SIMPLY

SCANDINAVIAN INSTITUTE OF MARITIME LAW YEARBOOK

2012

419

SIMPLY 2012

Scandinavian Institute of Maritime Law
Yearbook

MarIus nr. 419
Sjørettsfondet
Nordisk institutt for sjørett
Universitetet i Oslo

ISSN: 0332-7868
MarIus nr. 419 - SIMPLY 2012

Sjørettsfondet
University of Oslo
Scandinavian Institute of Maritime Law
P.O. box 6706 St. Olavs plass 5
N-0130 Oslo
Norway

Phone: +47 22 85 96 00
Fax: +47 22 85 97 50
E-mail: sjorett-adm@jus.uio.no
Internet: www.jus.uio.no/nifs

Editor: Assistant professor Alla Pozdnakova

For subscription and single-copy sale, please see Den norske bokbyen - The Norwegian Booktown
Internet: http://bokbyen.no/en/shop/
E-mail: kontakt@bokbyen.no

Print: 07 Xpress as

Overview of content

Director's preface

The year of 2012 has been a year with many happy events.

Firstly, the Institute was strengthened through the employment of two new assistant professors and a new professor II. Henrik Bjørnebye was appointed assistant professor at the Department of Petroleum Law. Bjørnebye defended his PhD dissertation *Investing in EU energy security - Exploring the regulatory approach to tomorrow's electricity production* at the Institute in 2009. Alla Pozdnakova was appointed assistant professor at the Center for European Law. Pozdnakova defended her PhD dissertation *Liner shipping: a competition law analysis* at the Institute in 2007. Henrik Ringbom was appointed professor II at the Department of Maritime Law. Ringbom defended his dissertation *The EU maritime safety policy and international law* at the Institute in 2007. The Institute highly appreciates that previous PhD candidates continue to work at the Institute or come back to work at the Institute after a period with other employment.

Second, a new PhD candidate was employed, Olya Gayazova from Russia. She holds a PhD in Political Science from Rutgers University (USA). The topic of her PhD thesis in law is a comparative study of the national laws of oil spill liability in various Arctic States.

Third, two PhD candidates being part of the research group Natural Resources defended their dissertations in 2012. The first was Nicolay Winge with the dissertation *Tradable Green Certificates Schemes Under EU Law. The influence of EU law on national support schemes for renewable electricity generation*. Winge was employed by the Institute but performed his research work at the Institute of Public Law. The second was Catherine Banet with the dissertation *Tradable Green Certificates Schemes under EU Law*. Banet did her research work for the dissertation at the Department of Petroleum Law.

Fourth, the Institute hosted or co-hosted several Nordic and International seminars during 2012. The Institute hosted the 25. Nordic Maritime Law Seminar in Åbo 27-29 august 2012 with the topic "Legal

framework and central contracts in the shipping and offshore industry – development and future perspectives": http://www.jus.uio.no/nifs/forskning/arrangementer/gjesteforelesninger-seminarer/sjorett/2012/08-27-jubileum.html

110 persons participated, which is a record for the Nordic seminars.

The 7. European Colloquium in Maritime Law Research, where the Institute is a co-host, was held in Palermo 26-27 September 2012 with the topic "Contracts in shipping: Flexibility, foreseeability and reasonableness": http://www.jus.uio.no/nifs/english/research/events/2012/09-27-7ecmlr

The Oslo/Southampton/Tulane network arranged the yearly Colloquium in Maritime Law Research, hosted by the Institute in Oslo 2-3 October 2012 with the topic "Indemnities, recourse and collaterals in chartering ": http://www.jus.uio.no/nifs/english/research/events/2012/10-02-chartering

The annual European Energy Law Seminar (EELS), organised by Nederlandse Vereniging voor Energierecht and University of Groningen in cooperation with the Institute, took place in Noordwijk aan Zee in the Netherlands in 2012: http://www.jus.uio.no/nifs/english/research/events/2012/04-16-eels2012

The above events come in addition the more than two dozen evening seminars that were held during the year, and the Institute's contributions to annual seminars organised by others (e.g. the "Kiel seminar" on energy law, the Petroleum Law Seminar and the Solstrand seminar on oil and gas law).

During 2012 the research priorities of the Institute were developed in three directions. The first development is a broader focus on off shore contracts with a particular emphasis on off shore charter parties. Charter parties have always been a core topic at the Institute, but this development will look into the significance of the charter party regulation for the legal development in other sectors than the shipping sector. In particular Ivar Alvik and Trond Solvang are working with this issue.

The second development is to direct the previous research project on Safety at sea into a more general ocean law perspective. In particular, the Institute wants to look into ocean law questions relevant for the

shipping sector and the continental shelf, which can be seen as an extension of the research already performed within the fields of maritime and petroleum law. Several of the researchers at the Institute are involved in this research area: Erik Røsæg, Henrik Ringbom, Rosa Grieves, Alla Pozdnakova, Irina Fodchenko, and Olya Gayazova.

The third development is to re-establish air/aircraft law as a research topic at the Institute. This topic is inspired by a seminar held at the law firm Vogt Wiig (later Simonsen, Vogt, Wiig) in December 2012 on aircraft finance, which covered a lot of issues that are relevant both for the shipping and aircraft sector. The research in this area will be performed under the Research Group "International Contracts" in cooperation with Institute of Private Law, in particular Giuditta Cordero-Moss and Herman Bruserud.

Apart from these more recent developed research directions, the Institute has during 2012 continued to pursue the research priorities of previous years. The Ship Safety Project is as mentioned continued into the Ocean Law project, and the focus on multimodal contracts and the newly signed Rotterdam Rules is also continued.

Research during 2012 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, variation mechanisms and other aspects of different construction and service contracts, and R&D contracts). Safety regulation is the topic of one PhD candidate, and some other issues of classical petroleum law have also been revisited under the inspiration of recent developments in the field.

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

- The Research Council of Norway
- The Norwegian Oil and Gas Association
- The Ministry of Petroleum and Energy/the Research Council of Norway

- The Eckbo Foundation
- 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 charging 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.

Trine-Lise Wilhelmsen

Editor's preface

We hereby present the annual 2012 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.

The Yearbook begins with an article by Trond Solvang, Professor at the Institute. The author investigates whether Norwegian law contains a doctrine equivalent to the English doctrine of indemnity for complying with orders, which allows the shipowner to recover the losses as to the employment of the ship suffered as a result of instructions by the charterer.

Professor Emeritus Thor Falkanger (the Institute) has written an article addressing the distribution of risk and liability under the Norwegian law with respect to receiving of the seaborne cargo by the cargo owner. The article examines duties of the cargo owner to take possession of the cargo, and the consequences that may follow if the cargo owner does not act in conformity with the contract.

Professor Knut Kaasen (Petroleum and Energy Law Department of the Institute) contributes an article written on a topic of regulation of safety in the petroleum sector. The author asks whether law and lawyers can contribute to the safety in this sector, and discusses the roles and tasks which the lawyers have in this respect. The article is based on Kaasen's presentation at the Start – up seminar for the Safety and Security at Sea project (the Institute) in Lysebu, Oslo, January 2008. Alongside other presentations from this event, this presentation was published in MarIus nr. 371 (2009) pp. 79-98.

Professor, Director of the Institute Trine-Lise Wilhelmsen has written an article on the liability and insurance clauses in contracts for ship services in the Norwegian off –shore sector. The author discusses a central feature of such contracts – a "knock for knock" principle – and focuses on the examination of the validity of knock for knock clauses.

Editorial board for MarIus and Simply have also received several excellent master theses written by master students at the LL.M programme in Maritime Law and at the Law Faculty of the University of Oslo. The Board decided to publish these theses in a separate edition of MarIus instead of Simply.

We are grateful for our regular and ad hoc peers for their valuable and timely comments on the article proposals 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

The English doctrine of indemnity for compliance with time charterers' orders – does it exist under Norwegian law?

