangerousness of such an attack is obvious, but will also be dependent on the particular characteristics of the vessel in question since the crew might enjoy some cover in a safe room inside the vessel. If the vessel for instance is carrying flammable cargo, a bad shot could ignite the cargo with disastrous effect for those on board the vessel. In such a situation it could be strongly argued that the health and even the lives of the crew and the PCASPs are at stake and that regardless of the underlying motives of the pirates, the self-defence provision is triggered for the purpose of defending against or

106 Ibid, p. 6

107 Supreme Court 1992 p. 679 at p. 681

108 Homepage of Maritime Security Blog (http://www.maritimesecurity.com/rpg7.htm, accessed 23032012)

preventing the pirate attack. However, taking into consideration that the PCASPs are required to be familiarised with the vessel in question (see Security Regulation section 22 third paragraph) and that the PCASPs are required to consider the dangers or damage those on board the vessel may be exposed to if the PCASPs engage in a firefight with the pirates, it could be argued that the gradual response plan, which the master is required to implement, should reflect the need to resolve the situation with minimum use of force since firing against soft targets might easily aggravate the situation to the possible detriment of all onboard. This underlines the importance of a gradual response plan that is customised to the vessel in question, and which clearly addresses the situation where the piracy attack is not averted through the use of non-lethal means.

Should the pirates choose to abort the attack, the PCASPs are obliged to discontinue any use of their firearms since there is no longer any danger present.[109] Extending this point, we could consider the situation whereby the PCASPs sink a pirate skiff, and the pirates end up in the water. In such a situation the master may be under an obligation to turn the vessel around and pick up the pirates from the water. According to the Norwegian Maritime Code section 135 third paragraph, the master is, subject to not placing the ship and its crew in serious risk, under an obligation to help people at sea in distress. It could be argued that the ship and its crew are not under a serious risk once the pirates are in the water and that any actions made thereafter may not be classified as an action made in self-defence in accordance with the General Civil Penal Code section 48.[110] However, to this should be added that piracy is a serious incident and that the pirates may take advantage of the emergency situation to take control of the ship.[111]

As argued above it is possible to use force in accordance with the

[109] See Norwegian Supreme Court 1978 p. 77

[110] Cf. Norwegian Supreme Court 1978 p. 147. In this case an unwanted sexual approach resulted in the person being knocked over board. The court considered that the nature of the attack did not warrant the attacker being left in the water to drown

[111] See the Provisional Guidelines – Use of Armed Guards On Board Norwegian Ships, p. 4

Ship Safety and Security Act section 40, or the General Civil Penal Code section 48, to protect the vessel and its crew from acts of piracy. When deciding what measures to implement in order to prevent the vessel from being hijacked the level of threat, and whether there are other options available will be of importance. Use of lethal force should only happen as a last resort and subject to other lesser means to avert the piracy attack being unsuccessful. The special characteristics of the vessel and the possible negative effects of a bad shot might have a bearing on the assessment of the situation and the level of force applied.

The assessment of when and to what degree force may be applied is however a complex one, and the Company and the PCASPs are well advised in engaging professional, qualified advisors to establish the scope of the legal rules to which they are subject to under Norwegian law. In dealing with PMSCs and PCASPs who, through the master, are authorised to apply force to defend against and prevent a piracy attack, the Company and the ship's master would be mistaken in believing that the Norwegian Security Regulations have solved the issue of when and to what degree use of force may be applied to defend against or prevent a piracy attack. Instead special note should be made of the following: PCASPs that fail to comply with the rules of force established under Norwegian law may reveal the Norwegian Security Regulation as a double edged sword that cuts Companies that are not diligent in their interactions with PMSCs and PCASPs.

Project integrated mediation (PRIME)

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Content

1 Project conflicts

One will have to search long and hard before finding anyone in the construction industry who has worked on a major project in which the parties, at all stages, were in harmonious agreement on the facts and the law associated with the terms of the contract. This is not surprising considering the many issues of facts and law involved in such projects – and the importance they have for the commercial aspects of the project.

But though disagreements and disputes are as old as project life itself, the methods for handling such common occurrences are not as static.

The objective of the following is to look at a relatively new variant used in Norway: PRIME – Project Integrated Mediation.[1] The key here is not to wait until a dispute has matured to summon the assistance of a third party, but to involve a third party from the start of the contractual work.

A distinction can be made between conflicts that arise during the course of a project, that is to say, prior to completion, and those associated with the settling of the final account. In both situations, the fundamental legal question is: Who carries the time and cost risk of what is happening or not happening now, or what should already have happened or not happened? And in both situations the parties must deal with a delightful mix of law and facts in an ill-fated spiral of a decidedly hermeneutic nature.[2]

However, the final account discussion has in addition some particular characteristics: Claims from the entire project period are gathered

[1] I am not aware of this term having been used before I used it in a commemorative volume for the Norwegian Association for Building and Construction Law, *På rett grunn – festskrift for Norsk Forening for Bygge- og Entrepriserett*, Oslo 2010 (see page 286). It is, I hope, fairly self-explanatory, but it will be discussed in more detail in what follows.

[2] "The hermeneutic circle means that in order to understand something with meaning (a text, a story, an image, an action) we must, in the interpretation of the individual parts, always start from a certain "pre-understanding" of the whole to which the parts belong. Our understanding of the parts thus attained is then impacting our understanding of the whole etc." (*Store Norske Leksikon*: Den hermeneutiske sirkel: http://www.snl.no.hermeneutikk, translated from Norwegian).

for collective review, during which they are considered in the sharp, but at times also quite unrealistic light of hindsight. The major issues are no longer the isolated consequences of delayed drawings, unmanageable ground conditions and mediocre productivity, but the collective consequences of an interaction between factors which, even individually, may be difficult to deal with. The key words are "productivity disturbances", breach of conditions, exceeded rate limits and other terms which, for many, conjure up images of numerous binders full of documentation, dismal progress reports and thoughtfull graphical presentations of selected parameters.

Such exercises in "reconstructing the project" to justify or reject claims are risky. It becomes a game involving an unclear evidentiary situation, huge figures and a strong element of discretionary judgement, in addition to the uncertainty inherent in contract law itself. Although the parties to an individual dispute may typically have a different tactically based view of the desirability of embarking on this game, there is no doubt that usually they would both prefer to be spared the trouble. Project life becomes so miserable when it is discovered that this is the way things are headed. The atmosphere becomes acrimonious, and constructive cooperation degenerates into distrust and the one-sided safeguarding of interests. But more important than the mood is the result, which is often that the project solutions are suboptimal.

2 How can project conflicts be handled?

Put simply, there are three ways of dealing with project disputes: prevent them, resolve them or ignore them. Few would recommend the last-mentioned approach: problems do not disappear by being ignored – they multiply.[3] On the other hand, both prevention and resolution present many variants.

[3] This is the opposite view to that held by the renowned existentialist philosopher Linus van Pelt, who through his ghostwriter Charles Schultz, maintains that"No problem is so big and complicated that it can't be run away from". He does not, however, take a specific stand as regards projects.

One of the classical tools for preventing disputes is first and foremost to improve the contractual basis. We will not look at this tool in any depth here. However precisely the contract is worded, however balanced and dynamic it is and however effective the implementation of the interaction between contractual basis, price format and project organisation, it will of course not be sufficient to avert all conflicts. It is simply not possible to regulate and organise away from all disagreement. And even if it were possible, situations might nevertheless arise where one party refuses to observe clear contractual commitments quite simply because he sees the consequences as unreasonable or unmanageable.

Thus, conflicts will arise, and as there is little to be gained by ignoring them, they must be resolved in some way or other. In principle this may be done in four ways: the parties manage to find a solution themselves, "power prevails", a third party assists or a third party decides.

We shall not look at the first two solutions, but we will look briefly at the two solution models that are characterised by the bringing in of a third party. As useful background for the discussion of PRIME, let us start with the most dramatic form: A third party decides.

3 Characteristics of arbitration and litigation

There are two different ways in which a third party may be given decisive authority in a parties' dispute: the parties may turn to the ordinary courts or they may agree to submit themselves to the decision of a privately appointed body. If this decision is to have executory force, the rules of arbitration must be followed.[4]

In both cases, the decision will normally be based on rules of law,[5]

[4] The Norwegian Enforcement Act, section 4-1(2) d). See also the Norwegian Arbitration Act, section 46.

[5] Arbitration is a possible exception here: "The arbitral tribunal shall decide on the basis of fairness only if the parties have expressly authorised it to do so" (cf. the Norwegian Arbitration Act, section 31(3)), but only then.

and the process leading up to the decision will follow the basic civil procedural requirements.[6] However, there are – in our context – important differences between a hearing before the courts and a hearing before an arbitral tribunal.

The basic difference arises from the fact that an arbitral award normally may not be reviewed.[7] As arbitration therefore becomes "the Supreme Court in the first instance" the parties are urged to leave no stone unturned – they cannot run the risk of leaving any arguments and submissions unused in anticipation of further proceedings. This may drag the case out, with all the consequences this has as regards costs and *may* have as regards judicial risk. On the other hand, arbitration may open the way for the flexible planning of proceedings in collaboration between the parties and the court,[8] and this may offset the disadvantages of the parties having only one go. A hearing in only one instance may save time and costs compared with a two or, at worst, three instance hearing in the ordinary courts. Saved time often also means saved costs in a hidden, but quite central item: the parties' loss of revenue as a result of taking key personnel away from their regular task in order instead to prepare the dispute.

The other differences between the courts and arbitration hearings are also well known and will not be described here beyond a brief outline of the main points. The parties are able to choose their arbitrators, which may be desirable in complex construction cases; they can through arbitration obtain confidentiality (provided they agree to it, cf. section 5 of the Norwegian Arbitration Act); and they will see more active management of the case from the arbitral tribunal than from ordinary courts – in part because the procedural arrangements provide for this and in part because the arbitrators usually have a better background of experience from the industry. This may be an advantage in

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6 This applies also to arbitration. See the Norwegian Arbitration Act, Chapter 6.

7 See the Norwegian Arbitration Act, section 42; cf. section 43 concerning grounds for invalidity. Decisions contrary to public policy (ordre public) excepted, errors in the arbitral tribunal's procedural application of law will not lead to invalidity.

8 See the Norwegian Arbitration Act, section 21.

fact-filled cases, which construction cases often are. On the other hand, the costs of arbitration are without doubt higher than a district court hearing because the arbitrators are more expensive than a court fee, and because the case is often dealt with in a broader manner (although the costs can be cut by using a sole arbitrator or written proceedings only). On a slightly different level is the difference that arbitration practice is often not made accessible to others, which means that the contributions which it might have made to legal developments are lost. However, it must be acknowledged that this situation only has special significance for parties which are either highly principled or run such large enterprises that a general legal clarification is important for them.

The possibility of choosing the arbitrators is perhaps tempting, but may also open the way for fateful choices. A good illustration here is the classical difference between the parties in typical construction cases, especially where the dispute arises from the final account: the owner demands that the contractor should establish chains of cause from the alleged cost consequences back to matters for which it is maintained the owner bears the risk, whilst the constructor invokes global considerations where an overall impression of the course of the project and the delay and cost factors are central. And whereas the owner demands that the claim be built from the bottom up, the contractor maintains that it must be justified from above, and never the twain shall meet. So should one opt for on an arbitrator keen on formalities who requires documentation or one with a freer approach who assumes that "there must probably be something to this", and how does one know which arbitrator will be what in the case in question?[9]

It is difficult to make fateful choices, especially when one does not have an overview of the alternatives and consequences. An important aspect of leaving the settlement of a dispute to an outsider is that the parties are relieved of the burden that may be involved in having to

[9] The belief that this can be predicted independent of the detailed circumstances of the case may well be the source of some astonishment.

defend a solution that they themselves have negotiated into existence.[10] But at the same time it is perilous to place one's destiny in the hands of outsiders who perhaps do not reveal how little they have understood of the dispute and the parties' views and needs until they come down from on high with a binding decision – which may be a little too late. Indeed, it may well be a burden for the parties to have control, but it may be even less desirable not to have control.

4 Mediation

We may therefore have a situation where the parties wish to have more control than third party decisions – even in the form of arbitration – give them, whilst they are at the same time unable to sort matters out alone through negotiations. In this case, mediation is an alternative: a third party assists, but does not decide.

This is not the place to go into details about the concept of mediation in general.[11] However, some characteristic features must be mentioned.

On the one hand, mediation is for most parties still something unfamiliar and therefore unsafe – there is uncertainty as to one's own role

[10] Cf. Vilhelm Aubert's observation: "The form of a trial, with two parties confronting one another, each of them with the opportunity to put forward his case, and with an objective body to make decisions, gives the impression that everything which reasonably can be done to ensure a fair solution has been done." (*Rettssosiologi*, Oslo 1968, page 95, translated from Norwegian).

[11] The USA was in many respects the pioneer in developing mediation as an alternative dispute resolution mechanism, and the literature from there is abundant. However, in Norway too, we have gradually acquired presentations and discussions of legal and practical aspects of mediation in legal disputes, both in the form of "judicial mediation" which is conducted within the scope of the Norwegian Dispute Act, Chapter 8 II (see immediately below), and pure ad hoc mediation. See, for example, Anne Austbø and Geir Engebretsen: *Mekling i rettskonflikter: rettsmekling, mekling ved advokater og mekling i forliksrådene og konfliktrådene* (2nd ed., 2006), Per M. Ristvedt and Ola Ø. Nisja: *Alternativ tvisteløsning* (2008), Kristin Kjelland-Mørdre (ed.): *Konflikt, mekling og rettsmekling* (2008) and Knut Kaasen, " 'Gaaer hen og forliger Eder, I skabhalse', Noen avveininger ved bruk av alternative tvisteløsningsformer", *Tidsskrift for forretningsjus* (Journal of Business Law), 1998, pp 3-19.

and the role of the other participants, what means that the mediator has at his disposal, and the dynamics of the process. This is to some extent the case even when the participants have tried it before, since each mediation process is influenced by the parties and the circumstances involved. In addition, there is the uncertainty inherent in the positive aspect of mediation – that the parties themselves have control of the outcome and (to a somewhat varying degree) of the process leading to the outcome. It may be difficult to return to one's parent organisation and say that "this is the result we have because I accepted it".

On the other hand, what mediation in principle gives the parties is precisely unlimited control of the outcome - they can break off mediation without grounds at any time. They also have substantial control of the proceedings, within the wide framework resulting from the fact that mediation by its very nature is flexible both as regards form and content. The criteria for resolution are also flexible; whilst the courts (for the most part) are bound by what they see as the relevant rules of law,12 there is nothing to stop mediation being based on a freer approach to the parties' interests.

In its role as a form regulated by law, judicial mediation[13] is in a class of its own.[14] The solution set forth in the Norwegian Dispute Act is that

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12 As Aubert stresses, "the courts [cannot] deal with the dispute as a pure conflict of interests, in the same way as the parties to a purchasing agreement can. The conflict of interests must couched in a form which at the same time makes it a disagreement about rules of law or about actual facts. … The court has only a limited opportunity to give weight to the parties' interests." (*Rettssosiologi*, Oslo 1968, pp 92-93, translated from Norwegian).

13 "Judicial mediation" follows provisions set forth in the Norwegian Dispute Act, sections 8-4 to 8-6, and the designation should only be used for this form of mediation. We do not have an established term for mediation of legal disputes outside the courts. "Mediation" is strictly speaking too imprecise since the word also – and traditionally perhaps most frequently in a Norwegian context ("megling") – is used to denominate conflicts of interest as opposed to those of law. However, the context normally makes it clear what is meant, as in "Project Integrated Mediation".

14 Anne Austbø (*Tvistelovbrev* nr. 8 (2007) points out that "the central role of mediation is emphasised by the name of the Act: 'Act relating to mediation and procedure in civil disputes'. The Civil Procedure Reform Committee saw the question of whether it is possible through rules in the Dispute Act to pave the way for creating a climate and culture for amicable settlements as crucial." (Translated from Norwegian.)

the court – after having heard the positions of the parties – may, pursuant to section 8-3, decide that judicial mediation is to take place in accordance with the provisions set forth in sections 8-4 to 8-6 of the Act, even if one of the parties to the dispute disagrees. The mediator may be a judge of the court in question or "a person from the court's panel of judicial mediators (section 8-4(1)). The Act requires that a panel of judicial mediators be established for this purpose, often a common panel for several courts. The requirements made of the selected persons are that they "should together cover the range of expertise required for judicial mediation before the court" and that they have "the qualifications necessary to act as judicial mediators" (section 8-4(4)).

5 A "project twist" to the classical conflict resolution methods.

After this summary overview of important features of litigation, arbitration and mediation, we now have a basis on which to make some observations concerning our point of departure, which was that typical construction disputes have important features in common which are of significance for how they may most expediently be resolved, regardless of whether the dispute arises during the project or not until the settling of the final account.

In this connection it is also useful to distinguish between models in which a third party decides and those in which he or she is merely of assistance.

Neither ordinary litigation nor arbitration brings anything new to the problems associated with the settling of the final account. They are methods of classical legal dispute resolution through classical proceedings based on the principle of audi alteram partem (both parties have the opportunity to comment on the views of the other before the case is settled). It is different if the dispute arises during the project and must be resolved there and then because the contract's system forces the parties to do so (preclusive lawsuit time limits etc.), or because the

project needs drive (management speed). In such situations, there are weaknesses associated with litigation and arbitration as resolution models. They take up time and attention in a situation where both are in short supply, and they do not provide solutions that the parties can readily embrace as the basis for their further work. Moreover, the parties must perhaps be more than normally professional in order to avoid the lawsuit's formalisation of the dispute creating an uncooperative and less than solution-oriented atmosphere between them. Such effects are difficult to demonstrate in a measurable form, but may be far more serious than the strain of spending many hours dealing with the lawsuit.

The mediation model where a third party assists without making a decision appears as less disruptive. In general, this form is not highly resource-demanding, partly because it is flexible and subject to the parties' control as the mediation progresses, but primarily because it does not entail "all or nothing" where everything is staked on one card at an early stage of the game. These are good characteristics, in particular in dealing with disputes during the course of the project. In this phase, full advantage may also be derived from another important property of the mediation process: as a rule, it does not create the same antagonism that a lawsuit tends to do; there is less disturbance of the focus of the project. And if the mediation is successful, what originally was a strain is turned into something positive – the parties, by working together, found a solution with which they can both live.

These positive effects can be reinforced if mediation is not just used ad hoc, but is made a part of the project, in recognition of the fact that disputes, and hence a need for mediation, normally are not one-off phenomena in projects, unlike in the case of, for instance, a pure purchase agreement.

This model of mediation seems to be gaining ground internationally. In its Norwegian variant it has been in use for some years – although not everyone in the construction industry seems to be acquainted with it. Phenomena should have a name, and in this instance a fitting name may be Project Integrated Mediation (PRIME).

6 What is Project Integrated Mediation (PRIME)?

6.1 A brief presentation

In essence, PRIME consists of three elements: (a) one or more mediators (b) are drawn into the project from day one (c) to maintain continuous contact between the parties, regardless, in principle, of whether there are any conflicts at the time. These simple and straightforward elements provide the basis for a broad spectrum of methods for conflict resolution because a *forum* is formed which paves the way for a flexible approach to the dispute.

Project Integrated Mediation does not normally mean that conflicts are prevented – it is all about *handling* conflict.15 Furthermore, PRIME means that *outsiders* are drawn in. The model therefore differs from resolution models based on the involvement of levels over the project organisations on both sides, for example in the form of a "bosses' forum" or a "contract forum" composed of personnel other than those who are running the project (see section 2 above).

Lastly, PRIME is in place *from the outset*. This means that the mediator becomes acquainted with the contract, the project, the challenges and the personnel before the going gets tough, and the parties get to know the mediator. Two advantages are thus obtained: the threshold for bringing disputes (or signs of disputes) before PRIME is lower than the threshold for issuing a writ, and the mediator already has sufficient understanding of the situation to be able to provide effective help swiftly. In this way, the frictions of project life are dealt with at the lowest possible level of conflict. Success here will mean that a great deal has been achieved.

In what follows we shall look in more detail at how the PRIME form

[15] But here it is tempting to speculate: A standing, effective mediation scheme will probably give rise to various types of impulses capable of neutralising conflicts which under otherwise identical conditions would have come into full bloom.

can be developed, some foreign variants and some experience of PRIME in Norway, before we conclude with a few evaluations: does PRIME have anything to offer?

6.2 Variables in the shaping of PRIME

The PRIME form per se lays down virtually no binding guidelines for the basic choices the parties must make when establishing the scheme. Certainly, there are some who hold "orthodox" views and believe that certain patterns must be adhered to, but I am not one of them. As in other mediation, the basic view that "purpose governs form" prevails. *The purpose* is to help the parties build a sufficiently secure basis on which to make choices they can defend – whether it be to settle (which is of course the most agreeable) or not to settle (which in some situations may nevertheless be the best solution). Within the bounds of reason, there are seldom grounds for imposing special constraints on the choice of *form* in order to reach this goal.

A fundamental question is whether the mediator should be nothing more than a go-between or whether he or she should also – possibly under certain conditions – be able *to make decisions* which are binding on the parties. This question is one of practical importance, but not for the reasons one would expect (and which result in a great deal of effort often being put into defining conditions for and effects of binding opinions from different types of "dispute resolution boards"). In my view, the point is that binding opinions must be based on neutral proceedings in which both parties are heard, which in many ways resemble the process leading up to an arbitral decision (or for that matter, a district court ruling). This lays down constraints which are not so readily compatible with effective mediation. For example, it is difficult to hold separate meetings with the parties if the aim is to provide a binding opinion, rather than help the parties agree upon a solution. One must therefore choose at a relative early stage in the handling of a dispute whether to aim at one or other form of contribution from a third party. If the choice entails refraining from using the means that effective

mediation calls for, the advantages of this flexible system will be replaced by the disadvantages of a "mini arbitration", which we have looked at in brief in section 3 above.

Experience seems moreover to suggest that the question is more one of principle than practice. Even where PRIME is required to be able to result in binding decisions, it is unlikely that this is what will happen. Instead, the mediator's advice and guiding viewpoints on the basis of procedures in which both parties are heard are perceived as such powerful signals that the question of formal binding is not pushed to its logical extreme.

A more important practical question is therefore *how many mediators* should there be – one or three.16 The cost aspect is of course of some significance here, but more importantly three mediators will be able to add greater dynamics and breadth to the mediation than one would. But the most important aspect is perhaps that it may be difficult to find one person who covers all types of knowledge for which there may be a need in such a long-term situation. Legal practitioners have, as we know, good all-round versatility, but engineering or project administrative skills would obviously strengthen the team. This is not least a question of the mediator's legitimacy in the project.

With three mediators, such considerations may be accommodated. However, if the decision is made to have one, priorities must be established. The distinctive character of the project may suggest otherwise, and of course the individual qualifications of experts vary a great deal, but I think, as a general rule, that it is nevertheless easier to teach a legal practitioner what he needs to know about technology, finances and project management in order to help with dispute resolution than to teach an engineer, economist or project administrator what he needs to know about the law in order to do so – to the extent that it is felt the process should have such a foundation. But the best solution will often be to say yes to "having one's cake and eating it".

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[16] More than three is of course in principle also possible, but will be costly and inefficient. Two may be a better alternative, but problems may then arise if binding opinions are to be issued. See immediately below.

The approach to the work involved in PRIME is thus governed by the purpose. Procedure and means are clarified underway as mediators and parties work together, and the whole arsenal of mediation weapons is available. The method used in the preliminary handling of a dispute is seldom the same as that used in the concluding phase leading up to the moment of truth – and may range from "a good conversation" to a "hammer-and-tongs" discussion via signals of the strength of positions and arguments. But some fixed points must be established. Firstly, the conditions for and effects of formal opinions or decisions from the mediators about questions that might have to be brought before them for decision should be considered thoroughly and set out in writing. Secondly, the ground rules for the mediation process should be clear and agreed upon. These include impartiality, ensuring both parties are heard, openness about the process at every stage (but of course not always about substance), and the freedom of the parties at any time to oppose further mediation – including a recommended outcome.

The intensity of meetings between mediators and parties will of course vary depending on the type and phase of the project and the level of conflict. But PRIME presupposes that there is no waiting until the conflicts are defined as such – before that stage is reached, insight, trust and forms of communications should be built up. Moreover, one of the points of PRIME is that the parties do not need to initiate dispute handling by defining an outstanding issue as a dispute. They can "air" the matter earlier and through their relatively regular contact with the project, the mediators will also acquire a foundation for intervening in matters at an early and preferably quite informal stage.

6.3 International inspiration

PRIME is not a purely Norwegian invention. Although an early variant was introduced in some of the petroleum contracts in 2000,17 previous

[17] See the Norwegian Total Contract (Norsk Totalkontrakt - NTK) 2007 Article 37 with regard to the "arbiter" (who, unlike the umpire in the Norwegian Standards, follows the PRIME pattern, and therefore should have a different title in order to avoid confusion). The scheme has been used in a couple of major offshore projects.

traces of the idea can be found internationally, for example, in the FIDIC contracts. However, developments first truly gathered pace when private organisations marketed dispute resolution boards as an option in (particularly) international contracts and at the same time established a milieu for developing clauses, methods and exchange of experience. A couple of examples may be mentioned briefly by way of illustration.

Both the International Chamber of Commerce (ICC) and the Dispute Resolution Board Foundation (DRBF) have developed rules for dispute boards.[18] The main features of these rules are similar. The parties to a contract appoint a dispute board, usually consisting of three independent persons. The board is not an arbitral tribunal, and its advice or decisions cannot be legally enforced, but its powers may range from providing informal assistance to making decisions.

The parties choose the role they would like the board to have by agreeing on one of the three alternatives defined by the rules (here using the terminology of the ICC rules).[19] The first alternative is a Dispute *Review* Board which issues recommendations to the parties. The second option is that the board is established as a Dispute *Adjudication* Board which issues decisions in disputes brought before it, whilst the third alternative is a *Combined* Dispute Board which does not go beyond making recommendations unless one party requests a decision and the other party does not oppose this.

The ICC rules acknowledge the need for more flexible forms of assistance from a dispute board than would normally fall under one of these three alternatives. When the parties are in agreement, the Dispute Board (DB) can assist the parties in an informal manner by "conversation among the DB and the Parties; separate meetings between the DB and any Party with the prior agreement of the Parties; informal views given by the DB to the parties; a written note from the DB to the Parties;

[18] See respectively http://www.iccwbo.org/uloadedFiles/Court/Arbitration/other/db_rules_2004.pgf (ICC's rules from 2004) and http://www.drb.org/manual_access.htm (DRBF's manual from 2007).

[19] See the following ICC Dispute Board Rules (as at 1 September 2004), in particular Articles 4, 5 and 6, respectively.

or any other form of assistance which many help the Parties resolve the disagreement". In this form, the ground rules are set for the dispute handling method which in practice characterises PRIME in Norway, where neither formal statements nor decisions are usual.

It may be natural to apply the rules pertaining to dispute boards in international contractual relationships, and they can also without doubt serve as inspiration. However, for purely Norwegian conditions they are perhaps not so necessary. Moreover, the division between the alternative forms may be rather rigid.

7 What speaks for and against PRIME?

As has, I hope, been demonstrated above, PRIME has some distinct advantages. The approach entails a low threshold for a flexible and swift handling of potential and ongoing disputes in projects. PRIME can therefore be an effective tool in efforts to smooth the way for concentrating on the essence of the project.

However, objections are conceivable.

One objection may be that the parties, by bringing in a third party, expose their positions, arguments and priorities in a way that binds them and may therefore inhibit agreement. However, this will of course also be the case when the parties negotiate directly, without assistance from a third party. It is precisely this immediate link between taking a position and exposing oneself that often prevents the parties from reaching a solution through direct negotiations. A third party can break the link – a party does not need to expose itself directly to the opposing party, just to the mediator. One of the principally most important features of mediation is that the mediator is a filter between the party's concession and the consequence thereof.

More prosaically, it could be objected that PRIME implies the parties using unnecessary resources on dispute handling before there is any dispute. However, the resources (costs involved in having mediators

and one's own invested time) are only a waste or disproportionate if it is assumed that there will be no dispute in the course of the project, or in any case that the benefit of handling the dispute using PRIME is not commensurate with the investments in the model. Neither of these assumptions seems particularly convincing. It is beyond question that one court or arbitration case saved by far outweighs the possible costs of the PRIME alternative. In a sense there is a certain parallel in the catch phrase "If you think knowledge is dear, try ignorance!"

A more fundamental objection might be that PRIME leads to unfavourable solutions, either in that the parties are duped into accepting results they do not want, but fail to resist, or in that the solutions are divorced from the dictates of the contract and the law. Here we come back to the intricate issues previously mentioned (sections 3 and 4) which concern the parties' control of the dispute and the relevant considerations involved in their decision. Certainly, cases are imaginable where there is an imbalance in the relative strengths of the parties (in general or in specific situations, based on, for example, liquidity requirements or the qualifications of key personnel) that may result in their failing to represent their own interests in a dispute. However, the sort of exposure that this will subject a party to during mediation will also be felt in negotiations without the assistance of a third party – and perhaps at least to the same extent. Admittedly, a mediation scheme may, in given situations, result in a pressure to which the party would not have been exposed in direct negotiations, but the scheme may also help the party consider positions and alternatives more appropriately than it could do alone. Thus, what must be central is the party's own choice. As long as PRIME can never force a party to something it does not want, it cannot be a weighty argument against the scheme that in a given situation it will lead to the party being exposed to pressure and may provide the basis for solutions other than those that would presumably have followed from rules of law alone.

Here, there is a practical consideration: Disputes in large projects may of course relate exclusively to the law, but just as often they involve a substantial factual content. The idea that the contract and contract

law give precise answers may in some cases be quite exaggerated. This means that a considerable risk is involved in pushing issues to their extreme, especially where the settlement thereof tends towards either/or more than a sliding scale of discretion. A risk-reducing approach to the dispute will therefore often in fact involve gradually identifying relevant factual and legal aspects whilst continually evaluating the consequences they will have, and on this basis make broader assessments of acceptable outcomes – that is to say, "assisted negotiation" where the mediator is responsible for the assistance.20

On a slightly different level is the objection that PRIME may provoke disputes that would otherwise not have become a problem. The parties are forced into establishing and justifying potential differences before they and the differences are ready for it. In response to this, there is little one can say other than that if PRIME works in this way, both the mediators and the parties have failed in their fundamental task – to cooperate on a process. Naturally this may happen, but obviously not as an inevitable consequence of entering into mediation. Quite the reverse: the very object of PRIME is to find the simplest and most efficient method of handling potential disputes – and then to use this method until a joint decision is made that it should be changed. If this can be achieved, potential disputes will not become greater than they should and must be.

It is perhaps more likely that the threshold for bringing an issue before the mediator becomes too low – the parties are not subjected to sufficient pressure to reach a solution at a lowest and earliest level. It may be very helpful to have to identify and objectify the issues with a view to presenting them to a third party, but at the same time there is a danger that the higher up in the hierarchy one comes, the greater the ignorance of the facts from which the issue has arisen. Again, the answer has to be that parties and mediator must cooperate on appropriate forms – including referring the issues to continued negotiation.

The last objection to PRIME which will be mentioned here relates to

[20] See a description in Kaasen, "Gaaer hen og forliger Eder, I skabhalse" (see Note 11 above), page 14 seq.

the more indefinable effects of the method: the common "project spirit" is undermined when the parties are unable to solve their problems themselves. And this is an effect that also simply cannot be dismissed. However, all experience suggests that when the parties do not manage alone, it is better that they collaborate on a solution together with one or more mediators than that they enter a straight confrontation with a subsequent court decision. The dispute that took focus away from the project and was a strain on the spirit of cooperation and everything good is turned into something positive, building on the relationship between the parties at the instant they – each with their "hand on the wheel" – succeed in finding a solution they both can live with. The strain becomes a strengthening.

This requires realism – which may be challenging to cultivate without substantive confrontation: Does this viewpoint hold? Is my factual understanding adequate? What are the consequences of being wrong, etc? A major contribution of PRIME is that the process forces the parties to adjust their views in the course of the project. – it is not easy to maintain an untenable view through to the settling of the final account.

8 An illustration: The Norwegian Public Roads Administration's Bjørvika project.

To the best of my knowledge, the Norwegian Public Roads Administration was the first public owner to put to use the mechanism that in this article I call Project Integrated Mediation. This happened in the Bjørvika project in the centre of Oslo, a project joining two tunnels and a main road (the Festning Tunnel, the Ekeberg Tunnel and Mosseveien (E18)), and involving three main contracts totalling some NOK 3.5 billion.21 In each of the three contracts a "dispute board" – later named the Conflict Resolution Board (CRB) – consisting of the same three

[21] See http://www.vegvesen.no/Vegprosjekter/Bjorvika for an overview of the project.

persons appointed jointly by the contracting parties, was established.[22] From immediately after the signing of the individual contracts, the CRB acted as a supplement to the other conflict resolution methods in the contracts (which are based on NS (Norwegian Standard) 3430).

According to the contracts, the purpose of the scheme is to "assist the parties in issues where disagreement arises concerning contractual matters (not technical), by a) giving informal advice when both parties agree to it, and b) implementing a formal process of conflict resolution at the request of at least one of the parties". As a general rule, the conclusion of the conflict board should "have the character of non-mandatory advice" which only becomes binding on the parties if they do not object within a specified time limit. Objection may lead to fresh negotiations between the parties or a court or arbitral tribunal hearing in accordance with the ordinary rules of the contract.

Disputes may be brought before the dispute board within 30 days after notice is given of the other contracting party's rejection or "unsatisfactory standpoint", otherwise "the claim is lost", whilst the dispute board should give notice of its view within 90 days after the parties have put forward their written presentations of the case. The contracts say little however about the working methods of the Conflict Resolution Board, beyond stating that the parties have the right to be heard and the right to hear. But the parties "should agree on a set of rules for the appointment, mandate, procedures and working method of the dispute board". Unless otherwise agreed, this set of rules should "follow internationally published rules for dispute boards or dispute review boards with reference rules published by the ICC on 1 September 2004", that is to say, the rules mentioned in section 6.3 above.

No further agreements as to the dispute handling method of the CRB have been made. However, each of the three members of the CRB has entered into an agreement with the parties in each of the construction contracts. In these agreements, it is stipulated that the CRB is to operate in accordance with the said frameworks set forth in the contracts and

[22] The following description is based on my experience as leader of the Conflict Resolution Board.

otherwise as agreed by the parties – implying *ad hoc*.23 These ad hoc arrangements have in practice developed into a pattern for the CRB's work.

The most important elements in this pattern are identification, facilitation and processing of (potential) disputes.

Identification involves establishing mechanisms for catching the disputes in time. As mentioned, general project experience indicates that problems do not disappear simply by being ignored, they multiply. The mechanisms for bringing them to the light in the CRB are quite banal: the threshold for identifying them must be made as low as possible by establishing trust so that openness is not seen as unprofessional or a loss of face, and furthermore there must be practical ways of doing this.

Trust can only be built up over time: it is perhaps here that Project Integrated Mediation shows its greatest strength compared with ad hoc mediation. On the practical side, the "concerns list" tool has proven to be effective. Before each meeting with the CRB, the parties – preferably jointly, but if necessary separately – submit a list of aspects of the project which "concern" them at the time, with brief documentation attached where appropriate. The concern need not mean that there is an established conflict, still less that it is not possible to resolve the situation through ordinary negotiations. What is decisive for whether a matter belongs on the list is whether the party or parties think that they see a matter which might prove difficult. This may be quite fundamental matters such as difficulties in establishing a revised progress plan after many different types of interruptions in progress, or limited issues as, for instance, the criteria for pricing a defined variation job.

Facilitation consists of the parties and the CBR jointly finding a suitable way of dealing with the concerns list. Some points on the list are simply noted at the present stage, but followed up on later lists. Other points may be taken up more or less spontaneously: the parties give an account of their view and what they base it on and the CRB acts as "agents of reality", without expressing a view, whereafter the parties

[23] Moreover, it is stipulated that the CRB member cannot be relied on as a witness in later disputes concerning matters dealt with by the CRB, and that concessions made in the CRB cannot be relied on in later disputes.

find a solution. And still other points on the list clearly need better preparation before anything meaningful can be done with them in a CRB context. The parties must discuss among themselves to clarify exactly what the disagreement consists of, they must find documentation and present arguments, or external factors such as requirements set by the authorities must be clarified. Facilitation may take place from one CRB meeting to the next, or it may stretch over a longer period of time. But the object is the same: the parties and the CRB must acquire a clearest possible picture of what the issue relates to in order then on this basis to cooperate on how it best may be dealt with.

In this phase, too, trust is a decisive factor. Without trust it is difficult for the parties to cooperate on the facilitation of an efficient handling of questions on which they profoundly disagree. Experience from Bjørvika is that the – admittedly few and simple – formal guidelines which were set forth in the contracts did not play any particular role in this process. The most important is the practical approach to a specific problem, and it requires a trust-based collaboration between professionals who wear the shoe - and therefore know where it pinches.

Processing designates the final brick in the CRB process. It results either in the problem being solved – by the parties themselves or with the aid of the CRB, or in the parties having to find the solution outside the CRB – that is to say, in accordance with the contract's general system for dispute resolution. Again, it is up to the parties, in consultation with the CRB, to set the course. In theory, there is a wide range of possible methods that can be used – from the CRB gently massaging the parties to it issuing binding opinions. At the time of writing, the CRB has not been asked to provide a binding opinion in this project. Instead mediation processes have been successfully used. These have varied in their detail, but all have consisted of a dynamic approach to the issues in a continuous collaboration between the parties and the CRB and a development of the mechanisms from the opening to the closing phase.

There may be several reasons why binding opinions have at the time of writing not been used. The main reason is perhaps that the CRB would not feel comfortable issuing such opinions without being able to

build on a broad preparatory process which would bring it closer to an arbitration process than has been seen as useful. In practice, however, the explanation is perhaps rather that the parties and the CRB have, during the process, agreed that the CRB as time goes by (often in separate meetings) should indicate its view on, for instance the process risk and the strength of the parties' submissions and arguments. On this basis, the parties have managed to find solutions they were able to live with, partly after lengthy rounds of mediation in which the parties probably at times quite rightly understood individual messages from the CRB as quite plain.24 As in other mediation: purpose governs form, and the parties draw on the trust account when things get tough – which they inevitably will do.

Without looking in more detail at specific instances of board mediation or the different possible elements in the mediation process,25 it can be established that the process is primarily based on *meetings* of different character. It is through this process that identification, facilitation and processing take place. Some of the meetings are ad hoc in order to make progress with an identified problem, and some are regular to keep the CRB up to date on the project – and to allow unpleasant questions to be asked, which may bring to light matters that should be dealt with. The meeting participants are the CRB and the parties' project and construction managers and their planning and contract personnel and consultants, depending on the particular case and the requirements arising from it.

The CRB keeps minutes of the meetings. In addition to the ordinary minutes, the CRB's considerations regarding the issues discussed in the meetings have often been noted – in a distinct print. The considerations have at times been presented in the meetings, but may also be the result of the CRB's subsequent deliberations. These may consist of emphasis of what the parties have said ("the CRB notes that …"), summarising

[24] It seems justified to say that the parties thus far have a positive experience of the CRB scheme in the project, which as at May 2011 has reached about 95 % completion without there being any unsettled disputes between the parties.

[25] Some practical considerations can be seen in Kaasen "Gaaer hen og Forliger Eder. I skabhalse" (See Note 11 above).

advice ("the CRB finds that the essence of the discussion is …") or suggestions ("the CRB gave no views on the solution to this issue, but reminded the parties that …" or "the CRB suggested that one possible way forward might be …"). Experience has shown that the CRB can thus put across its view in an efficient and relatively informal manner, and that the parties perceive this as helpful, without this mixed form seeming to cause problems. It has also been customary in the minutes to give the parties "homework" to do before the next meeting.

The CRB is not a replacement for the contract's general systems, nor does it replace the contract's requirements for notification of different claims in certain forms within certain deadlines, typically the rules of notification of the variation mechanism. It follows from this that no modifications have been made, for example, to the general notification rules on account of the CRB institution. Another matter is that the parties in a mediation situation have of course the opportunity to use relevant conduct with respect to the notification rules as a factor in the mediation. For example, the assessment of process risk might be completely different if the claim possibly can be precluded under the contract, and a claim which probably is precluded can nevertheless be brought into mediation to help break a deadlock.

9 Does PRIME work?

We are gradually beginning to have some years' experience with Project Integrated Mediation. Contracting – particularly in the public roads sector – seems to date to have used the scheme the most, but examples are also found in data deliveries and offshore fabrication – with the latter sector being the first to systematically use the system.[26] Although it is difficult to have a clear overview, the trend seems to be that more

[26] See Kolrud, Ny standardkontrakt for offshoreleveranser, NTK 2000 - Norwegian Total Contract 2000. *Tidsskrift for forretningsjus* (Journal of Business Law), 2000, pp 57-66, on page 66 re "a wise man on site". For further details, see Kaasen, *Petroleumskontrakter* (Universitetsforlaget 2006) pp 877-881.

contracting parties are now using PRIME.

For obvious reasons, nobody can have a certain opinion as to how successful PRIME is in general. Jungle telegraphs are rarely clear and unequivocal. But in this instance they can hardly be said to give particularly negative signals; quite the reverse. Most recorded feedback from parties and mediators is positive. PRIME is perceived as flexible and swift assistance with a low threshold, which is therefore worth considering in recognition of the fact that disagreement occurs in major projects and that it is costly to allow disagreement to drift unresolved.

This feedback is not surprising. A characteristic of PRIME is that the arrangement is a structured arena for flexible handling of large or small pebbles in the shoe of a project. Those wearing the shoe have the lead in choosing how the pebbles are to be removed, but they receive skilled assistance from persons who know the project and its challenges without being parties, and who have an insight into the tools available for removing pebbles. The point is this that the contract establishes the arena, the rest is sorted out underway. The framework is fixed, the content flexible.

If one is successful in establishing good collaboration for problem resolution without allowing the fact that one has problems to be a distraction, then much will have been achieved. PRIME is a suitable means for reaching this goal.

Co-insurance of third parties and waiver of subrogation under hull insurance of mobile offshore drilling units

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Content

1 Introduction

1.1 The topic

The purpose of this thesis is to examine and make a comparative study of the rights conferred upon third parties in the Norwegian and English legal environments in relation to the hull insurance of offshore structures, i.e. Mobile Offshore Drilling Units (MODU). Consequently I will make a survey of the scope of the rights and defences available to the third party and the insurer based on examples of the regulations provided in the insurance contract, the contract between the third party and the assured and the applicable background law.

A contract of insurance is basically a transfer of risk from a person exposed to such a risk to the insurance company in exchange for payment of a fee, i.e. the insurance premium. Subsequently the insurer agrees to indemnify the party to the insurance contract if and when a risk covered by the contract materialises and causes the party to suffer a loss covered by the insurance. Within the field of property insurance, it is the risk of loss caused to the property that the insurance company undertakes to cover.

As a point of departure, the parties to an insurance contract are the insurer and the assured[1]. Pursuant to §1 of the Norwegian Marine Insurance Plan the insurer is the one who undertakes to grant insurance while the assured is the one who is entitled to compensation when a casualty covered by the insurance has occurred. This is, however, a rudimentary description of the parties to the insurance contract and it needs further explanation.

Here it is pertinent to stress that there may be more than one ”owner” of the property insured, i.e. someone with an economical inte-

[1] In this thesis the terms ”assured” and ”insured” have been used. Both terms refer to the person entitled to insurance compensation. The terms are used interchangeably as having the same meaning in this thesis.

rest in the property insured, and these ”owners” may also want the benefit of the insurance agreement and to be insured under the same policy as the assured. In relation to the contract between the insurer and the assured these ”owners” are third parties.

In addition to third parties with an interest in the subject matter of the insurance, there may be other third parties wanting to benefit from specific conditions in the insurance contract. Where a third party has entered into a contract with the assured, e.g. containing regulations providing that damage or loss to the contracting parties' property shall be borne by the party who has suffered the loss, the third party needs the insurer to acknowledge these regulations and the insurance contract to contain provisions to this effect. Whether or not such third parties may actually rely upon terms of the insurance contract depends on the third party being granted such a right in the contract.

An assured who has suffered damage to or loss of an object insured as a result of a casualty caused by a culpable act of a third party may elect to claim against the insurer for compensation rather than against the wrongdoer. By doing so, the insurer is subrogated to the claim of the assured against the third party upon payment of compensation for the loss. The rule of subrogation to the assured's rights against the third party is part of the legislation in most countries[2]. Unless the insurer has waived his right of subrogation against the third party, the insurer may subsequently take recourse action against the third party in order to recover his compensation to the assured.

Those involved in the petroleum industry, i.e. in activities connected to “the exploration or exploitation or storage of natural resources of the seabed or the subsoil thereof”[3], are particularly exposed to the risk of causing damage to each other's property. Therefore it is common to allocate risk in the contracts that are used in this industry. This principle of risk allocation is called the knock-for-knock principle[4]. The result of

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2 Bull (1988) p.489, see note 194; Hellner, Regressrätt, p.7-13

3 Cefor Rig Form No. 1; I, 1(1)

4 Kaasen (2006) p.743, see Ørvig, Erik: ”The knock for knock agreement”, AfS 3.448 et seq. for more information about the historical origin of the term.

the contractual regulation of liability is often that loss lies where it falls, regardless of any culpable conduct by the tortfeasor. In other words, liability is assessed pursuant to contractual provisions and is not based in tort. Likewise responsibility for liability incurred to third parties will be regulated in the contract.

The allocation of liability and requirement of insurance cover in the contract is based on the presumption that any loss caused to the property of one contractual party by the other contractual party will be compensated by the insurer of the party who has suffered the loss. As the insurer bears the loss the parties are also assured that there is sufficient financial cover of the potential loss incurred to the property. However, this presupposes that the insurer acknowledge and accept the agreement between the parties and waives his right of subrogation against specific third parties, either express or implied, in the insurance contract. Risk allocation would be to no avail if the insurer could invoke ordinary tort law rules and claim against the wrongdoing third party in the event of a casualty.

To give efficacy to the allocation of liability in the contract between the assured and a participant in the petroleum industry the insurance contract must grant the latter a protection against subrogation. The topic of discussion in this thesis is thus what rights such a participant may obtain under the insurance and to what extent he is protected against subrogation.

1.2 The outline of the thesis

This thesis will examine the cover of third parties under hull insurance of offshore structures. Since the contracts used in the industry in which these structures participate are closely linked to the cover provided in the insurance contract, a successful analysis and assessment of the insurance cover cannot be achieved without employing the terms of the petroleum contract as a backdrop to the regulations in the insurance contract.

Chapter 2 provides an overview of the legal sources and insurance contracts utilised in the thesis.

Chapter 3 outlines the concept of marine and offshore energy insurance, the link between these two types of insurance as well as a brief presentation of the relevant insurance markets.

Chapter 4 provides an overview of the parties to a drilling contract in the petroleum industry, an explanation of the allocation of liability in the contracts and the knock-for-knock principle.

Chapter 5 examines and discusses how third parties acquire rights under the insurance contract, the specific rights of the respective third parties and the insurer's defences.

Chapter 6 examines and discusses to what extent the cover of the insurance contract mirrors and acknowledges the allocation of liability in the petroleum contract.

Chapter 7 discusses the position of the party protected against subrogation where the allocation of liability in the contract includes regulations departing from the knock-for-knock principle.

Chapter 8 provides a summary of and concluding remarks in relation to issues and problems accentuated in the thesis.

2 Legal sources

The rules applicable to marine insurance contracts in Norway and England are the relevant legal framework of the scope of this thesis. Therefore legal sources from these two countries constitute the appropriate legal basis for the insurance conditions analysed.