By Trond Solvang, Professor dr. juris
Scandinavian Institute of maritime Law,
University of Oslo

Content

1 Introduction

The English doctrine of indemnity for compliance with time charterers' orders essentially means that if a shipowner incurs losses in the course of following the charterer's instructions as to the employment of the ship, such losses are recoverable against the charterer under an implied right of indemnity. The rationale is that when the charterer is granted freedom to decide the manner in which the shipowner must perform, the charterer must also bear the risk of what may befall the shipowner when so performing, in the charterer's interest. Accordingly, rather than letting the loss remain where it falls – on the shipowner – it is allocated to the charterer.[1]

From a Norwegian perspective this doctrine is of particular interest. Norwegian lawyers are familiar with various types of contract-law principles that, among other things, assist in the construction of contracts. Generally speaking, English law takes a more restrictive approach: construction consists of giving effect to the express wording of the contract and terms are implied only if they are necessary to make the contract work; to give it "business efficacy".[2] However, in the context of time chartering and indemnity for compliance with orders, these restrictions on implying terms into a contract seem not to apply so stringently under English law. Rather, the doctrine seems to constitute an overall framework within which a charterparty is construed, reflecting a long-held belief in the industry that a shipowner enjoys this type of protection.[3]

In turn this suggests that this area of that law should be well suited

[1] See e.g. *The Georges Christos Lemos* [1993] 2 Lloyd's Rep 407: "*Under a time charter party the shipowner puts the vessel at the disposal of the charterer, who can chose for himself what cargoes he shall load and where he shall send the ship ….. When deciding who has to bear the consequences of a choice being made in one way rather than the other, it is reasonable to assume that the consequences shall fall upon the person who made the choice, for it is the charterer who has the opportunity to decide upon the wisdom of the selection which he makes*." See also *The Athanasia Cominos* [1990] 1 Lloyd's Rep 277 and *The Island Archon* at footnote 11 infra.

[2] Or to satisfy the so-called officious bystander test, see *Chitty on Contracts*, Volume 1, 28th ed., London, 1999, p. 643 et seq.

[3] See the discussion of *The Island Archon*, infra.

to a comparative analysis. How does the English law approach, which addresses an essential aspect of risk allocation in time chartering, compare with that taken by Norwegian law? Does the English doctrine exist under Norwegian law?

2 The English doctrine – as reflected in The Island Archon

Before embarking on a comparison, we should add something more about the doctrine itself – perhaps even asking whether the doctrine really exists under English law. For example, given the elaborate wording of today's charterparties, is there really a need for the gap-filling performed by such a doctrine? Moreover, does the doctrine have so many loose ends, for example in respect of causation, that its core area cannot readily be identified?

Such questions are best answered by looking at case law. The Court of Appeal decision in *The Island Archon* from 1994[4] may serve to illustrate both how the doctrine is given effect, and also the restrictions on the scope of its application.

The ship was ordered on a voyage from a European port to Basrah, Iraq. Upon discharge at Basrah, the local receivers claimed cargo shortage against the shipowner. The claim was no doubt fictitious, but the shipowner (in practice, its P&I club) had no choice but to pay because security had been posted and the court system in Iraq turning a blind eye. The shipowner claimed against the charterer to recover the relevant costs under the doctrine of indemnity for compliance with time charterer's orders. The shipowner succeeded notwithstanding the fact that the charterer's orders for the ship to sail to Basrah were fully legiti-

[4] [1994] 2 Lloyd's Rep. 227.

mate under the charterparty.[5] The shipowner's losses were found to be a direct consequence of the charterer's orders and this was held to be a sufficient ground for the doctrine to apply. Apart from that finding, the case also contains helpful observations on the scope of the doctrine.

Firstly, the doctrine's scope may be restricted on the basis of the risks assumed by the shipowner at the time of entering into the charter. In *The Island Archon*, if the so-called "Iraqi system" had at that time been generally known in the industry, the shipowner might have been held to have assumed the risk of becoming victim of that system. The reasoning would have been that the shipowner could have protected himself, for example by excluding Iraq from the trading limits, but had chosen not to do so.[6] As noted above, however, there had been no such general prior knowledge.

Secondly, a general restriction operates based on those risks that a shipowner will normally be taken to have assumed as part of the very nature of time chartering: risks falling within the category of perils of the sea, and expenses incurred in the course of the ordinary navigation of the ship, will be the shipowner's responsibility.[7]

Thirdly, there is a restriction based on causation: there must be an unbroken chain of causation between the charterer's order and the occurrence of the loss. For example, an intervening negligent act on the part of the shipowner will ordinarily break this chain of causation.[8]

Fourthly, a restriction obviously applies if the express terms of the charter, properly construed, have the effect of excluding the operation of the doctrine.[9] In *The Island Archon,* none of the above restrictions applied. In essence, the Iraqi system was an unforeseen event not covered by the charterparty, and the loss was allocated to the charterer in whose interest the ship was ordered to Basrah.

---

5 It was not obvious from earlier authorities that an indemnity could be implied where the charterer's orders did not constitute breach of charter nor were outside the scope of the charter, see the discussion by Evans L.J. at p. 232-234.

6 Evans L.J., at p. 236.

7 Evans L.J. at p. 235, referring i.a. to *The Aquacharm* [1982] 1 Lloyd's Rep. 7 CA.

8 Evans L.J. at p. 235-236 where he quotes Wilford, *Time Charters*, 3rd ed. 1989, p. 241.

9 Evans L.J. at pp. 237-238.

Before turning to Norwegian law, we will make some further observations on the English law position.

The first observation is perhaps somewhat provocative. Namely, it is generally recognized that in English law there is no implied duty of loyalty and good faith. That is no doubt correct, but in this particular area of time chartering, why would there be a need to impose a duty of loyalty on a charterer who is strictly liable to indemnify the shipowner for any adverse consequence? In this sense, the doctrine more than consumes any implied duty of loyalty.[10]

The second observation relates to the point made earlier about the circumstances in which terms may be implied under English law: the "business efficacy" test. In this particular area, the test seems not to apply. Clearly the charterparty as such would have worked perfectly well without the shipowner being granted a right of indemnity for a claim for cargo shortage. Indeed, *The Island Archon* contains elaborate discussion on this point. The basis for applying the doctrine seems different in nature from the ordinary requirements for implying terms: the notion of an indemnity constitutes, so to speak, a shipping-industry matrix that is fundamental to any time charter. To quote from Sir Donald Nicholl's speech:

> "Ultimately, the existence or not of an implied indemnity depends on the facts of the particular case. However, the established understanding in shipping circles is that the general rule is that the

[10] An important element of a duty of loyalty in the civil law systems is that a party shall have due regard for the interest of the other party when exercising its contractual rights. In that respect the very rationale of the English doctrine of indemnity for compliance with orders – see the next footnote – accords with such a duty of loyalty. This rationale can, on the other hand, be contrasted with the rationale applied in earlier English-law voyage-charter cases, where in the context of laytime and demurrage, a charterer was generally not obliged "to consult the convenience of the shipowner" when exercising its contractual right to order the ship to a specific berth, see e.g. *Tharsis Sulphur v. Morel Brothers*, 1353 [1891] 2 QB 647 (p. 652). On this latter point the Supreme Courts of the Scandinavian countries reached the opposite result, see Solvang, *Forsinkelse i havn*, Oslo, 2009, pp. 510-517. Obviously the considerations involved in time and voyage chartering may differ – a topic beyond the scope of this paper. The point is made merely as a reminder that certain aspects of (a civil law) duty of loyalty may also have their counterparts in English legal thinking.

> shipowner is entitled to look to the charterer for an indemnity against the consequences of complying with an order as to the employment of the ship … . This established general principle is part of the setting against which the charterparty is to be read and understood."[11]

The third observation goes to the complications associated with foreseeability and causation. To put it succinctly: if a particular event is a *too* foreseeable consequence of an order, the shipowner may be deemed to have assumed the risk of it; if a particular event is a *too* unforeseeable consequence of an order, the chain of causation may be broken. Hence, in neither of these situations would the doctrine apply. The point can best be illustrated by once again quoting part of Sir Donald Nicholl's speech in *The Island Archon*:

> "In this context causation will be a useful tool in some instances, as where the loss arose from an intervening act of negligence. … However, it cannot be treated as adequate for all purposes. In the ordinary way, a foreseeable consequence of an act may well be regarded as caused by that act. But in this area of the law, the fact that a consequence is foreseeable, far from leaving the chain of causation unbroken, may have precisely the opposite result. The very fact that the loss flowing from charterers' order was an ordinary unforeseeable risk may lead to the conclusion that it is not within the indemnity. So the application of conventional principles of causation will not always yield the answer."[12]

The fourth observation concerns potential overlap between the doctrine

[11] Sir Donald Nicholls V.-C., at p. 238. Clearly the express terms of the charter provided no basis for an indemnity, hence Evans L.J. appears to apply the "business efficacy" test at a more abstract level than ordinarily seen in English case law when stating, at p. 237: *"As Mr. Glennie [for the charterer] rightly submits, it is insufficient to justify an implied term that it would be "reasonable" for the shipowner to stipulate for an express term. Nevertheless the implication is justified, in my view, first by "business efficacy" in the sense that if the charterer requires to have the vessel at his disposal, and be free to choose voyages and cargoes and bill of lading terms also, then the owner must be expected to grant such freedom only if he is entitled to be indemnified against loss and liability resulting from it ….".*