2.1 Background law and insurance conditions

2.1.1 Norwegian background law

As a starting point, insurance contracts are regulated by the Insurance Contracts Act ("ICA") of 16 June 1989 no. 69. According to §1-3(1) of the ICA the rules in the Act are mandatory. The Act is drafted in a way which makes it very consumer friendly and thus not suited to regulating

insurance of ocean going ships owned by shipowners who normally have a professional insurance management[5]. This is subject to one exception, namely ICA §7-8, see ICA §1-3 second paragraph letter (c), which provides that the rules in ICA may be departed from if the insurance relates to a ship that is subject to registration as well as to certain other specified installations[6]. The mandatory protection provided for by the ICA may therefore be departed from in marine insurances.

2.1.2 The Norwegian conditions

The Norwegian conditions regarding marine insurance, with the exception of the rules concerning P&I and cargo insurance, are stated in the Norwegian Marine Insurance Plan of 1996 ("NMIP"). The NMIP is an agreed document drafted by shipowners, insurers and average adjusters and it is supported by extensive commentaries. The commentaries of the NMIP are to be regarded as part of the NMIP and they shall "carry more interpretative weight than is normally the case with preparatory works of statutes" when resolving disputes[7].

The NMIP is not binding on the assured unless it is referred to in the insurance contract[8]. Nonetheless, as far as a contract of marine insurance is concerned, the conditions of the NMIP will be applied even where a reference is lacking. This is because the NMIP is regarded as ordinary market conditions[9].

The point of departure is that the rules regarding hull insurance of offshore structures in chapter 18 of the NMIP are subject to the general rules in chapter 1-9, which are applicable to all the marine insurances in the NMIP, as well as being subject to the rules relating to hull insurance of "ordinary" ships in section 10-13, in each case unless the rules of chapter 18 provide otherwise.

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5 This view is expressed in the preparatory works "Norges Offentlige Utredninger" (NOU) 1987: 24 p. 40-41

6 See §§11, 33, 39 and 507 of the Norwegian Maritime Code.

7 Commentary of the NMIP, part one p.13

8 Wilhelmsen (2007) p.31

9 Wilhelmsen (2007) p.31

2.1.3 The English background law

A contract of marine insurance is subject to rules laid down by judicial decisions, most of which have been codified in the Marine Insurance Act 1906 ("MIA 1906"). However, most of the rules in the MIA 1906 are non-mandatory and may be departed from in the insurance contract.

Under English law, although subject to exceptions, the general rule of common law is that only parties to a contract are subject to rights and obligations of the contract[10]. The starting point is that only the party or parties who are named as assured in the policy obtains the benefit of insurance. However, amongst the exceptions to the rule are parties to whom the insurance policy is assigned and third parties who can rely upon terms of the contract based on the provisions of the Contracts (Rights of Third Parties) Act 1999. Thus, in relation to third party rights under the insurance, the Contracts (Rights of Third Parties) Act 1999 is also of importance.

2.1.4 The English conditions

Specific conditions relating to hull insurance of MODU's are contained in the London Standard Drilling Barge Form of 1972 ("LSDBF") with amendments. There are two versions of the LSDBF, an "all risk" and a "named perils" version. But, as the "named perils" version is rarely used, the "all risk" version is utilised in this thesis[11].

Unlike the conditions of chapter 18 of the NMIP, which are construed in a three tier system being based on general rules and ordinary hull insurance rules, the conditions of the LSDBF must be seen in the light of the rules of the MIA 1906[12]. The conditions relating to hull in-

[10] The rule of privity of contract; The third party may not benefit from a contract to which he is not a party; see Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co Ltd. [1915] AC 847

[11] Summerskill (1979) p.102

[12] Ibid p.456 et seq. and Sharp (1994) p.18 et seq. discuss whether all of the structures are encompassed by the definition "ship" and the applicability of the MIA 1906 to insurances of such structures if the application of the Act is not stated in the contract. However, Sharp states on p.26 that "[...] there is reasonable case to be made for the premise that the MIA 1906 might apply to mobile drilling units."

surance of ships, e.g. the conditions stated in the Institute Times Clauses (Hulls) or the International Hull Clauses, are therefore not implied into the LSDBF.

2.2 Case law

Case law, i.e. court judgments and arbitration awards, is used to develop or illuminate specific problems. Unfortunately, there is a limited amount of relevant case law related to the topic. This is particularly the case for Norwegian case law. Nevertheless, I have inserted references to existing case law where such facts and decisions affect the topic of discussion.

Because most insurance contracts are based upon standard forms, case law interpreting particular terms of the contract is also of importance.

2.3 Legal literature

Legal literature from Norway and England is indispensable in order to examine the general concept of marine insurance in these two countries. It is particularly important in order to assess the scope of the rules applicable to insurance of offshore structures and a necessary aid to comprehend the rather complex nature of the petroleum industry and its contracts.

3 Marine and offshore energy insurance

3.1 The insurance market

Because of the close connection between hull insurance of mobile drilling units and ordinary ships, statistical data concerning these two groups are pooled together. Hence, a description of the hull insurance market for mobile offshore drilling units is not a description of a single,

individual market but rather a description of the market relating to hull insurance of ships.

The main English marine insurance market, and historically the principal market for offshore business, is known as the "London Market". The London Market consists of Lloyd's Market Association ("LMA") and the International Underwriting Association of London ("IUA"). The IUA is a merger of what used to be the London International Insurance and Reinsurance Market Association and the Institute of London Underwriters ("ILU"). In 2008 the London Market had a share of 15% of the total global hull premiums[13].

The Norwegian insurance companies underwriting hull insurance, together with other major Scandinavian marine insurance companies, are represented by The Nordic Association of Marine Insurers ("Cefor"). In 2008 Cefor had a share of 16% of the total global hull premiums.

3.2 Mobile Offshore Drilling Unit

There are four basic types of mobile offshore drilling units ("MODU") being employed in the petroleum industry for which the separate hull insurance has been developed: i) Jack-Up drilling barges: the unit consist of a self-elevating unit and movable legs which can be jacked down so as to position the legs on the seabed or jacked up above the deck of the barge in order for it to be moved; ii) Submersibles: the drilling infrastructure is built upon a cylindrical substructure attached to pontoons. The submersible can perform drilling operations when the pontoons, after being filled with water, rest on the seabed. By reversing the procedure and emptying the pontoons the unit can be moved from the location; iii) Semi-submersible rigs: the unit consists of a deck supported by vertical columns on submerged pontoons. The submerged state is adjusted by the amount of water in the pontoons. At the drilling site the semi-submersible rig is kept in position by anchors or by propelled thrusters; iv) Drill ships: The drill ship has a conventional ship hull

[13] Data concerning global hull premium by markets is provided by Cefor: http://cefor.no/ statistics/documents/2010\%20Cefor\%20Fact\%20Sheet.pdf

and it is self propelled. The drilling usually takes place through a large aperture called the "moon pool" in the middle of the vessel. At the drilling location the ship is either anchored or kept stable through dynamic positioning systems.

3.3 Marine insurance

The term "Marine insurance" does not encompass only one type of insurance but a range of insurances, all of which cover and indemnifies losses incident to the marine activity[14]. The insurances cover different economic interests of the activity, i.e. the ocean-going vessel and the carriage of goods, and each type of insurance has its own scope of cover. Nevertheless, they can be divided into two main groups of insurances: shipowner insurances and cargo insurances.

Central to any marine activity is the ship, and the shipowner insurances provide cover for loss linked to the ship, e.g. hull insurance, hull interest insurance, freight interest insurance, P&I insurance and loss of hire insurance.

Hull insurance is a property damage insurance providing compensation when the vessel has suffered damage or is a total loss. In addition hull insurance provides a limited cover of collision liability[15].

The other shipowner insurances do not cover loss or damage incurred to the assured's property but are either linked to the asset value of the ship, loss of income or third party liability other than the collision liability provided by the hull insurance.

When the exploration of oil and petroleum activities moved to the deep waters of the Gulf of Mexico in the beginning of the 1960's, the players in this industry consequently needed insurance coverage of the new risks they were facing[16]. This spurred a new industry of marine in-

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[14] Normally there is a division between the losses caused by marine perils and those caused by war perils, the latter usually not covered by a marine insurance but a war insurance.

[15] A hull insurance policy based on the NMIP also covers a portion of the loss of hire in connection with casualty repairs.

[16] Sharp (1994) p.1

surances providing cover of risks associated with different aspects of the activity. One of the consequences of this was the development of separate conditions for hull insurance of mobile offshore drilling units.

Hull insurance of offshore structures is normally effected on specialised conditions, e.g. the conditions in chapter 18 of the NMIP, because of the particular risks and coverage needed in the activity in which they are employed. However, there is no clear distinction between "ordinary" ships and offshore structures, which means that the structure may be insured on conditions applicable to hull insurance of "ordinary" ships[17].

4 Allocation of liability in the drilling contract

4.1 The parties

The parties to a drilling contract are the licensees, consisting of a group of companies, and the contractor. The licensees are represented by an operator ("operator") which is usually one of the licensees[18].

In order to obtain a right to explore and develop the natural resources of the seabed and its subsoil the licensees bid for a concessionary licence from the appropriate licensing authority in the state or country which owns the mineral rights of the respective location. Having been awarded a licence, the operator initiates surveys of the region. If the surveys conducted indicate that the location contains significant reserves of hydrocarbons, the operator will start drilling to confirm the discovery.

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[17] Summerskill (1979) p.456 et seq. and Sharp (1994) p.18 et seq. discuss whether all of the structures are encompassed by the definition "ship" and the applicability of the MIA 1906 to insurances of such structures if the application of the Act is not stated in the contract. However, Sharp states on p.26 that" [...] there is reasonable case to be made for the premise that the Marine Insurance Act 1906 might apply to mobile drilling units."

[18] Bull (1988) p.17

The actual drilling and work related to the activity is done by independent contractors and their sub-contractors, each of whom are responsible for different parts of the activity. The drilling contractor ("contractor") provides the drilling unit while the sub-contractors are typically employed to perform specialised services connected with the drilling of the hole[19].

4.2 The allocation of liability between the parties: the knock-for-knock principle

Performance of offshore petroleum activities entails a high level of risk. Because of the number of parties involved in the activity, the complexity and scale of the work and the geographical location, damage or loss incurred to persons and property is almost inevitable. Furthermore, parties in the activity often carry out work in proximity to each other which increases the possibility of a casualty occurring.

The nature of the activity and the likelihood that both the tortfeasor and the claimant of a potential incident participate in the petroleum industry result in one of the most characteristic features of the petroleum contract, namely the contractual regulation of liability. Regulation of liability and allocation of risk in petroleum contracts, inter alia drilling contracts, are usually based on the knock-for-knock principle. Through applying this principle the two contracting parties provide for a distribution of any potential liability incurred to each other as well as to third parties. Thus, the principle comprises regulation of three situations[20]. The first situation is where either the operator or the contractor causes damage or loss to the other contractual party's property. In such a situation each of the parties will carry their own loss even where damage or loss is a result of culpable conduct on the other contracting party's behalf. Consequently, loss lies where it falls regardless of the basis of liability, thereby avoiding the application of ordinary tort law principles. In other words, the parties have disclaimed liability for any

[19] Sharp (2009) p.28

[20] Bull (1988) p.346-347

damage or loss caused to each other's property.

The second situation concerns liability incurred to a third party. The starting point, according to the Norwegian law applicable to the offshore petroleum industry, is that the operator is jointly and severally liable with a party working for the operator if the former incurs liability to a third party (see the Norwegian Petroleum Act §10-9). This rule is departed from in the drilling contract, since responsibility for liability to third parties is allocated between the operator and the contractor. In practice this means that both parties waive their right of recourse in the event the third party claims against the one who, pursuant to the drilling contract, is responsible for the liability incurred.

Finally, the parties to the drilling contract agree to indemnify each other for loss as a result of covering claims by third parties for whom they have not assumed responsibility. Contractual allocation of liability needs to be followed up by provisions of mutual indemnity which apply regardless of the actual wrongdoer being liable in tort. If the party protected against liability is not held harmless in the event claims are brought against him for damage or loss caused to persons or property for which liability the other contracting party has assumed responsibility, then the system of allocation of liability would be futile. If, for instance, the operator negligently damages the property of a third party for whom the contractor has assumed responsibility, the third party may claim against the operator according to ordinary tort law principles. This is because the third party is not bound by the allocation of liability in the contract between the contractor and the operator. Given that the contractor has assumed responsibility for liability to the third party, the operator has a right of recourse against the contractor, who will subsequently indemnify the operator for his loss as a result of the claim from the third party.

The contracts formed between the operator and the contractors and their respective contractors constitute contractual pyramids. The operator and the contractor are thus the heads of their respective contractual hierarchy. Within the hierarchy each single contract often echoes the conditions, clauses and allocation of liability in the contract between

the operator and the contractor. It is quite common to have a clause in the drilling contract instructing the contractor and the operator to implement similar hold harmless and indemnification clauses in the contracts entered into with their respective sub-contractors. Through such a back-to-back principle, the distribution of responsibility provided for in the contract between the two ”heads” may be consistently implemented throughout the respective pyramids.

> The contractor's (A) sub-contractor (B) causes damage to the property of one of the other contractors (C) employed by the operator (D). If the contract between D and C contains a clause whereby C agrees to hold A and his contracting parties, i.e. the group of parties who A represents, harmless, C has waived his claim against B and must bear his own loss.

The result of a consistent implementation of the knock-for-knock principle in the activity provides for a clear assessment of risk and reduces lawsuits between the parties, e.g. concerning potential liability and loss, as each party is responsible for loss incurred to their own property[21].

Non-contracting parties are, of course, not bound by the allocation of liability and can claim against the tortfeasor in tort. However, as the responsibility for liability to third parties not employed in the activity is also distributed between the operator and the contractor, the risk of incurring such liability becomes more predictable.

The knock-for-knock principle and contractual regulation of liability provides for a more accurate assessment of risk and thereby defines the necessary insurance cover for the respective parties. Moreover, it avoids the same risk being covered by more than one insurer, e.g. property insurer and liability insurer, as the contractual party who has assumed responsibility for a certain third party will hold the other party to the contract harmless in the event the latter has incurred liability to such a third party.

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[21] Insurance and Legal Issues in the Oil Industry (1993) p.157

4.3 The extent of the knock-for-knock principle

Distribution of liability in the drilling contract leads to the development of two risk zones, the contractor's and the operator's risk zone[22]. The two risk zones consist of parties with whom the operator and the contractor respectively are identified. Since the definition of the scope of the zones differs between the contracts, the number of third parties for whom the operator or the contractor has not assumed responsibility varies. The result is a division of third parties, those who are encompassed by the knock-for-knock regulation, for whom the operator and the contractor have assumed liability, and those who are not.

The contractor's risk zone usually encompasses the contractor, his subcontractor and the personnel of both parties[23]. The operator's risk zone, on the other hand, is either defined as limited[24], including the operator and the other licensees as well as employees and affiliates of both the operator and the licensees, or extended[25], also including other contractors in a contractual relationship with the operator and their sub-contractors. Thus, other third parties, i.e. parties who are not included in the two risk zones, make up an additional zone, viz. the third party zone.

Regulation of liability incurred to a third party not included in the risk zones may be based on different concepts[26]. The contract may provide that the contractor shall be responsible for any liability incurred to such a party regardless of the loss being caused by the operator. However, such a distribution of responsibility is more common in contracts where the operator zone includes other contractors employed by the operator.

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22 Bull (1988) p.347-348

23 An example of the contractors risk zone in Standard Contract for Mobile Drilling Rig, Edition 1-1997 published by CRINE Section 1.4 (the risk zone also includes the legal and beneficiary owner of the drilling unit as well as affiliates of the contractor and the sub-contractor) ; http: //www.logic-oil.com/mobile.pdf

24 See Standard Contract for Mobile Drilling Rig, Edition 1-1997, published by CRINE Section 1.2

25 Bull uses the terms "nuclear family" and "extended family", see Bull (1988) p.347

26 Bull (1988) p.372

Another concept is to let the contractual party who has caused the incident carry the whole loss, i.e. the contractor is liable for loss caused to a third party by anyone in the contractor group. LOGIC's "Standard Contract for Mobile Drilling Rigs" is based on this concept. According to section 18.1(c) and 18.2(c), the contractor group and the company group are responsible for damage or loss caused to a third party insofar as this is caused by their negligence or breach of duty. In the Norwegian petroleum industry, damage caused to a third party by the contractor would result in §10-9 of the Petroleum Act being invoked (see section 4.2, note 21 above). If the third party claims against the operator, the operator has a right of recourse against the contractor.

There are also examples of contracts basing third party liability on ordinary tort law principles and even regulations providing that the contractor is responsible for third party liability up to a certain sum and the operator being liable for the amount exceeding this sum[27].

4.4 Insurance provisions in the drilling contracts

As mentioned in section 4.2, the knock-for-knock principle agreed between the contractor and the operator and the insurance cover of each party are closely connected. First of all, the parties need to be assured that the party that has assumed responsibility for the liability incurred has the financial muscle to cover a claim by the claimant third party. The insurance cover of the potential liability provides this assurance. This is particularly important for the operator as he would otherwise have had to cover the claim based on the rule in §10-9 of the Petroleum Act. Therefore, the drilling contracts often require the contractor to effect hull insurance of the drilling unit[28].

In addition to benefitting from the liability cover under the hull insurance, i.e. collision liability cover, the operator needs to be granted protection against recourse from the contractor's insurer if the operator causes damage to the contractor's drilling unit and/or equipment. This

[27] Supra note 25 p.374

[28] Bull (1988) p.402

follows from the contractual regulation that each party is responsible for loss or damage to their own property.

The contractor's insurance cover may have an additional purpose for the operator as the scope of cover may include property owned by the operator. By requiring the contractor to effect hull insurance and provide the operator with the right to compensation under the insurance for damage incurred to his equipment covered by the insurance, the operator can gain the maximum benefit from the contractor's insurance.

An example of a contractual regulation regarding protection against subrogation and co-insurance of the operator is Clause 19.1 of the Standard Contract for Mobile Drilling Rig (Standard Contract). It states the following:

> The CONTRACTOR shall procure as a minimum the insurances set out in this Clause and ensure that they are in full force and effect through the life of the CONTRACT. All such insurances shall be placed with reputable and substantial insurers, satisfactory to the COMPANY, and shall for all insurances (including insurances provided by SUBCONTRACTORS) other than Employers Liability Insurance/Workmen's Compensation to the extent of the liabilities assumed by the CONTRACTOR under the CONTRACT, include the COMPANY, CO-VENTURERS and its and their respective AFFILIATES as additional assureds and, shall be endorsed to provide that underwriters waive any rights of recourse, including in particular subrogation rights against the COMPANY, CO-VENTURERS and its and their AFFILIATES in relation to the CONTRACT. Such insurances shall where possible, provide that the COMPANY shall be given not less than 30 days' notice of cancellation of or material change to cover. The provisions of this Clause 19 shall in no way limit the liability of the CONTRACTOR under the contract.

5 Third party rights under the hull insurance of offshore structures/drilling barges

5.1 Introduction

A knock-for-knock principle in the drilling contract is not effective if the operator does not obtain specific rights under the contractor's insurance. In practice this means that he must be granted a protection against subrogation where he has caused damage to the contractor's property covered by the insurance, as well as a right to claim the contractor's insurance if the operator has had to cover liability for which the contractor was meant to be responsible. The operator, who is a third party to the insurance contract, may obtain rights under the insurance either by the insurer waiving his right of subrogation against him or by becoming a co-assured under the contract.

The insurance provisions of the two countries reviewed in this thesis relating to hull insurance of offshore structures are based on different concepts regarding how a third party may become an assured under the insurance contract. The two different concepts are examined in section 5.2.

By holding the position as co-assured, additional assured or simply by being granted protection against subrogation the third party obtains specific rights under the insurance. Nonetheless, these rights are not absolute. Depending on the circumstances, the insurer may still have a defence which can be invoked against the third party resulting in a specific right being limited or lost. In addition, the benefit of the insurance may be lost altogether in the event the insurance contract is cancelled or amended. The following sub-sections examine the position of the co-assured and/or third party protected against subrogation under the insurance and how they may benefit from the insurance cover.

5.2 Co-insurance

5.2.1 Co-insurance under chapter 18 of the NMIP

The rule regarding co-insurance is stated in §18-9(2):

> The insurance is effected for the benefit of anyone who is contractually entitled to be co-insured under the insurance, provided that such contractual regulation is regarded as customary in the activities in which the structure is involved. If the co-assured's claim is covered by another insurance he has effected, cover under this provision is subsidiary in relation to that insurance.

The rule in §18-9(2) must be seen in the light of the general conditions for co-insurance of third parties which are stated in chapter 7, co-insurance of mortgagees, and chapter 8, co-insurance of third parties. Of these rules only §8-1 has been departed from in chapter 18. This means that the insured's mortgagee is still automatically co-insured (see §7-1), and that the rules of chapter 7 apply to mortgagees under a hull insurance effected on the conditions of chapter 18.

Section 18-9(2) provides that the interest of a third party is covered under the insurance if the third party has been given the right to the benefit of insurance in the contract used in the activity. The contractual regulation must, however, be customary in the activity in which the structure is involved in order to bind the insurer. This departs from the main rule in §8-1(1), which is applicable to "ordinary" hull insurance, which provides that in order for parties who own equipment on board the ship or who have an economic interest in the object insured to be co-insured, the co-insurance has to be explicitly effected for the named third party. Since the right to be co-insured according to §18-9(2) is dependent upon a regulation in the drilling contract, there is no need for the co-assured to have an insurable interest in the subject-matter insured[29].

[29] Commentary to the NMIP, part four p.435

5.2.2 Co-insurance under the LSDBF

The concept of co-insurance does not exist under English law. Although subject to exceptions, the general rule of common law is that only parties to a contract are subject to the rights and obligations of the contract. Thus, unless the insurance contract confers rights upon the operator as a result of one of the exceptions, the operator has to be named as an assured in the insurance policy, either explicitly or by naming a class within which the operator falls, in order to be co-assured under the insurance contract. Consequently the concept of co-insurance, as it operates according to the NMIP, does not exist in marine insurance effected under English conditions. Therefore, there are no conditions regarding co-insurance in the LSDBF, and a regulation in the contract between the operator and the contractor providing for co-insurance of the operator under the contractor's insurance (see Clause 19.1 of the Standard Contract in section 4.4 above) is not sufficient per se to confer any rights upon the third party vis-à-vis the insurer.

Anyone who is of full capacity and who has an interest in the subject-matter insured may be named as an assured in the insurance contract[30]. In other words, a person without an interest cannot be an assured. The essence of the insurance is that the insurer provides indemnity for the loss suffered by the assured. Naturally, where the assured has not suffered any loss he is not entitled to indemnity. The statutory regulation of the requirement for an insurable interest in marine insurances is provided in section 4 cf. chapter 5 of the MIA 1906, which states that a contract of insurance which is not related to an insurable interest, or which is entered into with no expectation of acquiring an interest, is void.

In order to be insured under the same policy, the operator and the contractor may insure their respective interests under the same policy. However, in practice, which is also clear from the wording of section 19.1 of LOGIC's Standard Contract, the contractor insures on behalf of

[30] In order to be of "full capacity" a company or person has to meet certain requirements, e.g. companies are subject to the provisions of the Companies Act 2006, see Arnould's Law of Marine Insurance and Average (2008) p.222

himself and for the benefit of the operator upon the request of the operator.

The general rule is that if the identity of the third party is known, the insured can confer the benefit of the insurance by contracting as an agent on behalf of the third party, thus making the third party a party to the contract. On the other hand, if the identity of the third party is not yet known, the insured can contract a composite contract conferring the benefit of insurance upon all persons within a certain category[31].

5.3 Rights under the contractors hull insurance during the insurance period

5.3.1 Rights under the NMIP

Pursuant to §8-3 of the NMIP the co-insured is not protected against the insurance contract being amended or cancelled. Therefore, the insurer is not subject to a duty of notification to the operator if the person effecting the insurance does not pay the insurance premium and the insurance is subsequently cancelled (see §6-2(1)). According to §6-2(1) the insurer only owes a notification duty to the person effecting the insurance, who, pursuant to §6-1, is the one whose duty it is to pay the premium. Likewise, the insurer does not have a duty to notify the operator when the insurance expires or if the contract terminates as a consequence of a change of ownership of the structure (see §3-21).