[12] Ibid.

and express terms relating to breach of contract, such as, safe port obligations. *The Evaggelos Th*, from 1971[13] may serve as example. The ship was rendered a total loss by Israeli gunfire after having been ordered to Suez during a ceasefire in the 1968 war. The charterparty contained a clause stating that the ship must only be ordered to places where she could "*always lie safely afloat*". According to Donaldson J., this clause only contemplated navigational risks, not political unsafety. In the light of this finding, the judge instead implied a safe port obligation covering political unsafety.[14] However, the charterer was held not to be in breach of that obligation due to the sudden outbreak of the war; the port had been prospectively safe when the order to proceed to Suez was given. The judge then proceeded to apply the doctrine of indemnity,[15] but also in this respect held in favour of the charterer. The judge's reasoning was that the proximate cause of the damage was the Israeli gunman who fired the shot, not the charterer's order for the ship to sail to Suez.[16]

This type of hand-in-hand application of various bases for recovery of losses from the charterer will however be excluded if the charterparty contains express provisions dealing with the precise risk in question. For example, applying the doctrine of indemnity in addition to an

[13] [1971] 2 Lloyd's Rep. 200 Q.B.

[14] It may not be obvious that a safe port obligation would have to be implied if the relevant risk is not covered by an express warranty, see *The A.P.J. Priti* [1987] 2 Lloyd's Rep. 37 CA which was a voyage charter case where the charterer was given a right of selection among various named ports, and where Bingham L.J. stated: "*There is no ground for implying a warranty that the port declared was prospectively safe because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because suc<h an implied would at best lie uneasily beside the express terms of the charter.*" Admittedly these considerations might be more apt in a voyage charter than time charter context but they nevertheless illustrate the point that implication of the doctrine of indemnity may not be obvious; in principle it boils down to a question of construction of the contract.

[15] The charter was based on the NYPE form where clause 8 set out the charterer's right of employment but with no express indemnity provision; hence the right of indemnity was implied.

[16] See also *The Erechtion* [1987] 2 Lloyd's Rep. 180 QB, where damage suffered by the ship from a submerged object when entering port was held not to constitute breach of an express safe port warranty but nonetheless gave rise to a right of indemnity, subject only to the requirement of causation.

express safe port warranty would – in the words of Evans L.J. in *The Island Archon* (page 235) – "*make it unnecessary to consider whether the charterer's order was given in breach of the charterparty, so as to found a claim in damages, because the charterers would be liable in any event*." Hence, the doctrine will yield to express wording, although the interaction between the two may be complicated.[17]

3 The function-based approach under Norwegian law

The above selected observations arise from what are, from a Norwegian perspective, the idiosyncratic nature of English law, with its system whereby principles are identified and elaborated in case law. This creates a potentially complex system of partly intersecting rules and principles at various levels of construction – and the rules and principles within this system are not always easily reconcilable.

However, returning to our question about the existence of the doctrine in English law, the short answer is that it does exist. We may now proceed to our next question: does the doctrine exist under Norwegian law? As already indicated, many of the idiosyncrasies at the periphery of the doctrine will probably not be found in Norwegian law. But our main interest is in the core of the doctrine: the charterer's strict obligation (not dependent on negligence or other breach of contract) to indemnify the shipowner for the consequences of giving instructions as to employment of the ship. The answer is probably that some elements of the doctrine can be found, but not as sweepingly expressed as under English law. To take some examples from the Maritime Code:

Firstly, there is some similarity in the area of the issuance of bills of lading. If the shipowner becomes liable for cargo claims under bills of

[17] See further discussions by David Foxton QC, *Indemnities in Time Charters*, at p. 99 et seq. in the book, *Legal Issues Relating to Time Charterparties* (edited by D. Rhidian Thomas), London, 2008.

lading that contain more onerous terms than those of the charterparty, he has a right of indemnity.[18] This resembles the English doctrine: the charterer is free to choose the contents of the cargo documents and thus should bear the consequences incurred by the shipowner when acting, so to speak, in the charterer's interest.[19]

Secondly, the Code regulates the allocation of costs incurred during the course of a voyage. Essentially the Code provides that these – the so-called voyage variable costs – are for the charterers' account unless they relate to the shipowner's obligation to equip and maintain the ship.[20] Moreover, if the shipowner, for some reason, were to incur expenditure for which the charterer was responsible under that scheme, the shipowner would have a right of reimbursement so that the costs would end up where initially intended.[21]

Thirdly, the Code regulates a time charterers' liability for causing damage to the ship, imposing a due-diligence obligation to order the ship only to safe ports.[22] If the ship were to suffer damage *without* the charterer being in breach of that obligation, clearly there would be no

---

18 Section 382 first paragraph.

19 The indemnity under Section 382 is restricted to increased liability imposed by the terms of the bills of lading, not by mandatory liability rules (e.g. Hague-Visby as enacted by national legislation). Moreover, Section 382 corresponds to Section 338 third paragraph regarding voyage chartering. In voyage chartering, there are parallel court decisions under English and Norwegian law: in the *Vestkyst I*, Nordiske Domme (ND) 1961.325, the Supreme Court held that third-party cargo liability imposed on the shipowner by reason of mandatory liability rules was outside the scope of the indemnity provision of the Code. Moreover, the liability exclusion in *Gencon* clause 2 was held to be insufficient contractual basis for a right of indemnity. In the English case *The C. Joyce* [1986] 2 Lloyd's Rep. 286 QB it was similarly held that *Gencon* clause 2 did not provide a basis for indemnity, since the charterparty (an amended *Gencon* form) contemplated issuance of bills of lading that would be subject to mandatory liability rules, and hence the shipowner had assumed the risk of such increased liability. In time chartering, however, the legal position under the two systems seems to differ. The implied indemnity under English law seems, unlike Section 382 of the Code, to cover situations where increased liability is imposed by reason of mandatory legislation, see e.g. *The Caroline P* [1984] 2 Lloyd's rep. 466 QB.

20 Section 387.

21 This kind of right of reimbursement formed part of the reasoning in the arbitration award, the *Jobst Oldendorff*, infra.

22 Section 385 second paragraph.

basis to subject the charterer to a separate duty to indemnify the shipowner on the basis of the latter's compliance with orders, or similar.

Following these sundry examples, we turn to the concept of "functions", which under Norwegian law plays an important role. A succinct comparison of the Norwegian approach with that of English law could probably be worded thus: "Risk must follow function" vs. "Risk must follow compliance with orders".

The Norwegian function-based approach involves identifying which party – the shipowner or the charterer – is responsible for performing what functions (operations) in the course of the performance of the contract. For example, the Maritime Code contemplates (as do most charterparty regulations) that the time charterer will be responsible for the functions of loading and discharging.[23] Moreover, if the shipowner incurs liability towards third-party cargo owners, the Code provides the shipowner with a right of indemnity if such liability resulted from acts included within the charterer's functions.[24] According to the preparatory works for the Code, such a right of indemnity may extend also to other types of third-party claims against the shipowner, such as personal injury claims brought by stevedores who are injured in the course of the charterer's performance of his functions.[25]

It may perhaps be said that this very structure – based as it is on the parties' functions – is close to the English, in that objective criteria relating to the charterer's conduct give rise to a right of indemnity. That may be so, but there are also differences: the scope of the Norwegian doctrine is less sweeping than the English, and this may have a bearing in relation to issues covered by the above-mentioned peripheral idiosyncrasies of English law. For example, the intervening causes that may

[23] Section 381 first paragraph.

[24] Section 381 third paragraph. Conversely, there is no remedy if the cargo liability arose from the shipowner's intervention in cargo operations that were prima facie the responsibility of the charterer.

[25] NOU 1993:36 p. 88. The example given there contemplates fault on the part of the charterer or someone for whom he is responsible, but it seems that the same result would ensue if the shipowner were to incur liability without any such fault on the part of the charterer, see the *Jobst Oldendorff*, infra, and the recognition accorded to that case in NOU 1993:36 p. 68.

arise during a vessel's sailing time, as well as during her port stays – which are of relevance under English law – are obviously potentially more numerous and more complex than the potential intervening causes relating merely to cargo operations that would be taken into consideration under Norwegian law.[26] Likewise, there would not be the same potentially complex overlap between implied and express terms: the Norwegian approach would not entail any potential overlap between the principles governing indemnity and, for example, the operation of safe port clauses.

Despite the above provisos, in many instances the two legal systems' differing starting points might well lead to the same result. To take *The Island Archon*: rather than saying that a right of indemnity for the cargo claim arose from the ship having been ordered to Basrah, one would under Norwegian law probably reach the same result by saying that the claim arose from cargo-related functions that fell within the sphere of responsibility of the charterer.

4 A tentative comparison of case law

We now move one step further in our comparison by taking a closer look at case law.

As chance would have it, there are two quite similar cases under the two systems: the English Commercial Court decision, *The White Rose* from 1969,[27] and the Norwegian arbitration award, the *Jobst Oldendorff* from 1979.[28] Both concerned liability imposed on the shipowner under

[26] Hence under Norwegian law there would be no need to define the scope of navigational risks as an exception to an otherwise applicable doctrine of indemnity for complying with charterer's orders, as would be the case under English law (see the discussion of *The Island Archon*, supra). On the other hand, under Norwegian law a line may have to be drawn between so-called voyage variable costs (being for the charterer's account) and costs relating to the ship and the shipowner's functions (being for the shipowner's account).

[27] [1969] 2 Lloyd's Rep. 52 QB.

[28] ND 1979.364.

U.S. law for personal injuries suffered by local stevedores in the course of cargo operations in the Great Lakes. Both shipowners claimed indemnities from their charterers. In the Norwegian case the shipowner succeeded, but in the English case he did not.

In both cases it was held as a fact that the shipowner was not to blame for the incident. In both cases the charterer had procured the cargo operation, by engaging a local stevedoring company, but in neither case was the charterer to blame for the accident. The position of the subcontractors is less clear, but this did not affect the reasoning in either case.[29]

In the Norwegian case the charter was based on the *NYPE* form and contained no express regulation of indemnity.[30] The tribunal's reasoning was essentially that this type of liability, imposed on the shipowner under local law, must be considered as part of the costs of the discharge, which was the responsibility (function) of the charterer.[31] The fact that the charterer had ordered the ship to the place where the liability was imposed formed no part of the reasoning.

In the English case the charter was based on *Baltime,* with its well-known clauses 9 and 13 in the shipowner's favour. The indemnity pro-

---

[29] As both cases were decided on the principles governing rights of indemnity and did not involve damages for breach.

[30] It merely contained rights of instruction as to employment, see the discussion of *The Caroline P* under footnote 19, supra.

[31] The essence of the reasoning states, at p. 369 (in the author's translation): "*According to the charterparty and complementary rules relating to time chartering, it is the time charterer who shall procure and pay for the loading and discharging of the ship, and all expenses and other costs in that regard shall be borne by him. The costs of loading or discharging must also include whatever third-party liability is incurred as a result of the loading or discharge, irrespective of the basis of liability. …. From what has been said it follows that it is the time charterer, Wilson, who internally, in relation to the shipowner, Oldendorff, must bear the costs of the discharge of the* Jobst Oldendorff *in Stapleton on 21 October 1968, including the liability vis-à-vis the longshoreman, Lopez, incurred by reason of the discharge – always provided that the shipowner or someone for whom he was responsible, was not to blame. The fact that liability under U.S. law is imposed on the shipowner, and that the shipowner in the first instance must pay such damages, is immaterial to their internal allocation. That allocation must if necessary be effected by way of indemnity, and the basis for such indemnity is, as stated, the general principles of contract law. No express contractual basis is required; but the contract must of course not expressly exclude such indemnity.*"

vision in clause 9 was held to accord with the implied doctrine of indemnity. However, the shipowner's claim failed, on the basis of causation.[32] Donaldson J. stated:

> "*The shipowners … have u*ndoubtedly established that their "potential liability" to Mr. De Chambeau and their actual loss of £2935 5s. 5 d. were incidents of and occurred in the course of complying with the charterers' orders to load grain at Duluth. But were they caused by such compliance? … What connected the accident with, and gave rise to, a potential liability and an actual loss were the provisions of Minnesota law. Unless it can be said that this law was so unusual as to constitute Duluth a legally unsafe port to which the vessel should not have been ordered – and no such contention is advanced – or that the time charterers engaged stevedores who were incompetent by legal standards, which is negative by the finding of fact, I do not consider that there is the necessary causal connection between the order to load and the loss."[33]

The White Rose judgment has been criticized for confusing the concepts of unsafe port and breach on the one hand with that of a right of indemnity on the other. Accordingly it may be worth looking at subsequent cases to try to come to grips with the issue of causation as expressed in *The White Rose*. In 1998 in *The Eurus*,[34] Rix J. put it like this:

> "*What is puzzling about [the* White Rose] is the suggestion that the finding of unsafety was necessary to the operation of the … indemnity clause. I suspect that what Mr. Justice Donaldson had in mind … was the thought that if a port had a characteristic danger, in that case of legal nature, then an order to go there might make compliance with that order the cause of any loss due to the materialization

[32] It is worth noting that the shipowner argued that the fact that cargo operations belonged within the charterer's responsibilities, combined with the exceptions clause in the shipowner's favour in *Baltime* clause 13, must lead to a right of indemnity (at p. 58-59) – a line of argument similar to that of the shipowner in the *Jobst Oldendorff*. Donaldson J. did however not address this in detail as the case was decided on causation (p. 59).

[33] Ibid. at p. 59-60.

[34] [1998] 1 Lloyd's Rep. 351.

> of that risk because the danger would then be one which both parties, or at any rate the charterers who had business at such port, could reasonably be expected to know. Otherwise, a brush with the law [at Duluth] was just something that happened in the course of a voyage but not by reason of compliance with charterers' orders."

This explanation by Rix no doubt makes sense: the concept of unsafe port entails certain elements of foreseeability that may have a bearing on causation also in relation to the doctrine of indemnity. It also illustrates the point, however, that the reasoning in English case law is not always easy to penetrate.[35]

It is not the ambition of this paper to get to the very bottom of the causation puzzle posed by *The White Rose*. The point has been to highlight it as part of a comparison of the legal doctrines that apply under English and Norwegian law. In that context, *The White Rose* serves to illustrate how integrated phenomena, such as causation, may play a crucial role. For example, when trying to grasp the English doctrine, there is no obvious reason why the "Iraqi system" in *The Island Archon* should be considered a direct consequence of ordering the ship to Basrah, while the operation of Minnesota law was not a direct consequence of ordering the ship to Duluth.

This brings us to a related consideration: can a court's reasoning be taken at face value? This is, of course, a question that far exceeds the scope of this paper. However, the point is once again to draw attention to the fact that such considerations may also add to the difficulty of

---

[35] A slightly different approach to the causation-related considerations in *The White Rose* can be seen in *The Island Archon* judgment. Here Evans L.J. discusses *The White Rose* and tries to reconcile the apparent confusion between breach of an unsafe port warranty and the application of the doctrine of indemnity. After having referred to the possible – but untenable – perception that the application of the doctrine presupposes breach of a safe port warranty, he states at p. 234-235: *"But another reading of the [White Rose] judgment is that an indemnity protects the shipowners in cases where there is some unusual feature of the port to which the ship is ordered to proceed. If that is so, then the causation argument produces the unexpected result that the chain of causation remains intact if unusual consequences intervene"*. In other words, the operation of U.S. law in *The White Rose* may have been so unusual as to break the chain of causation under the doctrine of indemnity.

comparing legal rules under different systems.

We will once again take *The White Rose* as an illustration. The case was an appeal from an arbitration award. The award was upheld, but it is important to note that the judge was bound by the arbitrator's fact-findings. When reading the facts, which were stated not to have been decisive to the result, but which were expressed nonetheless, one gets a flavour of what one might call the judge's inclination in the case. The facts indicated that the stevedore's injury was mainly self-inflicted and that his claim against the shipowner should perhaps not have succeeded in the first place.[36] In that sense the arbitrator had found that "*the accident was not caused by the shipowner having complied with the orders of the charterer*".[37] And this puts a somewhat different complexion on the result than the simple reasoning that the operation of Minnesota law was not caused by the shipowner having complied with the orders.

Although this was perhaps an undue detour into speculation on the facts, for the purposes of trying to grasp the English law doctrine it may matter whether the claim in *The White Rose* arose from some wholly unusual circumstances, combined with local tort law perceived to be unduly favourable to a local stevedore, or from a more ordinary accident in the course of loading. Under the finely-tuned criteria of English law for issues of causation and foreseeability, this may well be relevant and may, for example, assist in explaining the different outcomes in *The Island Archon* and *The White Rose*.[38] But under the more generalised

---

[36] The stevedore was injured by falling into an unfenced hold. In that respect Donaldson J. states, at p. 57: "*… Mr. De Chambeau left his position at No. 2 'tween deck hatch, and for his private purpose unconnected with his employment made his way aft into No. 3 'tween deck. The nature of these purposes must remain private, for they were not found and I will not speculate, although several possibilities spring immediately to mind, some of which would have been of interest to the local police, some to the local health authority and some to his employers, who are Grain Trimmers Inc., and not the respondent time charterers.*"

[37] Ibid. (the author's emphasis).