If the operator wants to be notified of any changes in the insurance contract during the insurance period, he can require the contractor through a regulation in the drilling contract to impose a notification duty on the insurer. A contractual regulation stipulating such a notification duty is common in the drilling contracts[32].

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31 Clarke (2009) p.171

32 Bull (1988) p.411, see also Standard Contract for Mobile Drilling Rig, Edition 1-1997, published by CRINE Section 19.1

5.3.2 Rights under the LSDBF

According to English law, both the contractor and the operator through their positions as assureds are jointly and severally liable to the insurer for payment of the premium[33]. This is contrary to the provisions in the NMIP where only the person effecting the insurance is liable to pay the premium (see above). Furthermore, the MIA 1906 ties the commencement of the insurance to the payment of the premium (see section 52). Here it is stated that the duty of the assured or his agent to pay the premium and the duty of the insurer to issue the policy are concurrent conditions. Thus, as a general rule the insurer is not at risk before payment of the premium has been made. Normally the insurance is effected through a broker and according to common practice the broker is solely responsible for payment of the premium[34]. If the policy contains a premium warranty pursuant to which the assured shall pay the premium instalments on a given day and the broker fails to pay when payment is due, any assured under the contract will subsequently lose his cover[35].

The position of the assured as regards termination of the insurance contract by another assured remains uncertain in English law. In the Australian case *Federation Insurance Ltd. v Wasson*[36] the court held that a unilateral termination of the policy was ineffective. This might indicate that, unless explicit wording in the policy provides otherwise, an assured under a policy covering more than one assured cannot terminate the cover of another assured's interest. This conclusion also coincides with the division of interests under a composite insurance[37].

Pursuant to English law, more specifically the Contracts (Rights of Third Parties) Act 1999, a third party to the insurance contract may be entitled to rely upon terms of the contract. This right is subject to certain provisos which will be examined below in section 5.7.3. During the in-

33 Summerskill (1979) p.87
34 Merkin (2006) p.914
35 Ibid p.292
36 (1987) 163 C.L.R. 303
37 Supra note 34 p.502

surance period, such a third party is protected against the contract being varied or rescinded provided that he has communicated his assent to the term (see section 2(1)(a)). Likewise, the insurer cannot extinguish the rights of the third party if the insurer knows that the third party has relied on the term or if he can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied upon it (see section 2(1)(b) and (c)).

Since rights under the insurance contract are conferred upon the third party consequent upon regulations to this effect in the contract between the assured and the third party, e.g. the operator, it follows that the third party relies upon the rights given. Consequently, the consent of the third party is required in order for the insurer to vary or rescind the contract.

According to the Act, the rights of the third party depend on the terms of the policy, and therefore it is up to the insurer to limit or remove such rights[38]. Thus, if the insurance contract contains a clause providing that the insurer may vary the contract without the consent of the third party, the insurer may do so even though this may remove the third party's benefit under the insurance[39]. However, as the Act came into force in 1999, a clause to this effect does not exist in the LSDBF.

5.4 The rights of the co-assured upon a casualty

5.4.1 Interests covered by the insurance

The main purpose of a knock-for-knock regulation in the contract is to benefit from the insurance cover effected by the respective parties. With each party taking responsibility for damage or loss to their own property the parties' need for third party liability cover is reduced.

Nonetheless, a co-assured operator may have a right to insurance compensation under the contractor's insurance despite the operator having assumed liability in the drilling contract for damage or loss in-

[38] Arnould's Law of Marine Insurance and Average (2008) p.236

[39] See Clause 36(2) of the International Hull Clauses 2003 for an example of such a clause.

curred to his own property. This follows from §18-2(b) no. 1, where machinery, equipment and spare parts of the structure are each covered by the insurance provided it is owned, borrowed, leased or purchased with a vendor's lien or a similar encumbrance by the assured or co-assured. In cases where such equipment has been damaged or lost, the co-assured has a claim against the insurer for compensation of the loss he has suffered. The rationale behind a cover of property regardless of ownership under the contractor's hull insurance is that the contracts differ as to who is responsible for providing certain types of equipment used in the activity. By including equipment which may be owned by the operator, the contractor and the insurer do not have to list the specific equipment covered by the insurance. This makes it possible to utilise the standard conditions of the NMIP and the parties avoid having to negotiate individual contracts based on the specific circumstances of the respective activity[40].

According to Clause 3 of the LSDBF the insurance covers the hull and machinery of the drilling barge named in the policy as well as "equipment, tools, machinery, caissons, lifting jacks, materials, supplies, appurtenances, drilling rigs and equipment, derrick, drill stem, casing and tubing" while aboard the barge and or barge/vessel used in connection with the drilling barge and moored alongside or in the vicinity of the drilling barge. The property is covered whether it is "owned by or in the care, custody and control of the Assured". This provision is similar to §18-2 cf. §18-3(1)(a) no.1 of the NMIP, which means that the insurance can extend to the operator's property.

In addition to property damage insurance, the NMIP covers liability incurred through collision and striking, with the exception of collision liability incurred to fixed installations on the Continental Shelf (see §18-14 cf. §13-1). Even though the contractor and the operator have allocated responsibility for liability in the drilling contract and thereby arranged for loss or damage to property to be covered by the claimant's property insurer, the co-assured operator may still benefit from the contractor's collision liability cover.

[40] Bull (1988) p.459, see note 132

As co-assured the operator probably has the right of direct action against the insurer for cover of collision liability incurred to a third party, for which the contractor was to be responsible according to the drilling contract[41].

The contractor (C) collides with a third party (B) who, as he is not bound by the allocation of liability in the contract between C and the operator (O), subsequently claims against O based on §10-9 of the Petroleum Act. The drilling contract provides that liability to B is C's responsibility. Consequently O may elect to either claim recourse from C or directly claim against C's insurer based on his position as co-insured under C's insurance to recover his loss.

Naturally, the operator would be able to recover his loss from the contractor based on the allocation of responsibility in the drilling contract, insofar as this is based on the knock-for-knock principle. Nonetheless, a right of direct action against the contractor's insurer, even when the contractor is not insolvent[42], provides the operator with certain advantages, inter alia the operator avoids disputes with the contractor concerning the claim and the negative impact this might have on the relationship between the parties in the activity[43].

The cover of collision liability is also of benefit to a co-assured bareboat charterer[44]. If the owner of the drilling unit provides for co-insurance cover of the bareboat charterer under the hull insurance, any collision liability incurred by the charterer is covered by the hull insurer.

The rule regarding collision liability in the LSDBF is stated in Clause 6. The scope of cover provided by Clause 6 is more limited than the scope provided in §13-1 of the NMIP. According to Clause 6, only the collisions between vessels are covered, thus excluding liability incurred

41 Ibid p.457

42 In cases where the wrongdoer is insolvent the claimant has a right of direct action against the wrongdoer's liability insurer, cf. §7-8(2) of the ICA.

43 Supra note 40 p.453

44 Commentary to the NMIP part four p.435

through "striking"[45], which is covered under §13-1. Finally, as Clause 6 only refers to collisions caused by the "vessel", it appears that an additional insurance has to be effected in order to cover collision between equipment and other items covered under the insurance and a vessel[46]. Under the NMIP, although subject to exceptions, striking by the ships' accessories and equipment are covered when caused by the ships' movement being transmitted through such objects[47].

Pursuant to section 6(a) of the LSDBF, the assured has a right to recover from the insurer for loss as a result of collision liability upon payment of damages to the claimant. Thus, the co-assured operator has a direct action against the contractor's insurer.

5.4.2 The scope of cover

Pursuant to the provisions of the NMIP, the scope of the insurance cover is not influenced by the fact that there is a co-insured under the insurance. Thus, a casualty covered by the insurance must have occurred and caused a loss which has been insured against for the co-insured to have a claim against the insurer.

Hull insurance effected under the conditions of chapter 18 of the NMIP provides an all risk cover of loss incurred to the object insured. However, the all risk cover pursuant to §2-8 is somewhat limited by §18-4 which states that "loss resulting from the structure being used for the drilling of a relief well for the purpose of controlling a fire, a blow-out or cratering associated with another structure or fixed installation" is not covered. Moreover, §18-4 must be seen in conjunction with the rules regarding excluded loss in chapter 10-12. Thus, loss due to ordinary use (cf. §10-3) and damage due to inadequate maintenance (cf. §12-3) and error in design (cf. §12-4) are not recoverable.

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45 According to the Commentary, part two, p.280: "Striking" presupposes that the physical contact between the ship and another object is a consequence of a (relative) movement so that the movement energy results in a pressure. "Striking" also includes pressure against or the touching of another object, e.g. an object floating in the sea or an installation on shore, see Wilhelmsen (2007) p.286

46 Summerskill (1979) p.111

47 Wilhelmsen (2007) p.286

As with insurance effected under the conditions of the NMIP, the LSDBF also provides an all risk cover. The phrase "all risk" shall not be interpreted as to covering damage irrespective of how it is caused as Clause 5 states that the cover is subject to terms, conditions and exclusions of the insurance. This means that the insurer is not liable for loss caused as a result of a warranty not being complied with or loss falling within the list of exclusions in section 8[48]. Similar to the situation under the NMIP, damage caused as a result of wear and tear or error in design is not covered, (see section 8(f)). This would also have been the case even if these exclusions had not been listed, since it is accepted that an all risk cover does not include losses which were caused by inherent vice or wear and tear. This is because the damage must have been caused by some kind of fortuitous circumstance, i.e. an accident or casualty, in order to be covered[49].

Contrary to the position for a co-insured under the NMIP, the risks covered in respect of the co-assured under English law are not necessarily the same as for the primary assured. Where the primary assured is only given authority by the additional assured to effect a cover limited to certain risks, the additional assured will then only be insured in respect of such risks[50].

5.5 The insurer's defences

5.5.1 Introduction

A very important question is to what extent the insurer may invoke a breach of the rules regarding the duty of disclosure and the duty of care against the co-assured, thereby causing the co-assured's rights under the insurance, (i.e. the right to compensation for loss caused by a casualty), to be limited or lost.

The first issue relates to the obligations imposed on the co-assured

48 Summerskill (1979) p. 98 et seq.

49 British and Foreign Marine Insurance Co. Ltd. v Gaunt [1921] 2 A.C. 41 (H.L.)

50 Merkin (2006) p.492, see BP Exploration Operating Co. Ltd. v Kvaerner Oilfield Products Ltd. [2004] EWHC 999 (Comm)

under the insurance and how the insurer may respond to a breach of these obligations.

The second issue is the issue of identification[51], namely, whether the insurer may identify the co-assured with other assureds or other third parties in respect of their acts or omissions under the insurance. More specifically, it is a question of whether the cover of the co-assured is independent from that of the assured or if the cover is dependent upon the assured's position vis-à-vis the insurer. An independent cover would result in the co-assured being entitled to claim against the insurer even where the rules relating to the duty of disclosure and duty of care have been breached by another assured.

Because the concept on which the Norwegian and English provisions base the protection of a co-assured differs, the analysis of the position of these parties is conducted separately in the sub-sections below.

5.5.2 The insurer's defences against the co-insured under the NMIP

Pursuant to §8-2 a co-assured who knows that he is named in the insurance policy is subject to *a duty of disclosure* similar to that of the person effecting the insurance. As the drilling contracts generally impose a duty on the contractor to effect hull insurance and grant the operator co-insurance, the operator will know of the insurance. Therefore, the operator must disclose information material to the insurer's assessment of the risk and a breach of this duty may result in the co-assured losing his insurance cover, (see the rules in chapter 3 section 1).

Likewise, the co-assured may lose his cover when he has breached the rules relating to the *duty of care* in chapter 3 of the NMIP. This is because any rules relating to the acts and omissions of the assured are equally applicable to the co-assured, that is to say, the assured is subject

[51] The concept of identification is a concept used in Scandinavian Marine Insurance and can be substituted with the "assured's responsibility for faults committed by a third person", see Wilhelmsen, Trine-Lise. Misconduct of the assured and identification. http://www.comitemaritime.org/ future/pdf/misconduct_a_id.pdf

to the duty of care and the co-assured is to be regarded as assured. Thus, the insurer's liability is reduced if the operator intentionally or through gross negligence has failed to take measures to avert or minimise loss pursuant to the rules of chapter 3 section 4. Furthermore, the co-assured does not have a claim against the insurer if the co-assured has intentionally caused the casualty. A similar outcome may be the result if the co-assured has caused the casualty through gross negligence. However, in the latter case the question of whether or not the co-assured has a claim and the liability of the insurer are dependent upon certain conditions (see section 5.7.2 below).

The insurer may also invoke a breach of a safety regulation against the co-assured. A safety regulation is, pursuant to §3-22, rules concerning measures for the prevention of loss which may be issued by public authorities, stipulated in the insurance contract, laid down by the insurer in the insurance contract or issued by the classification society. If the co-assured has negligently breached such a regulation and the loss is a consequence of the breach, then the insurer is not liable to the co-assured. Furthermore, the co-assured will be identified with the one whose duty it is to comply with the regulation if there has been a negligent breach of a special safety regulation laid down in the insurance contract. This extended identification also applies if periodic surveys required by public authorities or the classification society have not been carried out, cf. §3-22(2).

Pursuant to §8-1(1) of the NMIP the rules relating to *identification* in §§3-36 to 3-38 apply to the co-assured. Thus, the position of the co-assured is dependent upon the position of the assured. This means that the insurer can identify the co-assured with the fault or negligence committed by the assured or co-owner of the insured structure or anyone to whom these parties have delegated decision-making authority of material significance for the insurance, (see §3-37 cf. §3-36). In other words, if one of these parties has breached the rules relating to the duty of care in chapter 3, i.e. the rules relating to alteration of risk, safety regulations, casualties caused by the assured and the duty to avert or minimise loss, the insurer may invoke these rules against the co-assured.

The insurer can also invoke a breach of the duty of disclosure by the person affecting the insurance against the co-assured, see §3-38, which may result in the insurance contract being cancelled, thereby causing the co-assured to lose his cover under the insurance.

As the contractor is often the one with the overall decision-making authority for the ship, the provisions of §3-37 result in the co-assured being identified with the acts and omissions of the contractor[52]. However, it is less likely that the conditions for identification between the operator and the contractor are fulfilled if there has been a breach of the rules relating to the duty of disclosure or duty of care by the operator. This is because it is unlikely that the operator will meet the conditions for identification under §3-36 cf. §3-37, i.e. he will neither have decision-making authority concerning functions of material significance for the insurance nor will he have overall decision-making authority for the operation of the drilling unit. Therefore a situation may arise where the operator may be entitled to recover his loss indirectly under the insurance, even though he has caused a casualty through a breach of one of the rules relating to the duty of care and thereby lost his right to claim against the insurer for compensation. Even if the operator is not identified with the assured contractor, the contractor may still recover under the insurance. Provided that the rules relating to the duty of care in the insurance contract differ from the provisions regarding subjective fault in the risk allocation clauses in the underlying contract, the operator may subsequently claim against the contractor for compensation of the loss[53].

Independent cover of the co-assured may be obtained. The independent cover protects the co-assured against the insurer invoking a breach of the rules in chapter 3 and §5-1 by another insured against the co-assured (see §8-4). However, a co-assured would not be protected from cancellation of the insurance if the person effecting the insurance does not pay the insurance premium, (see chapter 6). Moreover, an extended co-insurance does not change the scope of the insurance cover. If the

[52] Bull (1988) p.475

[53] Supra note 52 p.476

operator needs an extended cover of his interest, such insurance must be effected by the operator. Finally, the independent co-insurance must be explicitly effected.

5.5.3 The insurer's defences against the co-assured under the LSDBF

It follows from what has been described in section 5.2.2 that, as a co-assured party in fact is a named assured under the insurance contract, the insure may invoke all the rules relating to the assured's duty of disclosure and duty of care in the MIA 1906 and the LSDBF against the co-assured. Hence, a co-assured operator which has suffered a loss covered by the insurance may risk loosing his right of recovery from the insurer if he has breached any of these rules.

The insurer's defences against a co-assured in case of a breach of the duties mentioned above by another insured are, as will be explained below, dependent upon certain conditions.

The definition of the insurance is decisive for the position of the additional assured under English law. Depending on the interest of the parties insured under the insurance it is either defined as a joint insurance, i.e. where the parties have the same insurable interest, or a composite insurance, i.e. where each party has different insurable interests in the insured object. The difference between the two concepts is that while the joint insurance policy is treated as one policy, the composite insurance is treated as a series of contracts made between the insurers and the respective assureds. The implication of different parties having different interests in the object insured is that the assureds have individual rights and liabilities[54]. In the context of hull insurance of a drilling vessel, an operator providing equipment to be used in the operations would have a different interest in the subject-matter of insurance than the contractor, thereby making it a composite insurance.

The position as composite assured protects the operator to a certain extent against the insurer invoking a breach of the duty of disclosure

[54] Clarke (2009) p.969

and duty of care by another assured. In the case of a breach of the duty of disclosure by an assured, the insurer cannot void the insurance contract as regards the operator's interest, (see section 17 cf. section 18 to 20 of the MIA 1906), insofar the assured did not effect the insurance on behalf of himself and to the benefit of the operator, i.e. acting as an agent on behalf of the operator[55].

As regards a breach of the rules relating to the duty of care, the starting point is that the assured operator is not identified with another assured. Hence, if the contractor causes the loss through a culpable act the operator will still be entitled to claim against the insurer. This would also apply to casualties caused by the wilful misconduct of the contractor, preventing the insurer from invoking Clause 55(2)(a) of the MIA 1906 against the composite assured not causing the casualty insofar as the loss constitutes an insured peril and the assured is not privy to the misconduct[56]. Obviously, it would bar the guilty assured from recovery under the insurance.

Wilful misconduct is not defined in the MIA 1906 but case law provides that the term encompasses both deliberate and reckless actions by the co-assured[57]. This means that the term includes both conduct which the co-assured knew was wrong as well as careless conduct, i.e. the co-assured is indifferent as to his actions exposing the insured object to a risk and a potential loss. Seen in comparison with the NMIP and gross negligence as the limit of the insurer's liability, the concept of wilful misconduct results in loss of cover of the assured if he has caused the casualty through gross negligence, as "the concept of wilful misconduct implies a degree of fault that departs further from the standard of reasonable behaviour than gross negligence"[58].

Section 5 of the LSDBF provides that the insurer is not liable if the loss is a result of "want of due diligence" by the assured or the owners or

55 Arnould's Law of Marine Insurance and Average (2008) p.232

56 Ibid p.232

57 Ibid p.958

58 Wilhelmsen, Trine-Lise. *Misconduct of the assured and identification*. http://www.comitemaritime.org/future/pdf/misconduct_a_id.pdf

managers of the subject-matter insured. It follows from this clause that if the owner's or manager's lack of reasonable care is the proximate cause of a loss, the insurer is not liable to the assured. Clearly, even though the assured is not the owner or manager of the insured object, he is still identified with such persons if damage is caused as a result of want of due diligence on these persons' behalf. As the contractor is normally the owner of the drilling unit in addition to being an assured, the provision seems to imply that the co-assured operator will lose his cover if the contractor fails to exercise due diligence and this results in a loss which would otherwise be recoverable.

Since "due diligence" is similar to ordinary negligence under Norwegian law, the cover of the assured is more limited than under the NMIP which may provide a reduced cover even when the assured has caused the casualty through a grossly negligent act[59].

Exactly what the phrase "due diligence" means has yet to be specifically defined, but the consensus is that it relates to the operational practice of the object insured[60]. By tying the duty of due diligence to the conduct of operational practice, a failure to exercise such duty by the master or crew of the vessel ought not to be equated with that of the assured, i.e. the senior hierarchy of the company. Nonetheless, since the distinction is not dealt with in the LSDBF there is still room for doubt regarding this issue[61].

The general rule is that a breach of a warranty or a condition by an assured will discharge the insurer from liability. A warranty is, according to MIA 1906 section 33(1)), an undertaking by the assured "[...] that some particular thing shall or shall not be done, or that some condition shall be fulfilled or whereby [the assured] affirms or negatives the existence of a particular state of facts". Section 32 further provides that a warranty may be express or implied, which means that the warranties listed in the MIA 1906 section 36-41 are implied into the contract as a

59 Wilhelmsen (2007) p.188

60 Sharp (2009) p.355

61 Ibid p.356, Sharp analyses the wording of the coverage clause in the London Standard Platform Form but the clause is identical to Clause 5 in the LSDBF.

matter of law. In addition the LSDBF contains a blowout preventer warranty where the assured warrants that standard blowout preventers shall be used. Unless the policy provides otherwise, the insurer is discharged from liability as from the date the assured breaches a warranty. However, a warranty may be breached by an assured without this amounting to a breach of another assured if the warranty does not have to be fulfilled by the latter[62]. Where the contractor has breached such a warranty, the insurer still remains liable to the operator.

Contrary to the situation under the NMIP, the co-assured is not identified with the assured in the case of a fraudulent claim by the latter. Consequently, an operator who has suffered a loss which is insured against may still recover under the insurance. If, on the other hand, the co-assured is involved in the fraud he is not entitled to recover from the insurer[63].

5.6 The claims settlement and payment of compensation

5.6.1 The general position; claims covered by one insurer

As with the scope of cover, the sum insured remains the limit of the insurer's liability irrespective of the number of co-assureds under an insurance contract effected on the conditions of the NMIP. In addition to the sum insured relating to damage or loss incurred to the assured's own property, there is an additional and equally large sum insured covering collision liability to third parties, (see §13-3), and yet another sum insured covering cost of measures taken to avert or minimise loss in connection with a casualty covered by the insurance, (see §4-18). Depending on the circumstances, the co-assured may benefit from all of these three sums being insured. However, the co-assured may still risk not being fully compensated for his loss under certain circumstances, (see below).

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62 Merkin (2006) p.500-501

63 Arnould's Law of Marine Insurance and Average (2008) p.233

As to the handling of a casualty and claims upon a casualty this may be done without the participation of the co-assured, (see §8-1 cf. §7-3(1)). Hence, the co-assured does not have the right to be involved in the handling of a casualty and the insurer may pay the compensation without the contribution of the co-assured. The rule applies regardless of the fact that whether the operator's equipment covered by the insurance has been damaged or lost.

The compensation may also be subject to set off by the insurer. According to §8-1(2) cf. §7-4(6) of the NMIP, the insurer may set off claims, e.g. premium arrears, which have fallen due in the course of the last two years prior to the settlement of the claim. However, only "claims which have arisen out of the insurance contract relating to the ship in question" may be set off. This identification with the person effecting the insurance, who according to §6-1(1) is the one responsible for paying the premium, also follows from §8-1(1) cf. §3-38.

The operator is not necessarily the only co-insured under the contract and this may result in a situation where the compensation is insufficient to fully cover the loss suffered by the different assureds. If there is a co-assured mortgagee, who is automatically co-insured according to §7-1(1), the co-assured operator's right to compensation is subsidiary to a co-assured mortgagee's rights[64]. Except for the rules regarding the mortgagee's priority to compensation, there are no rules in the NMIP concerning how the insurance compensation shall be distributed between the supplemental insured parties, e.g. the operator and the contractor, if the sum insured is insufficient to fully compensate the parties. The presumption seems to be that the compensation shall be divided pro rata according to the loss suffered by the parties[65].

As for an insurer under the NMIP, the insurer under the English provisions may become liable for compensation to the assured in three situations. In addition to entitling the assured to recover for both property damage and collision liability, (see the LSDBF Clause 10 cf. Clause 6), English marine insurance law also entitles the assured to claim

[64] Commentary to the NMIP, part one p.197

[65] Bull (1988) p.295

against the insurer for loss suffered as a result of taking reasonable measures to avert or minimise loss.

The indemnity paid by the insurer may be subject to a set-off. When an insurance policy is effected through a broker on behalf of the assured, the broker becomes responsible for the payment of the insurance premium, (see MIA 1906 section 53(1)). The broker thereby gets a lien upon the insurance policy for the premium he has paid and for any other charges he might have incurred in connection with the effecting of the policy, (see MIA 1906 section 53(2)). In other words, the debt of the assured owed to the broker is protected by the broker's lien. The broker may discharge the lien by deducting the debt from the insurance compensation under the policy.