[38] Moreover, this also serves to illustrate the difficulties of comparing cases within one and the same legal system. Contract law principles, including standards of causation, are flexible tools in the hands of any judge, which means that the task of foreseeing the outcome may depend on factual nuances and, of course, the differing proclivities of different judges.

Norwegian approach based on the charterer's functions, these kinds of nuances might not play the same role. A function-based approach does not take into account the charterer's giving of orders, hence it does not invite the same scrutiny of considerations of foreseeability – whether at the time of the order or at the time of the contract – that would take place under English law.[39] And to illustrate this very point, the *Jobst Oldendorff* award contains no specific facts regarding the nature of the stevedore's accident. This was simply not necessary for the purposes of determining the outcome of the case.[40]

5 Concluding remarks

This brings us to the end of this paper. Some core aspects of the respective English and Norwegian doctrines have perhaps been illustrated, but not much more. Grasping the full ramifications of the English doctrine would require significant efforts – for example in analyzing the case-specific facts to assess where the fairly flexible concept of causation is brought into play. Grasping the ramifications of the Norwegian doctrine would probably take less effort: its main principles are embedded in the Code and the doctrine itself appears to be less complex than the English. But this very disparity between the doctrines is in itself a hindrance to achieving a fruitful comparison.

---

39 See the discussion by Foxton, supra, pp. 105-106.

40 Another factor is that, also under Norwegian law, causation-related issues may limit the application of a function-based indemnity doctrine. If, for the sake of argument, a wholly fictitious claim for personal injury were to be made against the ship as a means of extorting a payment (in a part of the world where that would be feasible), then it might not really matter whether the person bringing such a claim had previously been involved in cargo operations or not; a fictitious claim could hardly be considered part of the costs of loading or discharge. Perhaps it would instead have to be considered a consequence of where the ship was ordered. This, in turn, brings to mind the dilemma of causation in *The White Rose*, and it also illustrates the potential limits of the Norwegian doctrine: would in such a case the loss remain where it fell or would the notion of the charterer's "functions" perhaps extend to the charterer's giving of orders as to employment?

Moreover, an attempt to compare the case law more closely may also prove difficult. If *The White Rose,* for example, were to be analyzed using the Norwegian approach, the case report probably contains sufficient facts to make such an analysis possible. The Norwegian award in the *Jobst Oldendorff,* however, may not contain sufficient factual information to make such an analysis possible under English law.

Perhaps our conclusion should be that there is no satisfactory answer to the seemingly simple question put in the title of this paper.

Delivery of sea borne cargo – distribution of risk and liability in liner trade

Thor Falkanger, Professor emeritus
Scandinavian Institute of Maritime Law University of Oslo

Content

1 The problem

When cargo arrives by ship at the contractual destination, the cargo owner should pick up his cargo at a time indicated by the carrier, provided it is not a door-to-door transport. The purpose of this article is to examine the relationship between carrier and cargo owner during this stage – in particular when the cargo owner is late in claiming possession of the goods. The relevant issues arise in both liner shipping and voyage chartering. The latter has, however, been thoroughly addresseded, in particular by Solvang, *Forsinkelse i havn* [Delay in port] (2009); this article is therefore limited to liner trade. [1] Furthermore, it is assumed that Norwegian law is applicable.

In order to be entitled to delivery at the contractual port of destination, there are certain requirements that have to be fulfilled on the part of cargo owner. Usually, freight and sometimes additional items have to be paid, and if the cargo is transported under a negotiable bill of lading, this document has to be presented to the carrier and eventually surrendered, duly receipted.[2] In international transport, there may also be custom formalities that have to be met before physical delivery of the cargo is possible. We presume that these matters have been settled. Our focus is on the duty of the cargo owner to take possession of the cargo, and the consequences that may follow if the cargo owner does not act in conformity with the contract. As a necessary pre-requisite for such an investigation, the basic rules on correct and timely delivery of the cargo as well as the distribution of cargo risks during this period must be outlined.

---

1 The questions which the relationship sender/receiver/cargo owner and on the other hand the carrier may raise are not considered in this article. For the sake of simplicity the cargo owner is used as the term for the person responsible towards the carrier.

2 See the Maritime Code (Act no. 39/1994) Sections 269 and 304.

2 The rules on timing of delivery

2.1 The Maritime Code

In this field the Maritime Code is non-mandatory.[3] The rules are based upon the traditional arrangement of a receiver taking over the cargo when it is discharged or soon thereafter – the characteristic feature is that the cargo is picked up by the cargo owner from the carrier's premises or from a warehouse operated by a third party. Today a considerable number of consignments are, however, carried on a door-to-door basis, and this contractual variation requires a separate discussion, see 8 below.

The Maritime Code Section 268 reads in an English unofficial translation:[4]

> "At the port of destination, the receiver shall receive the goods at the place and within the period of time indicated by the carrier. The goods shall be delivered in such a manner that they can be conveniently and safely received."

The first sentence presupposes that the carrier notifies the cargo owner of where the cargo can be picked up and gives a span of time for doing so. This rule is very loose: To whom should notification be given? Obviously, the notification – the format is not defined – should be given before the receiving period commences, but how much time should the cargo owner be given to prepare receipt of the cargo? And, furthermore, how long a time period should be allowed for applying for delivery of the cargo?

It is reasonably clear that an answer to any one of these questions will depend upon the individual circumstances of the transport in

[3] See Section 254.

[4] The original translation was made by Peter Bilton at the request of the Ministry of Justice, and has later been updated by others – the text is now found in MarIus no. 393 (2010).

question. For instance, the time for preparing the pick-up of a small consignment may be much shorter than for a substantial one.

The *travaux preparatoires* discuss to a limited extent these questions (in my translation):

> "In most cases, the receiver will have been notified beforehand of the arrival of the cargo, and consequently should have prepared for picking up the cargo. It is different only in straight door-to-door transports. In all circumstances the cargo owner will have a duty to receive the goods when they are put at his disposal. In carriage of general cargo the modalities of the delivery must, in general, be adjusted to the routines of the carrier; thus, the receiver is obliged to apply for the cargo or to receive it within the span of time stated by the carrier. A pre-requirement is, however, that the carrier – with regard to the demands in respect of expediency in modern liner trade – is considered to have given the receiver reasonable advance notice and a reasonable period of time for picking up the cargo."[5]

In summary: the quotation leaves the impression that the interests of the carrier are given a substantial weight. The protection afforded the cargo owner is connected with what is "reasonable" – a word which is not in the text of the section, but no doubt would have been inferred by a court of law.

We have, as far as this writer knows, no pertinent case law hammering out what these fairly vague words mean.

The Maritime Law Commission (appointed by the Ministry of Justice), which has considered the implementation of the Rotterdam Rules in the Maritime Code[6], has also drafted a new Section 308 to replace the present Section 268. The new section is said "mainly to correspond to the Maritime Code Section 268, but has a somewhat more limited scope" (NOU 2012: 10 p. 97). The wording of the proposed section is (in my translation):

---

5 NOU 1993: 36 p. 32.

6 See NOU 2012: 10.

> "When the cargo has arrived at the place of destination the receiver, claiming delivery of the cargo according to the transport agreement, shall receive the cargo at the time or within the period of time and at the place agreed in the transport agreement, or, if such agreement does not exist, at the time and the place where delivery could reasonably be expected based upon the terms of the agreement, customs, trade usage and the circumstances relevant to the transport."

In the commentaries to the proposal it is said that it is unusual for the transport documents to contain a specific deadline for delivery of the cargo, and consequently "what can be reasonably be expected will be decisive" (p. 97).

2.2 Examples from contracts

For a person acquainted with the detailed rules in voyage chartering for notification and time for taking over the cargo, a survey of a number of standard bill of lading forms must be rather surprising – there is very little to be found!

As an illustration we may take a Bimco-document: Conlinebill 2000, a form which has been revised a number of times, by people of great knowledge. The form has a "Notify Party"-box, as well as a "Port of discharge"-box, and related to our topic we find this clause:

> **"2. Notification**
>
> Any mention in this Bill of Lading of parties to be notified of the arrival of the cargo is solely for the information of the Carrier and failure to give such notification shall not involve the Carrier in any liability nor relieve the Merchant of any obligation hereunder."

This is all that is said on notification.

Clause 2(e) has rules on discharging and the related obligations of the cargo owner related:

> **"9. Loading and Discharging**
>
> (e) The Merchant or his Agent shall take delivery of the cargo as fast as the Vessel can discharge including, if required by the Carrier, outside ordinary working hours notwithstanding any custom of the port. If the Merchant or his Agent fails to take delivery of the cargo the Carrier's discharging of the cargo shall be deemed fulfillment of the contract of carriage. Should the cargo not be applied for *within a reasonable time*, the Carrier may sell the same privately or by auction. If the Merchant or his Agent fails to *take delivery of the cargo as fast as the Vessel can discharge*, the Merchant shall be liable to the Carrier for any overtime charges, losses, costs and expenses incurred by the Carrier" (my italics).

This latter clause apparently presupposes that the cargo owner has in some way been informed of the arrival of the cargo, but the contract gives no specific guidance.

As an example of the regulation in sea way bills we take the Combined Transport Sea Way Bill – also a Bimco-document. It has a notify box, and in clause 8, with the heading "Hindrances etc. Affecting Performance", we find:

> "(3) If the goods are not taken delivery of by the Merchant within a reasonable time after the Carrier has called upon him to take delivery, the Carrier shall be at liberty to put the goods in safe custody on behalf of the Merchant at the latter's risk and expense."

In Nor Lines Transportguide 2012 – which is part of the individual contracts - there is a more detailed regulation (in my translation):

> "DELIVERY/WAREHOUSE RENT
>
> Ordinarily, a consignment will be transported to the customer. If the goods are to be delivered to a private address, the customer will be notified. Notification will also be given if the consignment is claused with delivery restrictions. Warehouse rent is calculated for a consignment which is not picked up or which can be transported

> to the customer within 2 days after notification is sent to the receiver. A consignment which has to be kept at the receiving terminal for more than 2 days, is charged with warehouse rent as from the 3rd day."

Thus, a notification is required, and after the dispatch of the notification the receiver has two days to collect the cargo. The price list which is part of the Transportguide seems to qualify this: rent is due for any period "exceeding 2 working days".

It should be added that a number of carriers today have a cargo tracking system, which may be illustrated by an excerpt from the mentioned Transportguide (also in my translation):

> "In order for a customer to be able to track and follow the consignment from collection from the sender until delivery to the receiver, the consignment must be marked with a transport and/or a collo identificator. Nor Lines scans these identificators, and makes the information available on the internet. Thus, the consignment can easily be followed throughout the total transport chain." [7]

2.3 Summing up

It is reasonably clear from the Maritime Code that notification should be given, but there is no specific guidance on form, when notice should be given and deadline for picking up the cargo. More surprising is the lack of adequate regulation in a number of standard contracts, which means that customs of the trade may be of importance when defining the legal position. The Maritime Code – being somewhat less vague than some of the contracts – may also contribute to a conclusion: the effect of the Maritime Code is, primarily, that it imposes the requirement of reasonableness.

The general impression is that there is a notification system which is not very precisely formulated in the documents used. We have,

[7] One system which is in its initial stage is where he cargo is scanned when discharged, and then a notice is automatically created and sent as a SMS to the mobile telephone of the receiver.

however, seen examples of a different character. Nor Lines has fairly stringent rules; the time when notification should be given is not spelled out, but once this is done, the rules are straightforward. However, with modern technology the professional cargo owner (or one who has professional assistance) is not dependent upon notices to the same extent as previously: he will be able to follow his cargo and will, therefore, in most cases, have ample time to arrange for picking up the cargo. In other words: the need for information from the carrier is reduced to the final details for collecting the cargo.

3 Damage to cargo after discharge

Under this heading it is assumed that the cargo owner has been notified and that a "reasonable" or fixed period of time has been allowed for collecting the cargo.

3.1 The carrier's liability: the period of custody

The carrier's liability for loss of or damage to the cargo is in most instances of a mandatory nature, see the Maritime Code Section 254. Here we assume that this is the case, and we have to consider to what extent these rules are applicable to discharged cargo. The Maritime Code Section 274 states that the carrier is "responsible for the goods while they are in his or her custody … at the port of discharge". Subsection three defines when this period of custody ends:[8]

(i) when the cargo is "delivered" to the receiver;

This may be alongside the vessel: the truck of the receiver is waiting at the quay side and the receiver gets possession of the cargo immediately after discharge. However, in most instances the cargo is placed ashore in the carrier's terminal – inside or outside a terminal building, depending on the nature of the cargo. The period of custody ends when

[8] For a detailed discussion, see Wilhelmsen, *Rett i havn* (2006) pp. 61 et seq.

the cargo is picked up hours or days later;

(ii) where the receiver does not receive the cargo from the carrier (the cargo is not collected in time): when it has been "warehoused for the account of the receiver in accordance with the contract or with the law or usage at the port of discharge";

According to Section 271 warehousing is to place the cargo "in safe custody at the expense of the receiver", with proper notification to the cargo owner. Warehousing cannot be read literally, e.g. a container moved to an open, fenced in area may very well be considered warehoused;

(iii) when carrier has "delivered the goods to any authority or other third party to whom the goods must be delivered according to law or regulations applicable at the port of discharge".[9]

3.2 The liability after discharge but before expiry of custody period

Should the cargo be damaged after discharge but before the end of the custody period (described above), the carrier's liability is defined in the Maritime Code Section 275. [10] It is the same during the total period of custody: the carrier is liable unless he can show that the loss or damage "was not due to his or her personal fault or neglect or that of anyone for whom he or she is responsible". For the ashore period he must e.g. see to it that the cargo is protected against theft, against rain and wind[11] if the cargo is likely to suffer from such exposure, and that proper steps are taken to meet the requirements of refrigerated cargo.[12]

---

9 See as an illustration ND 1956 (= Nordic Maritime Law Report) p. 178 Swedish Supreme Court (Godown).

10 For an extensive discussion of Section 275, see Falkanger & Bull, *Sjørett* (7th ed. 2010) pp. 261 et seq.

11 See e.g. ND 1956 p. 420 Eidsivating Court of Appeal: Bales of sisal were damaged by rain and snow after discharge; and ND 1993 p. 304 Hålogaland Court of Appeal: Fish cases of very light material were not properly secured at the quayside and were blown away.

12 See e.g. ND 1961 p. 255 Eidsivating Court of Appeal: Cold sensitive cargo not taken properly care of after discharge.

3.3 Carrier's liability after expiry of custody period

When the cargo has been warehoused in accordance with Section 274 subsection three, cf. Section 271, then the carrier is not bound by the mandatory liability rules. There are, however, some requirements which must be complied with.

The carrier is not entirely free to warehouse, e.g. when a reasonable time has elapsed. The right to warehouse must follow from the contract or "the law or usage at the port of discharge". For discharge in a Norwegian port the Maritime Code Section 271 entitles the carrier to warehouse the cargo, but he is obliged to put the cargo "in safe custody". He must choose a warehouse that is suited for the cargo in question and he must give necessary instructions to the warehouse keeper on how to handle the cargo. When warehousing is implemented, the carrier must notify the cargo owner or the sender if the owner is unknown.

Transferring the cargo from the carrier's terminal to a warehouse may be impossible: e.g. if no suitable warehouse is available at a reasonable distance from the terminal, or even if facilities are available, the costs involved may appear unreasonably high. In many instances the practical solution would be that the cargo owner is informed that the cargo remains in the carrier's terminal, perhaps after being moved from the central part of the terminal to the periphery, now as warehoused cargo. Does the law allow this alternative, with the effect that the mandatory period of custody expires?

As far as I have ascertained there is no decisive court practice. Regarding the similar rule in Section 115 of the Maritime Code of 1893 (as amended), Grönfors was of the opinion that this section presupposes warehousing with a third party, and he adds that the different system in railway carriage has no parallel in maritime law.[13] A statement in the *travaux preparatoires* to the present Section 271 confirms this, however without any kind of discussion.[14] I hesitate to accept this: The text in

[13] Grönfors, *Sjölagens bestämmelser om godsbefordran* (1982) p. 143.

[14] The mandatory period expires "when the cargo is laid up … with a third party according to the rules in proposed Section 271" (NOU 1993: 36 p. 35).