In *Eide UK Ltd. v Lowndes Lambert Group Ltd. (The Sun tender*[66]) the Court of Appeal held that the broker's lien may only be offset against the indemnity of the assured who owes the premium. Contrary to the position of the co-insured under the NMIP, an assured under the LSDBF who does not owe a debt to the broker is not subject to a deduction of the insurance proceeds and, thus, will not be "identified" with the assured who owes the balance.

The LSDBF contains a "Loss Payable" clause, (see Clause 18). The assureds name a receiver in the clause to which loss is payable. Upon payment to the loss payee the insurer is relieved from his liability to the assureds[67]. If the indemnity paid is insufficient to cover the claims of the assureds, any dispute between them will have to be settled based on the provisions of the underlying contracts.

The "Loss Payable" clause is bypassed where the assured has incurred liability to a third party as a result of a collision, (see Clause 6). In such a case the insurer shall pay "the Assured or the Surety, whichever shall have paid". Consequently, if the operator, as in the example in section 5.4.1 above, has paid a claimant third party, he therefore has a direct claim against the contractor's hull insurer.

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66 [1998] 1 Lloyd's Rep. 389

67 Summerskill (1979) p.178

5.6.2 Double insurance

The situation described above is the situation as it appears when the insurance cover of the operator's equipment is only covered by the contractor's hull insurer. However, the co-assured may have effected his own insurance covering the very same loss to the equipment. If so, there is a situation of double insurance where the co-assured, if entitled to claim full compensation from both insurers, would be likely to recover more than his actual loss. This would be a clear breach with the principle of property insurance common to both Norwegian and English law, which is based on indemnification of loss suffered[68].

According to the NMIP, the general rule when the subject-matter of insurance is insured by two or more insurers is that each of the insurers are liable in accordance with their contracts with the assured until the assured has received the full compensation to which he is entitled (see §2-6(1)). However, this rule has been departed from in §18-9(2). Pursuant to §18-9(2) the co-insured's right to compensation is dependent upon the claim not being covered by another insurance effected by the co-insured. If the operator has insured his own equipment he cannot claim under the contractor's hull insurance. The cover of the operator, as provided in §18-9, is thus subsidiary to other insurances of the operator, thereby avoiding double insurance cover.

The insurer's subsidiary liability is limited in two ways. Naturally, the hull insurer is still liable when the interest is not fully covered by the other insurer, e.g. where the insurance covers loss which is excluded in the other insurance, (see §2-6(2)). Secondly, it follows from §2-6(3) that the insurer is subsidiarily liable only insofar as the other insurer covering the same loss cannot invoke a similar provision. If all the insurers have disclaimed liability the general rule in §2-6(1) shall apply.

The LSDBF does not contain any provisions concerning how a situation of double insurance shall be solved. However, according to section 32(2)(a) of the MIA 1906, the assured "may claim payment from the insurer in such order as he may think fit" until he has received the indemnity to which he is entitled.

[68] Wilhelmsen (2007) p.77 and Merkin (2006) p.408

5.6.3 Compensation for measures taken to avert or minimise loss

In addition to the primary scope of cover, the insurer, both according to the NMIP[69] and the LSDBF[70], is liable to the assured for compensation of costs resulting from reasonable measures taken to avert or minimise loss. Thus, a co-assured with property covered under the insurance who has taken measures to avert or minimise loss to the insured subject-matter may recover the costs of such measures from the insurer in the event of a loss.

The insurer shall indemnify the assured for all types of loss suffered due to measures to avert or minimise loss, with the exception of measures taken to avert or minimise blow-outs, cratering or fire in connection with a blow-out[71]. Moreover, the measures do not have to be successful[72]. Finally, it should also be noted that the amount of compensation for such measures is in addition to the ordinary sum insured[73].

5.7 The indirect liability cover

5.7.1 Introduction

When a third party has caused a casualty through a culpable act causing a loss covered by the insurance, the insured has a claim against the wrongdoing party for compensation of the loss suffered. As the casualty is within the scope of the insurance cover, the insured also has a right to compensation from the insurer. In such a situation the assured may prefer to claim against the insurer for indemnity of his loss. Upon the insured receiving compensation from the insurer, the insurer is subrogated to the rights of the insured against the tortfeasor. This implies that the insurer may take recourse action against the tortfeasor in order to recover up to the sum he has paid the insured. The rationale for the

69 See §4-7 of the NMIP

70 See Clause 13 of the LSDBF

71 See §18-7 of the NMIP and Clause 8(d) of the LSDBF

72 Wilhelmsen (2007) p.216 and Rose (2004) p.398

73 See §4-18 of the NMIP and section 5.6.1 above and Clause 13(b) of the LSDBF.

rule is that it prevents the insured from recovering both from the insurer and the tortfeasor, thus recovering twice in respect of the same loss. Furthermore, the wrongdoer should not be able to take advantage of an insurance he has not paid, that is to say, he should not be able to escape liability where he has been at fault just because the claimant has insurance cover for the loss suffered[74]. However, the right of subrogation may be waived. One of the ways this can be done is through an express waiver of subrogation clause in the insurance contract. A contractual waiver of subrogation is common in the in the hull insurance contracts of offshore units as this is necessary for the knock-for-knock principle to work as intended by the contractor and the operator. In addition, a waiver of subrogation may be implied into the contract based on law, regardless of the intention of the parties, e.g. based on the operator's position under the contractor's insurance. The extent and limitation of such clauses will be assessed according to the respective insurance conditions and the relevant law.

5.7.2 Waiver of subrogation under the NMIP

If a casualty has occurred which has been caused by the culpable act of a third party, the starting point is that the insurer, upon payment of compensation to the assured, is subrogated to the rights of the assured against the party who caused the incident, (see NMIP §5-13(1).)). The right to recourse proceedings stated in §5-13 reflects the provisions of §4-3 of the Norwegian Compensatory Damages Act. However, the insurer may include a clause in the insurance contract whereby he waives such a right.

Section §18-9(1) of the NMIP contains a waiver of the insurer's right of subrogation. The insurer does not have any right of subrogation against a person who has caused damage if such third party has been granted contractual protection against recourse, provided that such contractual protection is regarded as customary in the activities in which the structure is involved.

[74] Mitchell (2007) p.323

Hence, the insurer waives his right of subrogation against the tortfeasor if the tortfeasor has been granted protection against recourse in the drilling contract. Like the provision of §18-9(2) the protection is dependent upon the contractual protection being customary in the activities in which the structure is involved.

The scope of the waiver is not expressed in the NMIP but according to the Commentary of the NMIP the waiver is not absolute[75]. For this aspect, the Norwegian Contracts Act, regulating the formation and validity of contract, constitutes the appropriate background law[76]. Pursuant to §36 of the Act, which is a general clause restricting the freedom of contract, a person cannot disclaim liability for his own intentional and grossly negligent acts. Therefore, the limit of the insurer's liability is defined by §3-33 of the NMIP regarding the insurer's liability to the assured, in the event the assured has caused the casualty through gross negligence.

Pursuant to §3-33, the liability of the insurer in such a case is determined by the degree of fault and circumstances generally. Consequently, the wrongdoer is provided with a stronger protection under §3-33 of the NMIP than under §3-36 of the Contracts Act, as the insurer's right to exercise subrogation is not automatic upon a casualty caused through gross negligence, but assessed based on the "degree of fault" and "circumstances generally".

There is not any precise definition of gross negligence, but the Norwegian Supreme Court has provided an approximate description in Rt. 1989.1318:

> "For a conduct to be described as grossly negligent, it must in my view represent a clear departure from conduct which is ordinary justifiable. It must be conduct which is strongly blameworthy, i.e. the person in question must be substantially more to blame than in the case of ordinary negligence."[77]

[75] Commentary part four, p.434-435

[76] Hov (2002) p.34

[77] Hov (2002) p.34

Ordinary negligence, on the other hand, is when a person has not acted as a competent and reasonable person would have done under the same circumstances[78]. In other words, gross negligence is somewhere on the scale between ordinary negligence and intent.

The liability of the wrongdoer, where he has caused the casualty through a grossly negligent act, is determined according to the degree of fault and circumstances generally, thereby leaving it to the Court to assess the appropriate reduction of liability in each individual case.

Like co-insurance, protection against subrogation pursuant to §18-9(1) also confers a right of direct action against the insurer upon the protected party[79]. In other words, if the assured elects to claim against the wrongdoer instead of the insurer the wrongdoer may, in principle, subsequently recover his loss from the insurer. This issue will be further examined in chapter 7 below.

5.7.3 Waiver of subrogation under the LSDBF

According to English law the insurer is provided with the same right of subrogation as under Norwegian law (see section 79 of the MIA 1906). However, the right to subrogation may be waived as it is provided in Clause 15 of the LSDBF. Clause 15 provides:

The Assured may grant release from liability with respect to loss of or damage to property insured hereunder to any person firm or corporation for whom the Assured is operating under specific contract, provided:

> (a) the said release is granted prior to the commencement of the operations;
>
> (b) the loss or damage subject to said release arises out of or in connection with such operations. Underwriters agree to waive their rights of subrogation against such person firm or corporation having been so released from such liability.

78 Wilhelmsen (2007) p.186

79 Bull (1988) p.487

Pursuant to Clause 15 of the LSDBF, the assured is granted authority to release any person, firm or company for whom the assured is operating under specific contract from liability. The waiver clause thereby encompasses the operator for whom the contractor works. The operator may not necessarily be an assured under the insurance policy, and therefore not a party to the insurance contract, as such a position is dependent upon contractual regulations and is not an automatic right under the insurance contract, (see section 5.2.2 above). Because of the doctrine of *privity of contract*[80] a clause conferring a benefit upon a third party cannot be enforced by that party unless he can rely on the rules of the Contracts (Rights of Third Parties) Act 1999. According to the Act section 1(1)(a)), a term of contract may be enforced where the contract expressly provides that the third party may do so or, pursuant to section 1(1)(b), where the term purports to confer a benefit upon the third party. The latter is fulfilled in Clause 15 as the "Underwriters agree to waive their rights of subrogation against such person firm or corporation having been so released from such liability". In addition, the third party must be identified in the contract, either by name, description or by membership of a class, (see section 1(3)), a requirement fulfilled by the phrase "any person, firm or corporation for whom the Assured is operating under specific contract". Consequently, the operator may enforce the waiver of subrogation clause.

The protection against subrogation provided under the LSDBF is not unlimited, as the insurer may invoke the rules under section 3 of the Act against the protected party. The insurer can invoke the same defences against the third party as he has against the assured, as well as any defences he may have had against the third party if the third party had been a party to the insurance contract, (see section 3(3) and 3(4) respectively). As a result, it seems that the third party may not rely on the waiver of subrogation clause if he has caused the casualty through wilful misconduct.

The ambit of the waiver in Clause 15 of the LSDBF is limited to loss or damage arising out of the operations of the specific contract. Liability for loss arising in connection with events outside of the contractual

[80] See section 5.2.2 above

operations may not be released. Thus, the protection is dependent upon the definition of ”operations” which may potentially cause problems and disputes concerning causation, i.e. the relationship between the event causing the loss and the operations. This is because the operator may have entered into contractual operations with several contractors at the same time. It may prove difficult to establish to which contractual operations the event causing damage is sufficiently related. Under certain circumstances this may lead to the liability being covered by two or more parties[81].

§18-9(1) of the NMIP does not refer to the loss being caused in connection with the operations as a requirement for the insurer's waiver of subrogation, but, it refers to customary contractual regulations as a condition for liability. The reference to "customary" should most likely be interpreted to mean the same as Clause 15 in the LSDBF. This is because regulation of liability in the drilling contract is normally tied to the operations of the contract[82].

5.8 The co-assured's indirect liability cover

5.8.1 The co-assured's indirect liability cover under the NMIP

Besides being a property insurance entitling the co-assured to compensation in the event of a casualty, the contractor's hull insurance also provides the co-assured with an indirect liability cover. If the casualty has been caused by the co-assured, he is protected against the insurer exercising his subrogation rights after compensation has been paid to the assured, even when the co-assured has not been expressly released from liability in the drilling contract. This protection against subrogation is not expressed in the NMIP, but it is acknowledged that the co-assured has such a right of protection[83]. Therefore, the position of the co-assured,

81 Bull (1988) p.387

82 Ibid p.384 et seq

83 Ibid p.318, see note 168

in principle, does not change if the assured claimant assured claims against the co-assured instead of the insurer. As the co-assured would have been protected from recourse if the assured had claimed against the insurer in the first place, he has a right of direct action against the insurer for cover of the loss suffered[84]. The issue is examined in chapter 7 below.

The insurer's defence against the co-assured's indirect liability cover is the same as the insurer's defence against any claim by the co-assured under the insurance, (see section 5.5.2 above). Thus, the insurer can invoke the rules relating to breach of the duties of the insurance contract against the co-insured, assured (i.e. the rules of chapter 3).

Pursuant to §18-9 of the NMIP, the contractual regulation providing protection against subrogation, as well as co-insurance cover, is subject to the proviso "customary". Only a customary contractual regulation providing the third party with a protection against subrogation is binding upon the insurer. This is, in addition to the provision of §18-9, also clearly expressed in §5-14 as a limit of the insurer's liability. According to the Commentaries to the NMIP the assessment of what is to be regarded as customary is based on the activities in question and the geographical location of the structures being employed[85]. As regards the knock-for-knock principle, it is common in many areas[86]. However, the knock-for-knock principle may encompass regulations where liability is not evenly allocated between the parties, e.g. the contractor is responsible for liability to a greater extent than the operator[87]. Whether or not such regulations will be regarded as falling within the definition of the knock-for-knock principle ought to be assessed according to the customary definition of the principle in the particular activity.

However, even if the regulation is not customary, the insurer will not have any cause of action against the third party granted protection against subrogation in the drilling contract. This is because the insurer

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84 Ibid p.487

85 Commentaries to the NMIP, part four p.434

86 According to Bull most of the contracts in the Norwegian offshore petroleum industry are based on the Knock-for-knock principle, see Bull (1988) p.363

87 Bull (1988) p.348

is subrogated to the assured's rights against the tortfeasor. Where the assured has waived his claim for damages in the contract with the third party, the assured consequently has no right to claim against the third party, and, as a result, the insurer does not have any cause of action against the tortfeasor[88]. However, the payment of compensation to the assured shall in this case be reduced by the amount the insurer is prevented from collecting as a result of the assured's waiver of claim for damages, (see §5-14 of the NMIP).

It is common for the drilling contracts to contain a clause where the operator is entitled to a position as co-assured as well as being granted an express protection against subrogation. Norwegian law provides that co-insurance based on a contractual regulation does not require of the co-assured to have an interest in the subject-matter of insurance and it is not unlikely that the only reason for wanting co-insurance cover is the protection against subrogation[89]. An operator who does not have an interest in the object insured, and for whom the protection against recourse is of importance, does not obtain any better right through a "double protection"," under the NMIP, i.e. being granted co-insurance and protection against subrogation, under the NMIP than if he had only been granted protection against recourse through a waiver of subrogation clause and vice versa[90]. According to the background law, (see section 5.7.2 above), a person will not be protected against subrogation if he has caused the loss intentionally and potentially not if it is caused through a grossly negligent act. This applies irrespective of the protection being granted through a protection of subrogation clause or through the position as co-assured.

5.8.2 The co-assured's indirect liability cover under the LSDBF

The position of the co-assured under English law is dependent upon the type of insurance, i.e. whether it is a joint or composite insurance (see

88 Ibid p.489

89 Commentary to the NMIP, part four p.435

90 Bull (1988) p.487-488

section 5.5.3). While a co-assured under a joint insurance is protected against the insurer exercising his subrogation rights when he has negligently caused the casualty, the position of the co-assured under a composite insurance is somewhat more complex[91].

The general rule is that the insurer does not have a right of subrogation against a composite assured[92]. However, the judicial basis for this immunity has been uncertain. In *National Oilwell (UK) Ltd. V Davy Offshore Ltd.*[93] it was held that the waiver of subrogation was to be implied into the insurance contract. This has been rejected as a basis for the rule in recent cases[94]. According to Lord Hope in *Co-operative Retail Services Ltd. v Taylor Young Partnership Ltd.*[95] "the true basis of the rule is to be found in the contract between the parties". This view was adopted by Rix L.J. in *Tyco Fire & Integrated Solutions Limited v Rolls-Royce Motor Cars Limited*[96] who stated obiter that "the doctrine of an implied term in the insurance contract has now been replaced by a doctrine of the true construction of the underlying contract". Thus, a waiver of subrogation will be implied into the contract between the parties insofar as the contract does not provide otherwise. In other words, the intentions of the parties are decisive. Consequently, an express term in the drilling contract providing for specific liability of a co-assured to the assured would entitle the insurer to pursue a claim by way of subrogation against the co-assured.

The implied waiver of subrogation is not unlimited. First, the loss must be within the scope of cover of the co-assured in order for him to be protected. As mentioned earlier in this thesis, the insurance cover of the respective assureds is not necessarily coterminous. Therefore, a situation may arise where the loss caused is covered under the innocent assured's insurance but not under the wrongdoing assured's insurance.

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91 Merkin (2006) p.397-398

92 Rose (2004) p.543

93 [1993] 2 Lloyd's Rep. 582

94 Arnould's Law of Marine Insurance and Average (2008) p.1500

95 [2002] 1 W.L.R. 1419 para. 65

96 [2008]E.W.C.A. Civ. 286

In such a case the insurer is not prevented from exercising his subrogation rights against the wrongdoing co-assured.

Likewise, if the wrongdoing assured cannot make a claim under his own insurance, e.g. the co-assured has breached the rule in section 55(2)(a) and caused the loss through wilful misconduct or breached the duty to mitigate loss, he is not protected from subrogation upon the insurer having indemnified the innocent assured. It can be derived from what is mentioned above that the insurer cannot take recourse action against an assured who he has undertaken to indemnify for the very loss caused.

Secondly, an operator insured under the contractor's insurance must have an insurable interest in the damaged object which has been insured to be protected from a recourse claim. As regards the operator's equipment, this only represents a limited interest in the object insured. However, even though the operator has a limited interest in the object insured, he may have a pervasive insurable interest in the entire property[97]. English courts have accepted that where a party to contract works risks a financial loss in the event the works are damaged, such party has a pervasive insurable interest in the whole project. The principle has been applied in several cases relating to construction work. According to Lloyd, J in *Petrofina (UK) Ltd. v Magnaload Ltd.*[98]:

> "On any construction site [...] there is ever present the possibility of damage by one tradesman to the property of another [...]. Should this possibility become reality, the question of negligence in the absence of complete property coverage would have to be debated in court. By recognising in all tradesmen an insurable interest based on that very real possibility, which itself has its source in the contractual arrangements opening the doors of the job site to the tradesman, the courts would apply to the construction field the principle expressed so long ago in the area of bailment. Thus all the parties whose joint efforts have one common goal, e.g. the completion of the construction would be spared the necessity of fighting

97 Arnould's Law of Marine Insurance and Average (2008) p.232

98 [1983]2 Lloyd's Rep. 91

> between themselves should an accident occur involving the possible responsibility of one of them."

Thus, the traditional approach, that the co-assured had to have a proprietary or contractual right in the property, is departed from through the doctrine of pervasive insurable interest.

The basis of the doctrine is commercial convenience, i.e. to protect "ongoing participants in the construction project"[99]. However, the Court in *Stone Vickers Ltd. v Appledore Ferguson Shipbuilders Ltd.*[100] widened the definition of pervasive insurable interest by basing insurable interest in property on the potential liability of the assured. In addition, the case, which involved a co-assured supplier of parts, recognised that even participants who were not "ongoing participants in the activity" could have a pervasive insurable interest in the project, as they would be affected by loss or damage to the works.

The pervasive interest makes it easier to assert an insurable interest and protects the co-assured against subrogation if he causes damage to any part of the subject-matter insured[101]. Nevertheless, the protection is temporary. The pervasive insurable interest and the protection against subrogation come to an end once the project is completed[102].

The rule according to English law is that an additional assured must have an insurable interest in the subject-matter in order to be entitled to rely on the benefit of the insurance and protection against subrogation, (see above). Where this is the case, the protection against subrogation is conferred upon the co-assured party through an implied waiver of subrogation clause in the insurance contract. The situation for a legitimate co-assured who is also protected against subrogation pursuant to a waiver of subrogation clause may be somewhat different.

The starting point is that the scope of the waiver clause is construed

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99 Olubajo (2004)

100 [1991] 2 Lloyd's Rep. 288

101 Merkin (2006) p.397

102 Supra note 100

to be co-extensive with the co-assured's cover[103]. However, if the waiver clause clearly expresses the ambit of the protection and this is wider than the cover provided as co-assured then the clause may confer immunity upon the co-assured even in respect of uninsured losses[104]. Hence, the ambit of the protection provided depends upon how the waiver clause is construed.

It seems that a co-assured operator with a limited insured interest who is being released from liability by the contractor for damage or loss caused to any property insured does not have to rely on the application of the principle of "pervasive" insurable interest to be protected against subrogation. This follows Clause 15 of the LSDBF where the insurer agrees to waive his right of subrogation where the protected party has caused "loss or damage to property insured hereunder". The wording therefore includes both the contractor's and the operator's insurable interest.

6 The insurance cover; a benefit to the members of the risk zones?

6.1 Introduction

As mentioned in section 4.3 above, the allocation of risk in the drilling contract results in the formation of two risk zones: the operator's and the contractor's zones. The zones are characterised either as a "narrow family" or "extended family" depending on the parties for whom the contractor and the operator have assumed liability. To give effect to the risk allocation between the contractor and the operator, the hull insurer therefore has to provide all the members in the operator's risk zone with a protection against subrogation. In addition, by conferring a protection

[103] Arnould's Law of Marine Insurance and Average (2008) p.1505, see National Oilwell (UK) Ltd. V Davy Offshore Ltd. [1993] 2 Lloyd's Rep. 582

[104] Mitchell (2007) p.342

against subrogation upon the members of the contractor's own risk zone, the insurer enables the parties to fully utilise the respective parties' insurance covers, ensuring that each party is responsible for loss incurred to its own property. Sub-sections 6.2 and 6.3 examine how the insurance conditions arrange for risk allocation between the contractor and the operator under the LSDBF and NMIP respectively.

6.2 The position of the members of the risk zones under the LSDBF

The contractor's zone usually consists of the contractor and his employees in addition to the contractor's sub-contractors and their employees (see section 4.3 above). If the contract between the contractor and the sub-contractor is not based on the knock-for-knock principle, then liability for loss caused to the sub-contractor's property by the contractor or vice versa must be assessed based on tort principles, which is both time consuming and costly. Likewise, if the contract mirrors the allocation of liability in the contract between the contractor and the operator, then the sub-contractor assumes liability for its own property. Liability for damage caused to the property of the contractor's sub-contractor by a member of the operator's risk zone will therefore be borne by the sub-contractor. A situation whereby the member of the operator's risk zone would have to take recourse action against the contractor after covering a claim from one of the members in the contractor's risk zone is thereby avoided. However, for the allocation of liability to be effective the hull insurer must waive his right of subrogation against any member of the two risk zones.

According to Clause 15 of the LSDBF, the insurer waives his right of subrogation against "any person, firm or corporation for whom the Assured is operating under specific contract". Clearly, the contractor is working under a contract with the operator, that is to say, he is working for the operator. However, this is not the case with the sub-contractor who is under a contract with the contractor. Summerskill confirms this interpretation, stating that "Authority is not given to the assured to

grant a release [of liability] to those working for him"[105]. On the other hand, Sharp states that the clause also will apply to towage contractors[106]. However, exactly how the interpretation of the wording is aligned in order to encompass towage companies is not explained.

The tugs play an important role in the drilling activity, towing certain units from one location to another. As regards MODUs, this is particularly the case for jack-ups and semi-submersibles, which are dependent upon the tug for mobility. It is common for the towage contract to release the tug owner from liability for damage to the contractor's equipment, e.g. BIMCO's Towcon and Towhire[107], which are both based on the knock-for-knock principle. It is arguable that the insurer should acknowledge the risk allocation in such standard contracts, but the wording of Clause 15 nevertheless seems to exclude tug owners from the ambit of the waiver of subrogation[108].

No problems arise concerning which members are protected against subrogation in the operator's risk zone if the drilling contract arranges for a "narrow family" concept. This is because the operator's zone in such a case only includes the operator, its parent and affiliated companies and co-venturers. On the other hand, if the operator's risk zone includes other contractors employed by the operator, these contractors should also be entitled to rely upon a waiver of subrogation in the insurance contract.

Contractors employed by the operator are not encompassed by the wording in Clause 15. As a result, the members of the operator's risk zone based on an "extended family" concept are not protected against a potential recourse action by the insurer.

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105 p.166

106 (2009) p.74

107 https://www.bimco.org/

108 Clause 11 of the London Market Offshore Mobile Unit Form (LMOMUF), which was introduced by the London Rig Committee in 1996 and is an update of the LSDBF, contains a similar wording to Clause 15 of the LSDBF. However, the phrase "or who is working for the Insured" is added , removing any doubt as to the inclusion of subcontractors under the clause. The Form has not yet been regularly adopted by the insurers, see Sharp (2009) p.89

6.3 The position of the members of the risk zones under the NMIP

Under the NMIP the position of the members of the two risk zones vis-à-vis the insurer is quite different from that under the LSDBF. As with the acknowledgment of the risk allocation principles in the drilling contract, the protection against subrogation is conferred upon anyone who has been granted such protection in the drilling contract, provided that the regulation in the contract is customary. Inasmuch as the "extended family" concept is not an anomaly, the protection may be extended to a contractor employed by the operator[109]. The sub-contractor working for the contractor seems to be included regardless of the concept chosen in the drilling contract being characterised as "extended family" or "nuclear family"[110].

7 Contractual regulations diverging from the knock-for-knock principle

7.1 Introduction

So far, the topic of discussion has been drilling contracts based on a clear allocation of liability irrespective of fault. The rights of the co-assured and the party protected against subrogation have been seen in the light of a contractual regulation providing for mutual allocation of liability. However, contractual regulation of liability may, to a greater or lesser degree, depart from a "pure" knock-for-knock principle. A case in point is Clause 12(g) of Bimco's Supplytime 89, a contract which apart from this clause is based on the knock-for-knock principle:

> Notwithstanding any other provision of this Charter Party to the

[109] Bull (1988) p.363

[110] Ibid p.347

> contrary, the Charterers shall always be responsible for any losses, damages or liabilities suffered by the Owners, their employees, contractors or sub-contractors, by the Charterers, or by third parties, with respect to the Vessel or other property, personal injury or death, pollution or otherwise, which losses, damages or liabilities are caused, directly or indirectly, as a result of the Vessel's carriage of any hazardous and noxious substances in whatever form as ordered by the Charterers, and the Charterers shall defend, indemnify the Owners and hold the Owners harmless for any expense, loss or liability whatsoever or howsoever arising with respect to the carriage of hazardous or noxious substances.

If the charterer is a co-assured under the owner's insurance or has been granted a protection against subrogation and the contract fails to limit the rights of such parties the question whether or not he can recover from the insurer after paying the owner for losses pursuant to the clause mentioned above would arise[111]. The following sub-sections assess whether a party protected against subrogation may use his position and rights under the insurance to cover his own contractual liability to the assured.

7.2 The insurer's liability pursuant to the LSDBF for damage or loss for which the party protected against subrogation has assumed responsibility

Clause 15 of the LSDBF provides that the insurer waives his right of subrogation against a third party only insofar the contractor has released such party from liability. Thus, where the party has not been released from liability in the contract the insurer may exercise his right of subrogation against such a party. Since the scope of the waiver is tied to the release of liability in the contract, a situation where the operator is liable to the contractor but still protected against a subrogation claim by the insurer will not arise.

[111] According to Clause 14(a)(ii) of the Supplytime co-insurance and waiver of subrogation is given only insofar it relates to liabilities of the owner under the contract. Thus, the issue regarding the insurer's liability is solved as regards Supplytime 89.

As regards a co-assured's protection against subrogation, the general rule, as was examined in section 5.8.2, is based on an implied waiver of subrogation in the contract. Where the drilling contract provides that the contracting party shall be co-assured to the extent of the liabilities assumed by the other contracting party, like it is done in Clause 19(1) of the Standard Contract[112], the issue of cover under the insurance for the liabilities assumed by the co-assured does not arise. Furthermore, it seems that even a general provision of co-insurance, e.g. stating that the operator shall be included as additional assured without tying the co-insurance to the contractor's liabilities, will not protect the co-assured against subrogation with respect to his own liabilities. This is because the cover of the co-assured will be construed to only cover the loss for which the primary assured has assumed liability in the underlying contract. Hence, loss for which the co-assured has assumed liability is not covered under the insurance[113].

7.3 The insurer's liability pursuant to the NMIP for damage or loss for which the party protected against subrogation has assumed responsibility

The starting point for a co-assured according to chapter 8 of the NMIP is a protection against subrogation when he has caused a casualty covered by the insurance, provided he has not breached any of the rules relating to the duty of care or the duty of disclosure. If the assured claims the co-assured instead of recovering from the insurer the co-assured may then claim the insurer to cover the amount paid to the assured. That a co-assured under chapter 18, as a general rule, is entitled to the same protection is briefly mentioned in section 5.8.1. Likewise, a party protected against subrogation is entitled to claim the insurer under the same circumstances[114].

If the general rule applies when there is a discrepancy between the

[112] See section 4.4
[113] Merkin (2006) p.492
[114] Bull (1988) p.487

regulation of liability in the drilling contract and the protection provided under the insurance contract, e.g. where the party to the drilling contract is liable to the contractor within the scope of the hull insurance cover, the hull insurance would in practice be a liability insurance indemnifying the protected party for loss for which he has assumed responsibility. The loss for which he pursuant to the drilling contract has to pay the contracting party pursuant to the drilling contract is covered by the insurer.

Inasmuch as the provisions of chapter 8 do not limit the scope of the protection against subrogation, the insurer may assert that the regulation is not "customary" pursuant to the proviso in §18-9, in order to escape liability to the protected party.

As has been discussed earlier in this thesis, the definition of the term "customary" is volatile and must be assessed on a case by case basis. One could argue that, since the "customary" purpose of co-insurance of a party who does not have an economical interest in the subject-matter insured is the protection against subrogation after the insurer has covered a loss for which the assured has assumed liability, the co-assured should not be entitled to a cover in his own right. However, in the lack of an express provision to this effect, a general status as co-assured may defeat such an argument.

Regarding the Norwegian petroleum industry, a standard Norwegian drilling contract used on the Norwegian shelf could have provided an indication as to what the term "customary" ought to encompass. Attempts have been made by the players in the activity to draft such a contract but, as of today, the efforts have yet to bear fruit[115].

7.4 Additional clauses: Removing doubt as to the scope of the waiver of subrogation?

The ambiguity of the term "customary" may result in disputes concerning the exact ambit of the insurer's liability. Therefore, it is of interest to examine how the matter has been dealt with in selected additional

[115] Bull (1988) p.344-345

clauses, viz. Cefor's Offshore Operator Clause and the Norwegian Hull Club (NHC) Co-Insurance Clause.

> Cefor's Offshore Operator Clause 1978[116] provides:
>
> To the extent the assured has contractually agreed to give the charterer of the insured vessel, the offshore operator and his associates (coventures) or contractors the benefit of this insurance, the insurer agrees:
>
> (1) to waive his right of subrogation against the said persons or entities,
>
> (2) to cover the liability which the said persons or entities may incur through collision or striking by the insured vessel or a tug used by it, pursuant to the Norwegian general insurance conditions for hull insurance.

Instead of tying the co-insurance and waiver of subrogation to a customary regulation, the clause provides that the ambit of the protection is limited by the phrase "to the extent". If the drilling contract sets out that the contracting party shall be co-assured in respect of the contractor's liabilities, then the co-assured would benefit from the insurance only to this extent. Hence, the assured has not agreed to give the co-assured the benefit of the insurance with respect to damage or loss to the assured's property for which the co-assured has assumed liability. If so, the fact that the loss per se is covered by the scope of the insurance is irrelevant. Therefore, the insurer will probably be entitled to exercise his right of subrogation where the co-assured has incurred such liability.

On the other hand, where the drilling contract does not link the protection against subrogation to the contractor's liabilities, but rather provides the contracting party with an unspecified co-insurance cover or protection against subrogation, the result is probably a cover of the

[116] http://cefor.no/insurance_cond/InsuranceCond.htm

contracting party's liability to the assured, as the assured's insurance cover represents the "extent" of the benefit.

The NHC Co-Insurance Clause, as opposed to both §18-9 and the clause issued by Cefor, ties the liability of the insurer to the assured's liabilities pursuant to the underlying contract.

> Co-insurance shall within the frame of the vessels Hull & Machinery insurance conditions cover any claim and liability, including costs, which, according to the charterparty or other contract for the employment of the vessel between the Assured and the said Co-Assured, are the liability of the Assured. The co-insurance includes a waiver of rights of subrogation against the Co-Assured in respect of claims, liabilities or costs which are to be borne by the Assured under the terms of the charterparty or other contract for the employment of the vessel between the Assured and the said Co-Assured. Co-Assured are not entitled to membership in the association. The co-insurance period is for the duration of the charterparty or other contract for the employment of the vessel.

By connecting the insurer's liability to the assured's liabilities in the contract, the clause acknowledges the allocation of risk between the parties and the insurer avoids indemnifying the co-assured for loss for which he has assumed responsibility. If the co-assured wants cover of such contractual liability he will have to effect a separate liability insurance.

8 Conclusion

The knock-for-knock principle regulates three situations: i) each party assumes responsibility for any damage or loss caused to their own property; ii) both parties waive their right of recourse where they have covered a claim from a third party for liability to whom they have assumed responsibility in the drilling contract; and iii) the parties agree to hold each other harmless if they have covered a claim from a party

for whom they have not assumed responsibility. If the drilling contract is based on the knock-for-knock principle the contracting parties, i.e. the contractor and the operator, must be entitled to specific rights under each other's insurance, inter alia, protection against subrogation.

A protection against subrogation follows from the position as co-assured both under the LSDBF and the NMIP. However, while the co-insurance under the Norwegian conditions is dependent upon the party being granted such a position in the drilling contract, a party must be specifically named as assured in the insurance contract as well as having an insurable interest in the subject-matter insured in order to be co-assured according to English insurance law. Furthermore, the insurance cover of the co-assured under the LSDBF, contrary to the NMIP, is not necessarily coterminous with the cover of the assured. The co-assured is only protected against subrogation insofar as his insurance covers cover the casualty which has occurred.

The operator may also be protected against subrogation through a waiver of subrogation in the insurance contract. Both the NMIP and the LSDBF contains provisions to this effect.

Neither co-insurance nor a waiver of subrogation clause provides the protected party with an absolute protection against subrogation. Under both the NMIP and the LSDBF the insurer may invoke a breach of the rules relating to the duty of care against the co-assured. Likewise, a party benefiting from a waiver of subrogation under the NMIP may risk a claim from the insurer if the casualty was caused through gross negligence. Under the LSDBF the insurer may exercise his right of subrogation if the casualty was caused through wilful misconduct. Thus, there is a stronger protection against subrogation under English law.

Both the NMIP and the LSDBF provides the protected party with a right of direct action against the contracting party's insurer after covering a claim for which the contracting party has assumed liability. In the context of hull insurance this is relevant under the collision liability cover.

Under certain circumstances, property owned by the operator may be covered under the contractor's hull insurance. If the operator is co-

assured under the insurance he may claim against the insurer when such property has been damaged or lost. This is in breach of the knock-for-knock principle but it may still be a preferable solution, as the parties can use the standard insurance contracts and do not have to enter into individual negotiations.

The LSDBF and the NMIP differ as to the parties encompassed by the protection against subrogation. The NMIP ties the protection to "customary" regulations while the LSDBF only grants protection to parties for whom the contractor is operating under a specific contract. The former regulation is flexible while the latter greatly limits the extent of the knock-for-knock principle in the specific activity.

Finally, if the drilling contract departs from a mutual allocation of liability by, for instance, providing that the contracting party shall be liable for damage to the contractor's property under certain circumstances, the question arises as to whether the hull insurer will cover this liability based on the contracting party's position as protected against subrogation. Under the NMIP it seems that the insurer must base his defence on the regulation not being "customary". This may be insufficient and a provision linking the protection of subrogation to the assured's liabilities can better limit the insurer's liability in this case. On the other hand, this problem does not seem to arise under the LSDBF.

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http://cefor.no/statistics/documents/2010%20Cefor%20Fact%20Sheet.pdf

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List of Abbreviations

Cefor	The Nordic Association of Marine Insurers
ICA	Norwegian Insurance Contracts Act
IHC	International Hull Clauses
ILU	Institute of London Underwriters
IUA	International Underwriting Association of London
LMA	Lloyd's Market Association
LMOMUF	London Market Offshore Mobile Unit Form
LOGIC	Leading Oil & Gas Industry Competitiveness
LSDBF	London Standard Drilling Barge Form
MIA	Marine Insurance Act 1906
MODU	Mobile Offshore Drilling Unit
NHC	Norwegian Hull Club
NMIP	Norwegian Marine Insurance Plan
NSC	Norwegian Supreme Court
P&I	Protection & Indemnity

Deductibles as self insurance

The English and Norwegian approach

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Content

1 Introduction

A deductible in an insurance contract means that the insurer will deduct a certain amount (the "deductible") from the settlement in relation to a casualty or an insured event as defined in the insurance contract. The result of this is that the assured carries a part of the risk that is being insured. This self-insurance will depend on two issues: the first issue is the amount of the deductible, and the second is how often the deductible is to be applied. The amount will be agreed between the assured and the insurer when the contract is entered into, and raises no particular questions. The number of deductibles, on the other hand, may be more complicated. As a general starting point, the deductible will be tied to the insured event, being the event that triggers the insurer's liability. In cases where casualties occur separately with no connection in terms of cause, time or space, this will not cause any problem. However, if several instances of damages are interconnected in some way, distinguishing between one and more than one insured event may cause a problem. Needless to say, the problem increases in importance if the deductible amount is high. This is often the case in commercial contracts.

The distinction between one and more than one insured events in an insurance contract has been discussed both in Norway and internationally for many years. I wrote a lengthy article on this issue in SIMPLY 2003, which compared the solution in Norwegian law with the regulation in UK and US.[1] However, after this article was published, two new English court cases have been decided. In particular, one of them, the English House of Lords case: Lloyds - TSB General Insurance Holdings and others (Original Respondents and Cross-appellants) v. Lloyds Bank Group Insurance Company Limited (Original Appellants and Cross-respondents), cf. [2003] UKHL 48 (the TSB case), is interesting because it concerns a different definition of insured event than the previous

[1] Trine-Lise Wilhelmsen, "The distinction between one and more than one insured event", *SIMPLY* 2003, p. 105-186 (Wilhelmsen 2003).

cases, and this definition is apparently widely used in the English insurance market for professional liability insurance. Further, the TSB case contains some interesting remarks about the use of deductibles in commercial contracts.

In addition to seeing what new arguments may be gathered from the new cases, the purpose here is to take the comparative discussion one step further: to what extent can an English insurer expect that the English interpretation will be accepted in a Norwegian court; and if not, whether there are any arguments in favour of the English approach in this matter. The first question is of interest for Norwegian customers who effect insurance in the English market. This is a common choice for Norwegian professional entities. Further, the differences between the English and Norwegian solution and how an English clause may be treated in a Norwegian court will be of interest for the English insurance market. A Norwegian entity effecting insurance in the English market will often choose a Norwegian Choice of Law clause. As will be demonstrated below, this may result in a different interpretation than that which the English market expects. In particular, since the wording chosen in an English deductible clause has great significance for the premium required by the insurer, it is important to assess the risk of more claims being aggregated under one deductible than the insurer has estimated.

In general, the question of the distinction between one and more than one insured event occurs in two separate situations. The first situation is when there is a chain of causation between the first damage that occurs and the next. The typical example is when the insured object is damaged, and mistakes are made during the repair that result in more extensive damage.[2] This question must be seen in relation to more general issues of causation, and neither of the English court decisions deals with this. It will therefore not be addressed here. The second situation is where a common underlying cause materializes in several damages over a certain period of time. An example is where a vessel is damaged several times due to ice during a short trip down a river. This

[2] Cf. Wilhelmsen 2003 p. 126 ff.

is the issue to be discussed in this article.

In the following discussion, some general remarks on the use of deductibles as self-insurance are given in chapter 3. Thereafter, the English solutions are discussed in chapter 4. In chapter 5, the English clauses will be compared to the Norwegian interpretation; while the choice of interpretation where there is an English clause combined with Norwegian background law is addressed in chapter 6. In chapter 2, an overview of legal sources will be provided.

2 The legal sources``

The use of deductibles is not regulated in insurance acts either in Norway or in the UK, and is therefore decided by the parties to the insurance contracts. The main legal source is therefore the insurance contract. Normally, insurance contracts do not have preparatory documents. In Norway, there is however, one exception from this. The Norwegian Marine Insurance Plan 1996 Version 2010 (NMIP),[3] which regulates the use of deductibles in marine insurance, is supplied with a Commentary which reflects the parties' negotiations during the drafting process. [4] According to Norwegian legal method, the Commentary constitutes a preparatory document that carries significant weight when interpreting the conditions.[5] As the Commentary contains several observations on the concept of "each separate casualty", these will be presented here.

[3] http://www.norwegianplan.no/nor/index.htm

[4] http://www.norwegianplan.no/nor/index.htm
The Commentary to Version 2010 is not published. However, the Commentary to the 1999 Version, which is similar to the 2010 Version in regard to the issues discussed here, is published by Det norske Veritas, Elanders Publishing AS, Oslo 1999. References here will therefore be made to this Commentary.

[5] The status of preparatory documents to contractual regulation is discussed in ND 2000.442 NA *Sitakathrine,* ND 1998.216 NSC *Ocean Blessing*, ND 1991.204, NSC *Hardhaus,* ND 1978.139 NA *Stolt Condor, cf.* also Trine-Lise Wilhelmsen and Hans Jacob Bull, *Handbook in hull insurance*, Oslo 2007, p. 21, and Hans Jacob Bull, "Avtalte standardvilkår som privat lovgivning", *Lov, dom og bok*, Festskrift til Sjur Brækhus, ed. Thor Falkanger, Oslo 1988, pp 99-114, pp. 110-111.

Further, in both countries, the concept of event, casualty or a definition of these concepts through different serial damage clauses has been interpreted by the courts. These decisions concern the number of deductibles, or the numbers of sums insured, which are often tied to the same type of concepts. Court practice concerning the number of sums insured will therefore also be discussed here.

In Norway, disputes concerning insurance contracts are however mainly treated by the Insurance Complaints Board, which is a board consisting of members from the insurance community and representatives of the assured, and headed by a neutral chairman.[6]

3 The use of deductibles as self-insurance

Traditionally, the main reason for including a deductible in a policy is to obtain cost-efficient insurance coverage. [7] Insurance is a costly method of financing risk because, in addition to the expected damage, the assured will have to pay for the insurer's administration costs and overheads, safety funding and surplus. In general, it is estimated that 70 % of the premium relates to expected damage and 30 % to overhead etc. For incidents of damage below a certain level where the assured is able to pay for the damage out of his own pocket, without the need of external financing, it is, therefore, generally, more economic if insurance is not triggered. [8] It is further presumed that a deductible has a deterrent effect.[9] If any damage is fully compensated by the insurer, this may induce the assured to be less careful than he would have been if he had to pay for the damage himself.

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6 The FSN makes decisions in disputes between the assureds and the insurers. The board's decisions are not binding upon the parties, but are mostly followed.

7 Wilhelmsen: Egenrisiko i skadeforsikring, Oslo1989 (Wilhelmsen 1989), p. 48 ff. and p. 374 ff.

8 See for a more formal law and economic discussion of this point Wilhelmsen 1989 p. 384 ff., and references in notes 15-19.

9 Commentary NMIP Part I p. 170, Wilhelmsen 1989 pp. 53-54.

However, as deductibles reduce the overall payments from the insurer, the result will be a general reduction in premiums for the benefit of the assured. Particularly in commercial contracts, deductibles are often agreed at a much higher level so as to exclude minor casualties in order for the assured to reduce premium costs.

The consideration of avoiding minor casualties and reducing premium must, however, be balanced with the purpose of insurance, being to finance risk for the assured. It is important that the deductible should not be so large or be paid so often that this purpose is defeated.[10] In this latter respect it is of importance to determine how the event that triggers the deductible is to be determined.

4 The English clauses

4.1 Some starting points

English court decisions concerning the distinction between one and more than one insured event concern mainly the sum insured, either in direct insurance or reinsurance. However, the approach in the interpretation seems to be that the concept of event, or the unifying factor in an aggregation clause, should be interpreted according to the language used, without regard to the interest of the assured in the matter. This is expressly stated in regard to the number of deductibles in the TSB case[11].

> The TSB case concerns miss-selling of personal pension schemes. The marketing of such schemes was regulated by the Social Security Act 1986 (FSA), and the company selling the schemes had to comply with the rules published in accordance with the Act. The

[10] Wilhelmsen 1989 pp. 57-60.

[11] Lloyds - TSB General Insurance Holdings and others (Original Respondents and zCross-appellants) v. Lloyds Bank Group Insurance Company Limited (Original Appellants and Cross-respondents), cf. [2003] UKHL 48 (the TSB case)

TSB group breached these rules by persuading many employees to transfer to personal schemes without adequate advice. About 22,000 employees claimed their losses were covered by the TSB group. The claims were all below £35,000, but in total the TSB companies paid out more than £125 million in compensation.

The TSB group had effected a Bankers Composite Insurance Policy with a captive within the group. The captive's risk was reinsured, and the question was therefore whether the claims were covered by the reinsurance. The claims for miss-selling were covered by the insuring clause of the policy, but the insurance also contained a deductible clause. As a starting point, the deductible was of £1 million "each and every claim", but it contained a serial damage or aggregation clause with the following wording:

"If a series of third party claims shall result from any single act or omission (or related series of acts or omissions) then, irrespective of the total number of claims, all such third party claims shall be considered to be a single third party claim for the purposes of the application of the deductible."

In the discussion of this clause, the judge stated inter alia that:

"The choice of language by which the parties designate the unifying factor in an aggregation clause is thus of critical importance and can be expected to be the subject of careful negotiation; as Lord Mustill observed in the *Axa* case [1996] 1 WLR 1026, 1035, among players in the reinsurance market "keen interest [is] shown…in the techniques of limits, layers and aggregations" (sec. 17).

This was further emphasised by the second judge:

"Policies also normally contain clauses which limit the liability of the insurer under the policy and such clauses may provide a limit by reference to individual losses or claims but give the insurer the right to aggregate losses or claims so as to enable him to apply the limit to that aggregate. It will, therefore, be appreciated that aggregation clauses may favor the assured or the insurer and in some policies the same aggregation clause, because it qualifies both a

> deductible clause and a limit clause, may at times work in favor of the assured and at other times in favor of the insurer. Aggregation clauses thus require a construction which is not influenced by any need to protect the one party or the other. They must be construed in a balanced fashion giving effect to the words used" (sec. 30).

The court refers to the Axa case,[12] where a similar approach had been voiced in regard to the relationship between the excess of loss clause to be paid by the reinsured under a reinsurance policy and the limit of liability for the reinsurer under the same policy.

> This case concerned a reinsurance contract, where the unifying factor was claims "arising out of one event". In the underlying direct insurance, the unifying factor was "arising out of one originating cause". The lower court held that these expressions were identical for insurance purposes, but this was rejected by the House of Lords. The judge stated that in excess of loss reinsurance it could not be assumed that aggregation clauses in the underlying insurance are intended to have the same effect as aggregation clauses in the reinsurance. The underwriting strategy would not necessarily be the same for the direct insurer and the excess-of-loss insurer. The direct insurer could evaluate the individual risk according to his knowledge of the policy holder, the claim frequency, and the way the claims would be divided between claims lower than and above the deductible, and limit his risk by the use of deductibles and aggregated limits in the individual policies and by effecting reinsurance. The reinsurer, on the other hand, would have to take a broader view because he could not rate the individual risk. The elements of prudent underwriting were therefore not the same for the direct insurer as for the excess-of-loss reinsurer.