Section 271 does not refer to a third party or imply that a third party shall have possession of the cargo. The text is simple, it says, literally translated, that the cargo may be "laid up",[15] meaning stored, without any qualifications e.g. to where it should be laid up and who should supervise the laid up cargo. The only requirement is, as stated above, that it should be "in safe custody".[16]

Practical considerations support this view: the cargo owner is in default and the carrier has to take reasonable steps to protect the interests of the cargo, cf. e.g. Jantzen's construction of the former Section 115 (my translation):

> "The cargo should be laid up under safe conditions, i.e. to the extent this is possible with a view to the local conditions. If the carrier has a choice of possibilities, he should prefer the alternative which is cheapest and most secure …
>
> In case of need, he may let the vessel remain with the cargo on board when this is the cheapest and most practical way to take care of the cargo".[17];

As previously indicated (and to which we shall revert below), the expenses are for the account of the carrier, and one important aspect here is to what extent the carrier is obliged to carry the costs in the first round, typically expenses for transporting the goods to a warehouse of a third party and prepaying warehouse rent. The Code does not give guidance here, nor do the *travaux preparatoires*. However, Jantzen discusses the problem:

> "The carrier may, of course, in his own interest find it advisable to make disbursement or undertake obligations, but the cargo owner cannot demand anything in this respect" (p. 201).

---

15 This expression has, I think, somewhat unfortunately been translated as *warehousing*, which may give false associations.

16 See Wilhemsen op. cit. p. 209.

17 *Godsbefordring til sjøs* (2nd ed. 1952) p. 201 (my translation).

This is a restrictive attitude, directly related to voyage chartering, but Jantzen makes no reservations when he comes to liner trade on the following page. His words can hardly be maintained if taken literally,[18] but the quotation shows that there must be limits for what can be expected on the part of the carrier; this is so even if we take into consideration the right of retention, the rules on maritime liens, and the right to sell the cargo (see below). This has also a bearing on the possibility of laying up the cargo on the premises of the carrier as this may require the least amount of effort and expense.

Clearly, we may have evidence problems. When the cargo is transferred to a warehouse belonging to a third party, the change of status is obvious. There is no similar manifest act when the carrier decides that the time has come for laying-up/warehousing the cargo, in particular if the cargo is not moved (the container remains in the same place in the container yard). A proper notification becomes of vital importance in these circumstances. However, the conclusion in regard to this section is not so important if the reasoning below is accepted.

A further question is to what extent the parties are free to decide what constitutes warehousing. We have a mandatory Section 274 which refers to the non-mandatory Section 271. The *travaux preparatoires* indicate clearly that warehousing in accordance with Section 271 is not the only possibility for putting an end to the mandatory liability period:

> "The liability of the carrier for the cargo ceases when it is delivered to the receiver, or – if the receiver does not receive the cargo – when it is laid up for the account of the receiver with a third party according to the rules in the proposed Section 271 [= today's Section 271] or else in conformity with governing rules and practice at the port of discharge" (NOU 1993: 36 p. 35).

The quotation does not expressly refer to the contract, but to the rules at the port of discharge which must be taken as local formal law and regulations as well as commercial customs. The decisive factor, however, is

[18] It would in many cases (most cases?) make the laying-up/warehousing institute uninteresting.

that Section 274 subsection three no. 2 has an explicit reference to "laying-up … in accordance with the agreement", i.e. the transport agreement. Thus, the parties may agree e.g. that the cargo, without further notice, will be considered delivered two days after discharge, even if it is still in the carrier's terminal, and that the expenses are for the account of the cargo owner.

When the cargo is considered as being laid up in this way, according to general legal rules or contractual rules, , the carrier is outside the scope of the Maritime Code. But he will be liable if he has not exercised due diligence in arranging the lay-up and instructing a third party possessor. Should the cargo be damaged during lay-up at the carrier's terminal, he is outside the scope of the Code, but not totally excused from liability. He is now custodian of the cargo and may be held liable for damage according to the rules on bailment.

4 The expenses

The starting point is that the freight covers the expenses until the cargo is picked up, provided the cargo is applied for by the cargo owner within the time fixed in conformity with the contract or within a reasonable time after discharge. But when the cargo owner is in default and the cargo is laid up/warehoused as described above, this is according to Section 274 subsection three no. 2 "for the account of the receiver", which includes the cost of transferring the cargo and the rent due to the warehouse holder. It is, as stated above, a duty on the part of the carrier to arrange this as cheaply as possible, without endangering the safe custody of the cargo. In addition, we have the problem – mentioned above – to what extent the carrier is obliged to advance such expenses.

If the cargo is stored at the carrier's terminal, he should have the right to charge a reasonable sum, reflecting his expenses and the loss he suffers if storing the cargo prevents other business.

The Code's rules on expenses are not mandatory, see Section

254 subsection two. We can find an example of how this freedom of contract is used in the standard condition for "Delivery/warehouse rent" in Nor Lines' Transportguide 2012. This condition is quoted in full above; here we repeat a part of it:

> "Warehouse rent is calculated for a consignment which is not picked up or can be transported to the customer within 2 days after notification is sent to the receiver. A consignment which has to be kept at the receiving terminal for more than 2 days is charged with warehouse rent as from the 3rd day."[19]

The price list included in the guide says: "Warehouse rent after 2 working days, per day or part of day NOK 215 per 100 kg."

An important question is when the rightfully claimed expenses are due for payment – which in our context is transformed to: is the carrier entitled to refuse delivery of the cargo until the expenses have been paid?

The Maritime Code Section 270 gives the carrier the right of retention for claims "according to Section 269" as well as for claims secured by a maritime lien. The claims mentioned in Section 269 are "freight and other claims due to the carrier pursuant to the bill of lading", which may very well include warehouse rent etc.[20] If the cargo is not carried pursuant to a bill of lading, the Maritime Code has no provision in its rules on sea way bills (Sections 308 and 309) similar to Section 269, nor any reference saying that the terms of Section 269 "apply correspondingly". General contract law comes, however, to the assistance of the carrier: if the claims are due on delivery according to the terms of the contract, the carrier will be entitled to deny delivery of

---

[19] It should be noted that the clause does not explicitly say that on the third day the cargo is considered delivered, with the liability consequences flowing from the Maritime Code.

[20] See e.g. Conlinebill "shipped box" where it is stated, delivery of the cargo "on payment of freight as indicated to the right plus other charges incurred in accordance with the provisions contained in this Bill of lading".

the cargo until payment is received.[21] Since Section 270 also refers to maritime liens, we have to ascertain whether the claims we are interested in fall into this category. The pertinent rule is found in Section 61 no. 3; a maritime lien on the cargo exists for "a claim by the carrier arising out of the chartering agreement,[22] in so far as the claim can properly be brought against the person claiming delivery". These words clearly cover the expenses with which we are concerned.[23]

5 Special rules for non-commercial cargo owners etc.?

The Maritime Code does not distinguish between commercial and non-commercial cargo owners, but in deciding on questions of reasonableness, of providing information on the cargo (from owner to carrier and vice versa) etc., it is very likely that the courts will pay regard to differences in professionality.

Nor Lines' Transportguide 2012 gives an example of some special rules depending upon the status of the receiver. These rules deserve a full quotation (in my translation):

> **"Consignments to private persons or unattended day address**
>
> Consignment addressed to private person or unattended day address, building sites, hospitals, schools or customers that have restrictions regarding delivery between 0800 hours and 1600 hours will normally be discharged to terminal. This applies also to

[21] See in particular Brækhus, *Pant og annen realsikkerhet* (3rd ed. by B.H. Berg, 2005) pp. 567568.

[22] Chartering agreement includes «agreements on the carriage of general cargo (typically documented by a bill of lading or a sea way bill)" (Falkanger, *Maritime liens on cargo: A survey of the provisions in the Norwegian Maritime Code*, Simply 2002 (= MarIus no. 295), pp. 83 et seq. on p. 92.

[23] See also Brækhus op. cit. p. 586.

consignment/collo charged with giro[24]. It will be calculated an additional notification charge and possible warehouse rent to be invoiced to freight debtor or receiver. (See price list)

It is assumed that the receiver picks up the cargo within 2 working days after having received notification from Nor Lines or that it is agreed on delivery by truck between 0800 hours and 1600 hours. If the consignment is kept at the terminal for more than 2 working days warehouse rent is charged as from day 3 (See price list),

If the receiver wants Nor Lines or its representative todeliver the cargo at an unattended day address/building site etc., this is done only against/after written confirmation of the task by fax or mail. Receiver is made aware that Nor Lines does not accept any liability fnor the cargo after delivery regarding any damage/loss which the receiver might later ascertain/claim. Nor Lines will, however, before local transport, check that the cargo is in conformity with the description in the transport documents, and deviations, if any, in the form of damage/shortage will be noted/notified to the customer."