This approach implies that it does not matter whether the aggregation clause concerns the deductible or the sum insured, but that each clause

[12] Axa Reinsurance (UK) Plc. v. Field (1996) 2LLR 233. A similar point was made in Countrywide Assured Group v DJ Marshall & others (2003) 1 All ER (Comm) 237, where the deductible was tied to each occurrence, whereas the sum insured contained an aggregation clause with cause as unifying factor. The assured claimed that this combination was contrary to the nature of insurance, but this claim was denied.

must be interpreted according to the language used.[13] In general, the English approach concerns three different aggregation clauses: losses that arise out of the same event, losses arising from one originating cause and "any single act or omission (or series of acts or omissions)".

4.2 "Cause" as a unifying factor

The concept of "cause" as a unifying factor was first discussed in *Cox v. Bankside Members Agency Ltd.* (1995) 2 Lloyd's Rep. 437.

> The case concerns the sum insured under E&O insurance which was tied to "any one occurrence or series of occurrences arising from one originating cause". Three underwriters had failed to have sufficiently regard for the correct principles of underwriting in relation to the effect of the spiral. The judge found that the failure of an individual that led him to commit a number of negligent acts could arguably be said to constitute the single event or originating cause responsible for all the negligent acts and their consequences. However, this was not true when a number of individuals each acted under an individual misapprehension. This was so, even if the nature of this misapprehension was the same. The result was therefore that each individual underwriter was a separate originating cause. Since there were three underwriters, the result was that there were three originating causes.

In this case, even if the nature of the failures was the same, there was nothing to unify the failures. There was therefore no "originating cause" that was behind the three failures.

The concept of "cause" was further elaborated in the *Axa* case, where the judge made a comparison between *the* expressions "arising out of one event", and "arising out of one originating cause":

[13] There appears to be en exemption from this rule in regard to proportionate reinsurance, at least when the language may be interpreted as having the same meaning, cf. *Mann and Holt v. Lexington Insurance Co* [2001] LRLR 179 (GA) concerning a deductible for each location and any one occurrence and sum insured for each occurrence, cf. further Wilhelmsen 2003 p. 160.

> "In my opinion these expressions are not at all the same. In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way … . A cause is to my mind something less constricted: it can be a continuing state of affairs; it can be the absence of something happening. Equally, the word "originating" was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses it sought to aggregate. To my mind the one expression has a much wider connotation than the other."

This interpretation of original cause was agreed to in Countrywide Assured Group v DJ Marshall & others:[14]

> C was held liable for a number of instances of pensions miss-sellings due to the lack of training given to its salespeople, and therefore made a claim under its professional liability insurance. The policy contained a limit for the liability of 1 million pounds for each claim. The concept "any claim" was defined as "all occurrences of a series consequent upon or attributable to one source or original cause". C argued inter alia that the claims should not be aggregated as each individual miss-selling was a separate event. The judge said that the words "event, occurrence or claim" describe what has happened, whereas the word "cause" describes why something has happened. "Originating cause" therefore entitles one to see if there is a unifying factor in the history of the claims, which here was the lack of training.

It follows from this that the concept of "cause" refers back to a unifying factor in the history of the claims, and that a characteristic feature of such unifying factor is that it can explain why something has happened. On the other hand, a series of similar mistakes is not sufficient to make the mistakes unified if the similarity does not have a common explanation.

[14] (2003) 1 All ER (Comm) 237.

4.3 "Event" as a unifying factor

The concept of "event" as unifying factor was first discussed in a series of cases which all concerned failure to investigate risks before underwriting them. The first case is Caudle v. Sharp:[15]

> The case concerned an underwriter A who was negligent in underwriting 32 reinsurance contracts without conducting the necessary research and investigations into the problems of asbestosis. The reinsurers sued under A's E&O insurance. B, who settled the claim against A, claimed recovery under his own reinsurance. The question was whether the losses under all 32 contracts could be aggregated for the purpose of a claim under the reinsurance. The arbitrators held that there was only a single loss arising out of one event, namely, the negligence of A in writing the contracts without conducting the necessary research and investigations into the problems of asbestosis. This failure was the occurrence that gave rise to the series of losses.
>
> The award was upheld on appeal, "…on the basis that there was a continuing state of affairs amounting to an event out of which the losses arose, rather than on the basis that the writing of the 32 contracts taken together was an event " (p. 87).
>
> The Court of Appeal however, did not agree to this interpretation. The judge stated that a
>
> "failure to conduct the necessary research and investigation into the basic underlying problem of asbestosis" could not properly be decided as an "event" within the clause because it was a happening without beginning and without end. The failure was an omission that could constitute negligence, but it did not become a negligent omission until (A) underwrote a relevant policy of insurance. Until he did that, his failure was not negligent, however deficient in general knowledge expected of an underwriter he may have been; he was not obliged to accept insurances of this sort. A negligent

[15] *Caudle v. Sharp* (1995) L.R.L.R. 80, appeal in *Caudle v. Sharp* (1995) 2 L.R.L.R 433 (CA)

> omission could not be an event within the usual meaning of the word until the first of the insurance contracts was entered into. The negligent act and the relevant occurrence arose out of his decision to underwrite the insurance rather than from his previous failure to inform himself of what he should have known. The failure to conduct the necessary research and investigation does not fall within the natural and normal meaning of the word "event" except by reference to each and every occasion when he entered into an insurance contract, which given his lack of knowledge it was negligent for him to do so. In my judgment his ignorance of failure cannot be regarded as a single event …"

This approach was agreed to in the *Axa* case, referred above in 4.1 and 4.2. It is thus clear from the *Axa* and the *Caudle v. Sharp* cases that a negligent omission does not in itself constitute an event. Rather, the failure must manifest itself through the negligent act that results in a loss that is the basis for a claim, i.e. writing a contract, in order to qualify as "event".

The concept of "event" as a unifying factor has also been discussed in war risk insurance against loss or damage of property. The first case is an arbitration award concerning excess of loss reinsurance called the *Dawson Field Award16* :

> Four aircrafts were hijacked by the Popular Front for the Liberation of Palestine (PFLP) in 1970. The hijackings were conceived and designed as a means to procure the release of terrorist prisoners. One aircraft was placed in Cairo and the other three were placed at Dawson Field. The jet at Cairo was blown up first, partly as an incentive to enforce their demands in respect of the other three planes. When PFLP's demands were not met, they decided to blow up the remaining three planes. The explosions at Dawson Field took place within some five minutes.
>
> The arbitration arose under an excess-of-loss reinsurance contract

[16] The award is dated 29 March 1972. It is not published, but is extensively cited in another case, *Kuwait Airways Corporation and Another v. Kuwait Insurance Co. S.A.K and Others* [1999] 1 Lloyd's Rep. 803, which is referred below.

> containing an excess-of-loss clause that spoke of "the ultimate net loss sustained in respect of each and every loss ... and/or occurrence and/or series of occurrences arising out of one event". The question was whether the loss of the aircrafts arose out of one event. The judge stated that the concept of "event" was identical to "occurrence" and denotes something which happens, a happening. … Whether or not something which produces a plurality of loss or damage can properly be described as one occurrence … depends on the position and viewpoint of the observer and involves the question of the degree of unity in relation to the cause, the locality, the time and, if initiated by human action, the circumstances and purposes of the persons responsible." The judge emphasized that "a plan cannot by itself constitute an event". In his view, the "destruction of the aircraft arose from the decision or order to detonate the explosive charges in them, which was thereupon carried out in the way described above. If three aircraft became total losses because of a decision or order to blow them up together was carried out, why is the carrying out of the decision or the order not one event?"

The result conforms to the *Caudle v. Sharp* case, in that similarly to a failure, a decision does not constitute an event before it materializes into an act that can be described in terms of how and when it happened. If the decision materializes through an act that results in a plurality of losses or damages, the concept of one event depends on the "degree of unity in relation to the cause, the locality, the time and, if initiated by human action, the circumstances and purposes of the persons responsible". This view was further developed in the *Kuwait Airways* case,[17] which concerns the number of sums insured under a direct war insurance policy.

> During Iraq's invasion of Kuwait the forces took control over Kuwait Airport 2 August 1990. On the ground at the airport were 15 planes belonging to KAC. Within a week, 14 of the 15 aircraft had left Kuwait. The fifteenth left just afterwards. KAC claimed the loss of the 15 aircrafts from their war-risk insurers. One of the

[17] *Kuwait Airways Corporation and Another v. Kuwait Insurance Co. S.A.K and Others* [1999] 1 Lloyd's Rep. 803.

> questions was whether the loss of the aircrafts constituted "one occurrence", or whether the aircrafts were separately lost when they were flown out from Kuwait Airport. The underwriters contended that as all the aircrafts were lost altogether on the first day of the invasion this constituted a single occurrence and that the subsequent removal of the aircraft from the airport to the Iraqis should be seen as the logistics of their disposal, subsequent to their loss. The judge agreed and stated inter alia:
>
> "An occurrence … is not the same as a loss, for one occurrence may embrace a plurality of losses. Nevertheless, the losses' circumstances must be scrutinized to see whether they involve such a degree of unity as to justify their being described as, or as arising out of, one occurrence. … In assessing the degree of unity, regard may be had to such factors as cause, locality and time, and the intentions of the human agents. An occurrence is not the same thing as a peril, but in considering the viewpoint or focus of the scrutineer one may properly have regard to the context of the perils insured against".
>
> It was held that as the aircrafts were all lost on 2nd August, there is unity of time and unity of location. Further, "there is unity of cause, for, whichever of the insured perils is the appropriate one, it operates alike for all aircrafts". There is also unity of intent. The judge concluded: "the occurrence is the successful invasion of Kuwait, incorporating the capture of the airport and with it KAC's aircrafts on the ground; at its narrowest, it is the capture of the KAC fleet at Kuwait airport. On either view, it seems to me those matters are appropriately described as one occurrence."

According to the interpretation of "event" in previous cases, both the decision to fly the airplanes out of the airport and the initial capture of the airplanes may be described as an "event"; the capture can be described in terms of how and when it happened, and the decision to fly the airplanes out materialized in a loss for the assured. The direct cause of the loss is the decision to fly the aircrafts out. However, once the aircrafts were captured, they were in reality out the owner's control, and therefore lost to him. The solution therefore seems to be that if one event triggers a new and more direct event leading to the loss, the first

event is decisive if the loss for the assured may be established at this point in time. But if the first event only triggers a potential loss, and not an actual loss, this does not constitute an event; cf. *Mann and Holt v. Lexington Insurance Co* [2001] LRLR 179 (GA):

> During civil unrest 22 Ramayana stores in Java were damaged over a period of two days. One issue between the parties was whether this riot damage constituted one occurrence or a number of occurrences. Applying the reasoning in the *Dawson Field* case and the *Kuwait Airways* case for establishing the meaning of the word "occurrence" in an insurance context, the judge stated that there was no unity as to time or place. The only point of unity that one could attempt to prove was that the riots were centrally orchestrated by the government. It was, however, the judge's view that it would still be "difficult to conceive of a situation in which, if the properties were some distance apart, and, if there was a lack of unity of time, there could still be one occurrence by virtue of some factor such as 'orchestration'". It was held, therefore, that the losses constituted more than one occurrence within the meaning of retrocession, by reason of the different localities and times at which they occurred.

In the *Kuwait Airways* case and the *Dawson Field* case the decisive "event" can also be described as the common underlying cause of the losses. However, the relevant cause is the decision to destroy (*Dawson Field*), or the seizure of Kuwait or the Kuwait Airport, which materializes in a direct loss for the assured. Both the *Dawson Field* case and the *Mann and Holt* case state that the overall plan behind the act cannot as such be an occasion. The *Mann and Holt* case conforms to the *Dawson Field* case in that an overall plan lying behind all the incidents of damage is not sufficient for the incidents to constitute one event. This seems to conform to the decision of the *Axa* case and the *Caudle v. Sharp* case that a negligent omission does not in itself constitute an event.

4.4 "any single act or omission (or series of acts or omissions)"

The last unifying factor is "any single act or omission (or series of acts or omissions)", which is a normal wording in professional liability insurance. This wording was interpreted in the TSB case, which is referred above in 4.1. The question was whether the 22,000 claims raised against TSB would trigger one deductible for all the claims, or one deductible for each claim.

> As a starting point, the deductible was of £1 million for "each and every claim", which barred any recovery for the claims against TSB under the policy. However, the deductible clause included the following aggregation clause:
>
> "If a series of third party claims shall result from any single act or omission (or related series of acts or omissions) then, irrespective of the total number of claims, all such third party claims shall be considered to be a single third party claim for the purposes of the application of the deductible."
>
> The question was whether the aggregation clause could be used in this case. The court agrees that the unifying factor is a common cause, but that cause is described as a "single act or omission" or, by an extension in the parenthesis, a "related series of acts and omissions". So the question turns upon the meaning of an "act or omission" or "related series of acts or omissions" (18). The term "act or omission" was seen in relation to the clause defining the insurer's liability for third party loss, where the relevant part was that the insurer was liable for a breach of the regulation "in respect of which civil liability arises on the part of the assured". An "act or omission" must therefore be something which constitutes the investor's cause of action.
>
> It cannot mean an act or omission which is causally more remote. The court found it "therefore necessary to examine the nature of the cause of action asserted by the 22,000 claimants. According to the regulation, TSB had a duty to "ensure that" company

representatives comply with the regulation. A duty to "ensure that" something does or does not happen is the standard form of words used to impose a contingent liability which will arise if the specified act or omission occurs." Once the act or omission occurs, the company is liable. (21)

The absence of a training or monitoring system, however, even though an independent breach of the rules, was legally irrelevant to the civil liability of the TSB companies. What triggered the civil liability for the TSB companies was that their representatives actually contravened the Code. This was regardless of the establishment or failure to establish any training and monitoring system. Therefore, this failure could not have been an act or omission from which liability resulted (22). In the present case, the act or omission which gave rise to the civil liability in respect of each claim (failure to give best advice to that investor) was different from the acts or omissions giving rise to the other claims (23).

The court thereafter addressed the expression "(or related series of acts or omissions)". The court pointed out that "the parties started by choosing a very narrow unifying factor: not "any underlying cause", not "any event" or even "any act or omission", but only and specifically an act or omission which gives rise to the civil liability in question (25). This very narrow starting point presumably also had a bearing on the meaning on the content of the parenthesis (26). A main argument here was that the sentence in the parenthesis does not in itself provide for a unifying factor such as a "single underlying cause" or "common origin". The clause only states that the acts or omissions must be "related" and a "series", and that they "result" in a series of third party claims. The implication of this is that the unifying element is a common causal relationship. But "that common causal relationship" is, so to speak, downstream of the acts and omissions within the parenthesis. They must have resulted in each of the claims. This obviously does not mean that it is enough that one act should have resulted in one claim and another act in another claim. That provides no common causal relationship. It can only mean that the acts or events form a related series if they together resulted in each of the claims. In this way, the parenthesis plays a proper subordinate role of covering the case in which

> liability under each of the aggregated claims cannot be attributed to a single act or omission, but can be attributed to the same acts or omissions acting in combination"(27).

The deductible is here tied to each "act or omission". A failure to establish a sufficient training program is an omission, but the court argues that this omission is not relevant because it is not sufficient to trigger the insurer's liability. The insurer becomes liable only when the third party has suffered a loss, which obviously can only materialize after the individual seller has sold the pensioning scheme. In this respect, the decision conforms to the *Axa* and the *Caudle v. Sharp* cases in that a failure does not constitute an "event" for the purpose of the deductible until it has manifested itself through the negligent act which results in the loss that is the basis for a claim, i.e. writing a contract. The basis for the result is, however different. By using the word "event", an "omission" is outside the concept of the unifying factor. In the *TSB* case, "omission" is included as a unifying factor, but it is argued that the omission must be the proximate cause of the loss. This also conforms to the reasoning in the *Dawson* case: general unrest would similar to the omission to establish a training program create a risk for loss through theft or liability for miss-selling, but the actual loss did not occur until the act of theft or selling had taken place.

4.5 Summary

Thus, according to the English court decisions, the three different clauses analyzed here have distinctively different meanings, moving from the most narrow "any single act or omission (or series of acts or omissions)" through an "occurrence" or "event" to the widest "cause". The first expression implies that the "act or omission" must be the proximate cause of the loss, and leaves little room for aggregation. An "occurrence" is synonymous with an "event", but not necessarily equivalent to a single "loss" or the happening of an insured peril. On the other hand, an occurrence or an event is a narrower concept than a

cause. An occurrence or an event is something that happens at a particular time, at a particular place, in a particular way. A condition, an absence of something happening, an omission or a plan cannot be an event, but may constitute a cause. The distinction between one event and several events depends on the position and viewpoint of the observer and involves the question of the degree of unity in relation to the cause, the locality, the time and, if initiated by human action, the circumstances and purposes of the persons responsible.

5 The Norwegian solution

5.1 The approach

In Norwegian insurance, the distinction between one and more events has been discussed, partly in relation to the number of deductibles, and partly in relation to the number of sums insured. None of the cases discuss the significance of this difference between the issues. However, according to Norwegian legal method, it is clear that the purpose of the clause and policy considerations constitute relevant arguments. As these arguments differ in relation to the two issues, the result of the interpretation may also differ. In particular, it is a relevant argument that unclear conditions should be interpreted against the person who wrote them. This will in most cases be the insurer, which implies that in cases of doubt, the clause should be interpreted against him. In relation to the numbers of sums insured, this means that the clause would be interpreted in a wide sense, whereas a more narrow interpretation may be expected in regard to the number of deductibles.[18] It is therefore not obvious that the result will be the same.

The deductibles will normally be tied to "each insured event" or "the settlement". These concepts will be discussed below.

[18] Wilhelmsen 2003 p. 20 and note 37 for further references, Bull p. 230-232.

5.2 One deductible for each insured event

The concept of "each event" is the ordinary starting point for the calculation of the number of deductibles in Norwegian insurance policies.[19] As a starting point, it is easy to follow the English interpretation that an event is something which happens, that can be described in terms of how and when it occurred. In relation to insurance contracts, the concept of "event" further seems to refer to the actual accident that triggers the insurer's liability. Without such liability, there will be no compensation from which to make deductions. This also seems to conform to the English reasoning, although explained in a different way.

This narrow interpretation was used in the first case where the distinction between one and more than one event was an issue.[20] However, this case concerned the number of sums insured, and the narrow interpretation was therefore in favour of the assured, because the result was that three road accidents due to a slippery liquid spilt on the road triggered more than one sum insured. In relation to the number of deductibles, the interest of the assured is opposite, namely a wide aggregation clause in order to limit the number of deductibles. This case is therefore not necessarily relevant for the number of deductibles.

In later cases, the concept of event is interpreted in a somewhat wider sense. In 1973, the Norwegian Supreme Court interpreted a deductible clause in a marine insurance policy. The deductible was USD 100,000 for "claims arising out of each separate accident". It was further stated that:

> "For the purpose of this clause each accident shall be treated separately, but it is agreed (a) that a sequence of damages arising from the same accident … shall be treated as though due to one accident …"

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19 Wilhelmsen 2003 p. 12 ff, Bull: Forsikringsrett, Oslo 2008 p. 231.

20 RG 1952.232 (slippery liquid spilt on a road and resulted in several car accidents. The court held that one sum insured should be paid for each accident), cf. also Wilhelmsen 2003 p. 15

The Sunvictor grounded due to ice in the cooling water intake on a trip from Montreal to Quebec. The grounding and the salvage resulted in further ice damage. After the salvage, Sunvictor sailed to a port of refuge, but continued early the next morning to Quebec to avoid becoming icebound. During this trip the Sunvictor sustained further ice damage.

It was agreed that the grounding due to ice in the cooling water intake and the ice damage during refloating was one accident, but the insurer claimed that the ice damage sustained on the voyage from Trois-Rivières to Quebec was a new accident. The Supreme Court held that the entire sequence of incidents of damage constituted one accident for the purpose of the deductible. Part of the reasoning was that the later ice damage was caused by the fact that the Sunvictor was delayed during the grounding, and during this period the ice problem in the channel grew more serious, thus increasing the risk of further damage. However, the court also stated that there was no need to decide whether such causation between the different occurrences of damage was a condition of the clause, as the decisive factor in this case was that all the damage was caused by the same underlying cause, namely, "the general ice situation on the St. Lawrence River". The judge pointed to the fact that all the damage was a result of the ice problems on the river. Ice problems led to the grounding, which made it necessary to bring the Sunvictor to safety, and during this attempt, further damage occurred, again due to ice and in a situation where the captain had no choice as to where to take the vessel. The chain of events from the time the Sunvictor was grounded to its arrival in Quebec thus constituted a sequence of incidents of damage according to the deductible clause. The ice problems from Trois-Rivières to Quebec could not be viewed as a "new peril", as the underlying problem was the ice, and it was not unforeseeable that further ice damage could occur.

The expression "each separate accident" as a starting point focuses on the immediate event triggering the damage and not on the underlying cause of this event. This is particularly so when the cause, as in this case, is a condition, namely the ice condition in the channel. However, the

serial damage clause implies that all incidents of damage caused by the same accident shall be unified for the purpose of the deductible. But the unifying factor is qualified as an "accident", which again seems to place some restrictions to the application of the clause. From a language point of view one should think that the clause refers to a "series of damages" in a causal chain starting when the first accident had taken place, which conforms to the first part of the judgement, and is similar to the reasoning in the *TSB* case. But the court also states that the incidents of damage were caused by the same underlying cause, the ice conditions in the channel, thus opening the door for a wider interpretation. The reasoning for this solution seems to be partly that the "captain had no choice", which may imply that considerations of deterrence did not favour a second deductible, and that further damage was foreseeable, which is a more general causative argument.

As the court found that there was causation between the two incidents, there was no need to discuss the common underlying peril. Even so, the solution is generally accepted in marine insurance,[21] and it is referred to in a later case from the Appeal Court in Gulating Appeal Court 27.11.2002, but here in relation to the number of sums insured:

> A technical consultant company committed three different errors in its technical calculations for a building project. The errors resulted in the subsidence of the construction floor due to insufficient reinforcement. The builder claimed that the subsidence should be allocated different percentages for the three different errors, thus triggering three liability limitation sums under the consultant contract and three sums insured under the liability insurance contract for the consultant company. Both the liability limitation sum and the sum insured were related to "each incident of damage".
>
> The judge concluded that the subsidence of the floor constituted one incident of damage and that only one liability limitation sum and sum insured could be claimed. A key point was that the lack of sufficient reinforcement was caused by the use of a special

[21] Commentary to the Norwegian Marine Insurance Plan 1996 to § 4-18 (sum insured per casualty) and § 12-18 (deductible per casualty), cf. also Bull p. 235.

> calculation method, and the consultant's lack of understanding of, or experience with, the functioning characteristics of the building material that was being used for the construction floor. Thus, even if several different errors were committed, these errors were brought about by a common underlying cause, i.e. a lack of understanding of the functioning of the building material. It was added that the different errors were committed during a limited period and concerned the same question, namely, the calculation and evaluation of the reinforcement required and the choice of the reinforcement method for the floors. Thus, the three different errors constituted one "complex of causes" with errors that were related. However, the judge also pointed out that even if it were technically possible to attribute the subsidence of the floor to the different errors, it was not natural to divide the subsidence into three different incidents of damage for the purpose of the sum insured.

In this case, one could argue that, since there was only one incident of damage (subsidence of the floor), it was irrelevant that this was caused by more than one error. Even so, the judge also emphasised the connections between the errors, and the fact that the three different errors made during the project had a common underlying cause, viz. a lack of understanding of, or of experience with, the functioning characteristics of the building material. This implies that an underlying error consisting of the lack of understanding or of experience may constitute the operative "event" for the purpose of the sum insured.

This interpretation of the concept of event is also supported by the Commentary to the Norwegian Marine Insurance Plan 1996. In Norwegian Marine Insurance, the sum insured and deductible is tied to "each separate casualty". In relation to the sum insured, the Commentary states that some guidance may be found in case law concerning limitation of liability under section 175 no. 4 of the Norwegian Maritime Code, which ties the limitation of liability to "the sum total of all claims arising from one and the same event".[22] The distinction between one and more than one event for the purpose of the number of limitation funds was discussed in Rt. 1984.1190 *Tønsnes* and Rt. 1987.1369 *Ny Dolsøy*:

[22] Commentary NMIP 1999 p. 171.

In Rt. 1984.1190 Tønsnes, the trawler Tønsnes damaged seven net loops owned by five fishing vessels during one hour of fishing. The owner of Tønsnes accepted that he was liable for the damage, but claimed that he had a right to limit his liability according to Chapter 10 of the Maritime Code of 1883, and that all claims "arose from one and the same event" according to the previous Maritime Code of 1883 § 235. As the total losses exceeded one limited liability sum the claims would, in order to be covered, have to be reduced pro rata. The injured ship owners, on the other hand, claimed that there was one event for each net loop that was damaged by the trawl during the time it was out, i.e. altogether seven events.

The Supreme Court decided that all the claims in the case arose out of "one and the same event". The reasoning of the court was that all the sustained damage was caused by one particular disposition – the shooting of the trawl – and that the trawl was in use for a limited period of time (approximately 70 minutes). The fact that the trawl could have been withdrawn earlier, and with the exercise of greater care should have been withdrawn earlier, would not have led to a different result.

Rt 1987.1369 Ny Dolsøy (ND) concerned damage caused by contaminated bunker oil. The oil was delivered from Norske Fina AS, and was loaded onboard Ny Dolsøy one week after Ny Dolsøy had delivered the catch from the previous fishing. Ny Dolsøy delivered the oil to two fishing vessels within the same fishing area with 24 hours between the deliveries. After a short period both these vessels experienced problems with their engines, and it was claimed that the bunker oil had been contaminated. After an unsuccessful claim against Norske Fina AS for damages, a claim was made against Ny Dolsøy. One question concerning this claim was whether the delivery to the two vessels constituted one or two events in regard to the previous Maritime Code § 235.

The majority of the Supreme Court (three against two) decided that the two deliveries had to be regarded as "one and the same event". The court found that the bunker oil that was delivered to the two fishing vessels was contaminated, and that the contamination was caused by the failure to clean the tanks of Ny Dolsøy after the

> previous fishing. The majority further decided that the claim should be limited to one limitation fund. The reason for this was that liability was caused by the same negligent act, namely, the failure to clean the tanks and the pipe system of Ny Dolsøy. Further, the bunker oil was delivered according to a single order to vessels that were situated in the same fishing area and within a connected operation, even if some time had to pass between the two individual deliveries. The majority was of the opinion that the connection between the two deliveries was of such a nature that it accorded with normal interpretation to characterize them as one event.

These two cases concern the interpretation of "one and the same event", which can be compared with the concept of an insured event without any aggregation clause or further definition. Thus, from an interpretative point of view, it could be argued that the "event" was the incident of damage caused by the negligence and not the negligent act itself. This is particularly relevant to the *Ny Dolsøy* case, because the failure to clean the tanks and the pipe system is more similar to an absence of an event, i.e. of cleaning, than to an event. The *Tønsnes* case is more complicated because the negligence here consisted of an event, i.e. the shooting of the trawl. However, if the interpretation is accepted, the result must be that the negligence causing the damage should be treated in the same way, regardless of how the negligence came into force. Also, a more narrow interpretation would be favoured by policy considerations, i.e. to protect the injured third parties against an uncovered financial loss. The need to protect the negligent party is more limited because he already has a right of limitation. [23]

Hence, the results of these two cases are somewhat surprising. It does however indicate that the Norwegian Supreme Court tends to aggregate claims if they stem from a common underlying cause in spite of the wording of the rule applied.

These decisions in relation to the concept of event also conform to the approach in the Commentary to the Norwegian Insurance Plan in relation to the number of deductibles, in situations where several in-

[23] Wilhelmsen 2003 p. 140-141.

stances of damage are caused by an error in design.[24] According to the Commentary, there is one casualty if 1) there is one error in design or a similar error, 2) this error results in the same kind of damage within the same insured unit and within a limited period, and 3) once the error is made, it is foreseeable that this error will affect several parts of the unit. On the other hand, if the assured can be blamed for not having avoided the new cracks, a new deductible should be applied. The Commentary therefore seems to place more weight on the deterrent effect here than in the *Tønsnes* and *Ny Dolsøy* cases.

FSN practice creates a less clear picture, but may be more in conformity with the English interpretation of the concept of "event". In cases where there are fractures in pipelines or water damage due to such fractures, the starting point is that, if there is no connection between the several fractures that are discovered at the same time, each fracture constitutes one event.[25] On the other hand, if the cracks stem from the same underlying cause and are also connected in time, they may constitute one event,[26] but not necessarily.[27]

In cases where several instances of vandalism or theft are done by the same person over a certain period, a deductible is decided for each instance even if caused during a limited period of time.[28] This seems to

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24 NMIP § 2-18, Commentary NMIP version 1999 to § 2-18 p. 322, cf. Wilhelmsen 2003 p. 141-142.

25 FSN 1876, 6521, 5007,

26 FSN 1882: Two fractures in the same pipeline caused by corrosion due to stress. The second was discovered right after the first was repaired. One deductible was applied, FSN 2079 Four fractures in a sewage pipe due to pressure from two different sources. The underlying cause was the weakness of the pipe under pressure, and one deductible was applied. The cause of the weakness is not discussed, 2011-249: Four fractures in the waterpipe system in the house due to weakening of the pipes because of low PR value in the water triggered one deductible. Se also FSN 3499.

27 FSN 2464 Water damage to twelve bathrooms in a hotel, appearently due to some leakage in the structure. The majority of the Board found that as the extent and spread of the damage was different in the different rooms, the result was twelve deductibles. The minority found that the instances of damage sprang from the same cause, that they were detected at the same time, and thus constituted one accident. FSN 4657: Three fractures probably due to work on the neighbouring area 15 years ago creating movement in the ground.

28 FSN 3472, FSN 4016, FSN 3060, cf. also 5241, 4052 and 2504.

conform to the English *Dawson* case. On the other hand, if several incidents of vandalism occur as the result of the same error or act, or by one or more acts during the same occasion, only one deductible is applied.[29] This result may be compared to the *Kuwait Airport* case.

In liability insurance, the term each "incident of loss" has been interpreted to refer to each separate case of liability, even if the error was made by the same person and resulted in the same type of loss.[30] This also seems to conform to English practice. A similar interpretation has been made in regard to a serial damage clause stating that "losses caused by the same error, omission or misunderstanding of factual or legal matters shall be regarded as one incidence of damage" in cases where the board found no interconnection between the errors.[31]

5.3 One deductible for each settlement

As a starting point, the word "settlement" refers to the insurer's calculation of the damage, which is different from the concept of "event". If several events are discovered at the same time, notified to the insurer at the same time and the payment made in a common settlement, it may be argued that "settlement" is a different concept from "insured event". On the other hand, if one event results in a settlement and it is later discovered that this event caused more damage than was first established, one event may then result in two settlements.

The first solution can be illustrated by practice from the FSN Board.[32] The board has argued that when a common underlying factor or cause

[29] FSN 3053: Damage to house by water leaking down from the roof. The water came from three holes made in the floor of a built-in veranda above the room. The Board found it likely that the holes had been made on one occasion and one deductible was applied

[30] FSN 2436 (22.12.1995) Accounting company liable for 19 delay penalties towards 19 customers for a period of ca 6 months due to delivery of tax report after the time limit.

[31] FSN 2509 Eight design errors made by an engineering company triggered eight deductibles because the errors were of a different character and with different consequences for different parts of the project. FSN 3215 two separate errors made by a surveying company when surveying a painting job resulted in two deductibles.

[32] FSN 1584, 2011-515, FinKN-2011-589.

(theft of cheques, illegitimate use of a car, male cat chasing a female cat) results in several instances of damage (failures to detect falsified cheques, damage due to reckless driving and destruction, markings by cat) which are discovered and notified to the insurer simultaneously and settled in one operation, this appears to be a single settlement from the viewpoint of the assured. [33] This is true even if the instances of damage may be regarded as more than one insured event in a narrow sense.[34] In particular, where the instances of damage are repaired in one operation, it seems less natural to say that there are different settlements even if is clear that the cause has materialized in several instances.[35] It may also be that when the instances of damages are discovered at the same time, it may be difficult to sort out how and when each instance happened. If it appears that all the damage occurred at the same time, a conclusion of one settlement may be the result of lack of information on how the damages are distributed within the time span during which it was possible for the damage to occur.[36] However, in two of these decisions, the Board also stated that the instances of damages constituted one insured event for the purpose of the deductible. [37]

The second solution, that the same cause shall result in several settlements, may have some support in the wording, but, to the best of my knowledge no support in practice. The general rule, that unclear conditions should be interpreted against the insurer, may in this case result in equating "settlement" with "insured event". [38]

Further, in FSN practice, it seems that in several instances, "settlement" is equated with "insured event".[39] This conclusion is supported by policy considerations. Cost efficiency considerations requiring that the assured should retain the risk for smaller losses that he can easily

33 FSN 1584.

34 FSN 2788 (Continuous thefts during two years by a maid discovered simultanously resulted in one settlement and one deductible).

35 FinKN-2011-589

36 2011-515.

37 2011-515, FinKN-2011-589

38 In this direction 2011-249.

39 FSN 2504, 4656.

carry within his own budget should have regard each insured event, and not several unconnected incidents of damage. In the latter case, the purpose of the insurance would be severely limited. On the other hand, if several individual incidents of damage were added together, one would lose the deterrent effect of subsequent incidents. Also, the mere coincidence relating to the discovery and the reporting of different insured events, or to the speed with which the insurer makes settlement, can hardly be decisive for the number of deductibles. This is particularly relevant when the deductible is high. It is therefore reasonable to interpret "settlement" in this context as the settlement for each "insured event".[40]

It follows from this that the concept of "each settlement" in regard to the deductible is not clear, and should be avoided both in Norwegian and English contracts.

6 Some main differences and the problems that may result

6.1 Similarities and differences

It follows from the discussion above that there are several differences between the Norwegian and English interpretation of the deductible clauses. The English approach is a very linguistic oriented interpretation of the wording, which focuses on the differences between the concepts of "cause", "event" and "act or omission" with a serial damage clause in parenthesis, and these concepts are seen in relation to the occurrence that triggers the liability of the insurer. The only relevant policy consideration seems to be that the choice of expression is of crucial importance with regard to the premium to be paid, and that the expressions should be given a neutral interpretation, since they are sometimes used

[40] For a more detailed discussion, see Wilhelmsen pp. 108-110.

in deductibles and sometimes to limit the liability. The Norwegian approach implies a tendency to disregard the wording chosen, and to treat the distinction between one and more than one event (or one or more settlements) from a more general perspective and with a view to what seems reasonable.

An English deductible clause using "cause" as a unifying factor would probably not lead to any surprising results in a Norwegian court. Both systems also seem to accept that an event is not the same as each separate loss or incident of damage, or even the immediate cause of the loss. The English interpretation of "event" as a "happening" may, on the other hand, not be followed by a Norwegian court. The English concept of an event is narrower than the concept of a cause: a permanent state of affairs or the absence of something happening does not constitute an event. This seems contrary to the *Sunvictor* case (ice conditions treated as an "accident"), *the subsidence of the floor* case (implying that a lack of understanding of, or experience with, the building material is an "event"), the Commentaries to the NMIP and several Board cases.

How a Norwegian court would treat the English interpretation of "any single act or omission (or series of acts or omissions)" in the TSB case is more uncertain, as a similar wording has not been interpreted by Norwegian courts. But the *New Dolsey* and *Tønseth* cases demonstrate that a Norwegian court does not necessarily put decisive weight on the most proximate cause in a liability situation. If the proximate cause approach results in several deductibles to be paid, there is a clear risk that a Norwegian court would apply a wider cause approach.

If a Norwegian commercial customer chooses to effect insurance in the English market with an English deductible clause and a Norwegian choice of law clause, the question will then be to what extent a Norwegian court would accept the English interpretation.

6.2 English deductible, Norwegian choice of law

To the best of my knowledge, except for the *Sunvictor* case, there are no court decisions in Norwegian insurance law interpreting an English

clause combined with Norwegian background law. This issue has recently been the object of a more general contract law research project,[41] but even in this broader context we have no decisive court decision. On the other hand, this issue has a longer history in Scandinavian maritime law,[42] and here we also have some court material. The most extensive analysis is made by Erling Selvig.[43]

> Selvig has analysed Scandinavian court cases within the maritime law area during the past 50 years, and concludes that a contract designed by English lawyers will, as a rule, will be treated in the same way as a contract drafted by Norwegian lawyers. In situations where the interpretation according to Norwegian or Scandinavian law differs from the interpretation in English law, normally the Norwegian interpretation will be followed. In Selvig's material, only four of the analysed cases were determined/decided according to English law: ND 1983.309 *Arica*, Norwegian Arbitration (calculation of the off-hire period in time charter, see further below); ND 1954.749 Swedish Supreme Court (interpretation of the expression "damages for detention"); ND 1949.540 Oslo (interpretation of the term "ton"); and ND 1959.242 Norwegian Arbitration (interpretation of the expression "safe port"). In two of the cases following English law, it was particularly stated that the English solution was fair (ND 1954.749 and ND 1959.242).[44]
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> Selvig's discussion of the court material further shows that the English solution will normally be followed only if this solution clearly follows from English court decisions. Questions that are not yet solved in English practice will be solved according to Norwegian

41 Gordero Moss (ed): Boilerplate Clauses, International Commercial Contracts and the Applicable Law, Cambridge 2011

42 Solvang: *Forsinkelse i havn - risikofordeling ved reisebefraktning,* Oslo 2009, Selvig: "Interpretation according to Norwegian or other Scandinavian law of charter parties and other standard contracts written in English" in *TfR* 1986.2; and Grönfors: "Interpretation of freight contracts" in *Gothenburg Maritime Law Association paper 67.* The problem is also touched upon in Venger: "Hull insurance for the building of petroleum installations", *MarIus* no. 233

43 Selvig: "Interpretation according to Norwegian or other Scandinavian law of charter parties and other standard contracts written in English" in *TfR* 1986.2.

44 Selvig p. 3.

> contract tradition even if English tradition may lead to another result.[45] In cases where there are clear decisions/outcomes according to English court practice, a Scandinavian court will normally not follow these if the court finds that these solutions are unfair compared with Scandinavian background law, see ND 1971.78, ND 1952.442, ND 1950.398, Norwegian Arbitration *Karmøy*.[46]

According to Selvig's material, the starting point seems to be that the Norwegian interpretation will be followed. On the other hand, if it can be documented that both parties to the contract based their understanding of the contract on the English interpretation or, this interpretation should be accepted. This follows from the principle rule, according to Norwegian legal method, that the contract shall be interpreted according to the common intention of the contracting parties. If the assured and/or his insurance broker during the negotiation of the policy knew about how the chosen clause was interpreted in English practice, this would be decisive regardless of the result according to Norwegian law.

One possible extension of this argument is that if the contract is based on English terms and conditions, the English contract tradition will also be the key to defining the intention of the parties. Such arguments were used in ND 1983.309 *Arica,* which concerned the interpretation of a clause in an English time charter party (Texaco-time 2), originally with an English/American Choice of Law Clause. However, the choice of law was changed to Norwegian in the disputed contract, thus combining an English standard contract with Norwegian choice of law. The facts of the case are as follows:

> Arica suffered an engine breakdown while laden with coal on a voyage from the US East Coast to Japan. The vessel was towed across the Pacific, where the cargo was discharged and the ship repaired. The question concerned the way in which hire should be calculated whilst the vessel was under tow. The off-hire clause in the charter party (cl. 9) stated that the vessel was off-hire for the period that the breakdown had prevented "the efficient working of

[45] Selvig p. 7

[46] Selvig, pp. 10-12.

the vessel". Read literally, this implied that as long as the ship was not in working order, hire was not payable ("gross loss of time"). This interpretation was given in an English court case from 1891 (Westfalia) concerning a more or less identical clause and accepted in later English court practice. The result of this interpretation is that no hire would have been payable during the towage, i.e. that the charterer would have the cargo transported across the Pacific free of charges.

Contrary to this, a similar clause was interpreted by the Norwegian Supreme Court in Rt. 1915.881 (ND 1915.168, Herman Wedel Jarlsberg), where the finding was that only the net loss of time due to the breakdown should be deducted from the hire. This implied that only the time that was wasted for the charterer could be deducted. This solution was later incorporated in the previous Norwegian Maritime Code (NMC) 1893 § 144, which conforms to the NMC of 1994 § 392. In the Arica case, the result would then be that hire was payable for the time that the voyage across the Pacific would normally take.

Two out of three arbitrators followed the English interpretation of the off-hire clause, whereas the last arbitrator interpreted the clause according to Norwegian law. The majority based their decision on what was presumed to be the intentions of the parties to the contract, and this presumption was again explained by a reference to the preparation or history of the contract. Rather surprisingly, the majority referred to the Commentary to the Norwegian Marine Insurance Plan to document the weight of the intention of the parties. In the Arica case, however, no preparatory documents existed and there was no documentation of the intention of the parties except for the wording of the clause. Even so, the majority stated that it "seemed clear" that the parties' intention had been to follow the English meaning, and that this was supported by the fact that the time charter had previously had an English Choice of Law clause. Thus, a conclusion similar to the English interpretation was reached through an interpretation according to Norwegian method, where the wording of the clause read literally was supported by the common intention of the contracting parties. In this context the Westfalia case was significant, not because of its status

> as English background law, but because it explained the meaning of the clause. Even if the majority found that the gross loss method seemed unfair to the owner, this interpretation was followed. As for the previous Rt. 1915.881 (ND 1915.168 Herman Wedel Jarlsberg), it was pointed out that this decision was made in order to obtain a fair result and without looking into the development of the clause in English law. This result did not conform to the development of time charter clauses after 1915.
>
> The minority, on the other hand, stated that the off-hire clause should be interpreted according to the Norwegian Maritime Code, which would lead to a more fair result.

The result in the Arica case is widely discussed in Scandinavian legal theory.[47] The main arguments for agreement with the result are that "charter parties" is an Anglo American contractual instrument, and that the English interpretation is respected internationally as a general rule of shipping. This is not the situation here: insurance contracts are normally developed according to national law, the English influence on Norwegian land based insurance law is very limited, and to the best of my knowledge there is no international agreement as to the content of a deductible clause.[48] The reasons for supporting the methodology of the Arica case and for following the English interpretation are therefore not the same for insurance policies.

The Arica case is however criticized by Selvig, and apparently also by Solvang, along the same lines. Selvig claims that the method of interpretation in the Arica case breaches previous Norwegian principles for interpretation of off hire clauses in charter parties in Norwegian law as these principles are established in ND 1952.442, Norwegian Arbitration *Hakefjord* and ND 1950.398, Norwegian Arbitration *Karmøy*. The court

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47 Cf. Solvang: p. 13 ff. Several authors agree with both the result and the method (Krüger: *Norsk Kontraktsrett*, Bergen 1989, p 524, Honka: *Fartygets Skick* p. 157 and further Solvang p. 76 note 71) whereas Grönfors p. 52 disagrees with the method (which combine English and Norwegian methods of interpretation), but agrees with the result

48 Cf. Wilhelmsen 2003 p. 182 ff.

stated in ND 1950.398 that the English principle of interpretation, applying a narrow interpretation of the wording, was contrary to the Norwegian legal method. It was further held that Norwegian background law would be relevant in supplementing the contract, not only when the wording was unclear, but also when it was not explicitly stated in the clause that the regulation was exhaustive. This was particularly so when the wording, interpreted narrowly, would lead to an unfair result. In the Arica case, on the other hand, the court accepted that the time charter clause should be interpreted literally and not be supplemented by the background law, even if the result seemed unfair.

Selvig also points out that the combination of English interpretations for some questions and Norwegian for others, concerning the same contract, creates an unbalanced state of law by combining elements from both systems. A homogeneous result can only be obtained by a common approach. As the English interpretation is normally disregarded if it is not defined through English court practice, the Norwegian method of interpretation, with the use of Norwegian background law to supplement the contract, should be preferred in order to secure a balanced result. The English interpretation should only be accepted if it is clear that the parties to the contract chose the disputed clause after individual negotiations and with the English interpretation in mind. However, this was not the situation in the Arica case. The parties had chosen the contract form without detailed knowledge of the content. The "intention of the parties" was thus not the intention of those who had entered into the contract, but rather the intention of those who had drafted it, and this "intention" were presumed to conform to the interpretation in English court practice. Selvig's conclusion is that this approach should be avoided, as it would force Norwegian judges to accept solutions that are contrary to our contractual culture and give the English system virtual monopoly in the interpretation of international contracts.

Based on Selvig's discussion of the court material and his critique of the Arica case, the starting point is that an English Policy, notwithstanding that the policy is designed according to English market practice,

shall be interpreted according to Norwegian legal method and background law. This implies that the wording should not be interpreted narrowly, but should be supplemented by Norwegian background law and policy considerations. This is particularly so if a strict interpretation according to the wording seems unfair to one of the parties.

However, it may be asked how "fairness" should be evaluated in this context. The impression from the Norwegian cases is that a key point is the situation of the person who has to pay the agreed amount more than once. If so, a relevant argument is the need to protect the liquidity of the assured. The argument from the English cases, on the other hand, is that the choice of aggregation clause for deductibles is reflected in the premium. The amount of premium is assessed against the risk of having to pay a series of deductibles in cases where a peril or a negligent act results in a series of damages. A deductible applied to each event or act or omission will normally result in a lower premium than a deductible applied to all damage arising out of the same cause. If the assured chooses a narrow deductible in order to save premium, and the court allows the assured the benefit of a wide interpretation, the assured will obtain an unwarranted benefit which the insurer will have to finance through future premium raise. Further, if the insurer is exposed to the risk that a Norwegian court will not follow the English more nuanced system, he may decide to limit the choices to concepts that are treated similarly in the two systems. This is not necessarily to the benefit of professional customers who want cost efficient insurance coverage.

Considerations of economic efficiency therefore imply that the English interpretations should be followed. Economic efficiency is however not an argument often found in Norwegian court decisions. The English insurance market can therefore not rely on this type of consideration.

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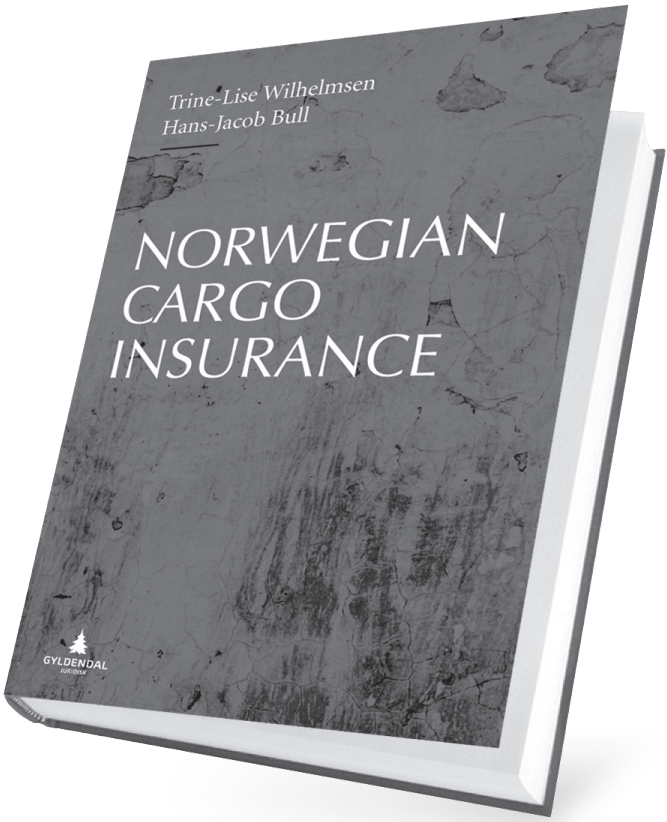

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