6 Sale or disposal of non-delivered cargo

6.1 Putting an end to warehousing

When the cargo is warehoused as described above, this may be due to:

(a) the cargo not having been collected at the terminal within the agreed time or after the lapse of "a reasonable time", or not having been received when presented by the carrier who has undertaken a local transport from the terminal to the customer, or

(b) the carrier has refused to let the cargo owner have possession because freight and expenses have not been paid. tcarrier should get his

[24] This is an arrangement whereby the sender (the seller) is secured payment: the cargo shall not be delivered unless it is clear that the giro amount is paid.

money, the warehouse should be emptied and the cargo should be used in a sensible manner. We need a set of rules applicable where the parties involved are not able to negotiate a workable solution.

6.2 Sale of cargo

The Maritime Code Section 272 gives the carrier the right to sell the cargo on the following conditions:

(1) A notice has been given to the effect that cargo has been warehoused and that the cargo, after a stated time limit – which should be reasonable – may be sold or otherwise disposed of according to Section 272 (Section 271 subsection three);

(2) Historically, the cargo had to be sold at "a public auction or in another safe manner". Today the manner of sale is decided by the carrier, subject to an obligation to "exercise care in the conduct of the sale";

(3) The sale should be limited to what is necessary to give the carrier satisfaction. Out of a consignment of sugar in bags, the sale should be limited to the number of bags necessary to covering the mentioned items.[25] The Code gives no guidance regarding the unsold part of the consignment. It seems that it is doomed to remain in custody drawing further warehouse rent, which may lead to a new sale. However, in many instances the cargo is physically or commercially indivisible and the total cargo has to be sold. After covering what is due to the carrier, a possible surplus should be paid to the cargo owner (or deposited if his whereabouts are unknown).

Conlinebill has an answer to the the particular problem concerning the remaining cargo when a partial sale covers the outstanding claims. In clause 9(e) it is said:

> "Should the cargo not be applied for within a reasonable time, the Carrier may sell the same privately or by auction."

[25] See the corresponding rules in the Code of Enforcement of Claims (Act 86/1992) Section 811.

Seen from the carrier's point of view this is a sensible solution; he is able to clear, within a reasonable time, most issues deriving from an unfortunate contract; the remaining issue may be a monetary settlement which does not interfere with the daily liner operation. The clause raises, however, a difficult question: to what extent is it possible to regulate the consequences of default? The basic principle in Norwegian law is found in the Code of Enforcement of Claims (Act 86/1992) Section 13 subsection one first sentence (in my translation):

> "Before a claim is in default, it cannot validly be agreed that covering same shall take place in another way than through the enforcement authority."[26]

From this principle there are a number of exceptions. Thus, we have seen that the carrier is free to sell the cargo as he pleases, provided that he takes proper care of the interests of the cargo owner. But this is a right given him by special enactment, viz. the Maritime Code Section 272. It appears to be generally accepted that such a form of self-help as clause 9(e) opens up for the carrier, may also have sufficient basis "in customary law of general principles of law".[27] In my opinion the salient point is whether clauses of this type, which no doubt are extensively found in standard documents, have acquired the status of customary law. In this respect I do not have sufficient information enabling me to give a considered conclusion.

6.3 Using the maritime lien

The carrier's claims are, as mentioned, secured with a maritime lien, and he has the alternative of enforcing on this basis; however, the Maritime Code has no rules in that respect. Consequently, we have to apply the Code of Enforcement of Claims (Act 86/1992), which means that satisfaction would be obtained through a sale administered by the en-

[26] Generally, see Falkanger, Flock & Waaler, *Tvangsfullbyrdelsesloven* (4th ed. 2008) pp. 62 et seq., in particular p. 64.

[27] Falkanger, Flock & Waaler op. cit. p. 53.

forcement officer in the district where the cargo is warehoused. For a survey of the rules applicable in this context, see Falkanger op. cit. pp.103-105.

6.4 Alternatives to sale

Sometimes a sale is not feasible – there is no market for the cargo or the cargo has no value (from the very start or now: the fruit is rotten). The Maritime Code Section 272 subsection two provides for this situation:

> "If the goods cannot be sold or if it is evident that the costs of sale will not be covered by the proceeds, the carrier may dispose of the goods in some other reasonable way."

This may entail destruction of the cargo (e.g. dumping the rotten fruit), in some instances with substantial costs, which have to be borne by the carrier in the first instance. It is, however, clear that these expenses are a consequence of the cargo owner's failure to take delivery, and the carrier is entitled to compensation from the cargo owner. And, of course, the claims on the part the carrier prior to e.g. destruction do not disappear; the (technical) loss of security in the cargo is immaterial for the personal liability of the cargo owner.

Also the Transportguide 2012 has rules worth noting:

> **"Delivery hindrances**
>
> When the receiver refuses to take delivery of the cargo or hindrances for delivery arise, the carrier shall request instructions from the customer. If instructions are not received within 7 days from date of request, the consignment is automatically returned for the customer's account and risk."

7 Door-to-door transport

7.1 Introduction

Above we have touched upon door-to-door transports. They deserve, however, a somewhat broader survey. In our context, a door-to-door transport is the following: the cargo discharged at the sea terminal, is carried, usually by truck, from the terminal to the receiver's (for the sake of simplicity) warehouse, and this is part of the carrier's contractual obligation – to be performed by himself or someone engaged by him.

It should be mentioned that the Maritime Code has no specific rules on a sea voyage to which a short or a long road transport is linked. A reasonable starting point seems to be that delivery by truck close to the terminal is seen as an accessory to or a small extension of the sea transport, while delivery far away is to be considered as a multimodal transport. Obviously, we may have difficulties here in drawing the line between the two, which may be vital in some respects. The problem should not, however, be dramatized because many of the issues with which we are concerned are not subject to mandatory legislation.

7.2 Delivery questions – delivery by truck

The parties – carrier and cargo owner – are free to determine to where the cargo shall be carried, and they are free to agree on delivery procedure and expenses arising in connection with delivery. In view of this, we turn once again to Transportguide 2012. The delivery address will be stated in the way bill, and the Guide says (my translation):

> "COLLECTING/DELIVERY BY TRUCK
>
> Collecting and delivery by truck is usually included in the freight.
>
> …

> The cargo is collected/delivered at ramp/street level. It is assumed that the conditions are such that this can be done with ordinary distribution material.
>
> …
>
> DELIVERY/WAREHOUSE RENT
>
> Consignments will usually be delivered by truck to the customer; When the goods are to be delivered to a private address the customer will be notified … Warehouse rent will be calculated for consignments which are not collected or cannot be delivered by truck 2 days after notification is sent to the receiver. Consignments which have to be kept at the terminal for more than 2 days are charged with warehouse rent from and including day 3."

If the cargo cannot be delivered (including the situation where the cargo owner refuses to take delivery) the carrier should take care of the cargo, usually by keeping it at the terminal. The carrier may then make use of the warehousing rules mentioned above (Section 271) and finally be entitled to sell (Section 272) and thus get rid of the safe keeping obligation and – hopefully – have his monetary claims covered. There is, however, a little "but" here, inasmuch as Section 271 presupposes the traditional pattern with the receiver picking up the cargo at the terminal (cf. the wording: "If the goods are not collected …"). The grounds for the carrier's rights to get out of an unfortunate situation caused by the cargo owner are, however, also present where the carrier has undertaken an extra delivery service. Consequently Section 271 should be construed to apply also to the latter situation. The notice requirement in subsection two must be complied with. In the situation directly covered by Section 271, the notice gives the cargo owner the possibility of collecting the cargo within "a reasonable time", thus avoiding a sale. In a door-to-door case there seems to be three possibilities: (i) the carrier is obliged to transport the cargo to the cargo owner's warehouse, when the cargo owner so demands, provided all extra expenses are paid; (ii) the obligation to perform the road transport has ceased: the cargo

owner's possibility for avoiding a sale is to apply for the cargo at the carrier's (or a third party's) terminal; or (iii) the cargo owner has the possibility of negotiating with the carrier, and if no agreement is reached within the time limit, sale proceedings can be commenced. The answer will probably depend upon the individual circumstances. For example, if the carrier has a well organized road delivery system and a second delivery does not cause difficulties worth mentioning, it does not seem unreasonable to hold that the delivery duty still exists – provided that all extra expenses are paid.[28]

7.3 Cargo responsibility

We also have to consider damage to or loss of the cargo. Once it has been warehoused, the rules mentioned above are applicable. The special question arising in a door-to-door transport is: who has to carry the loss where damage occurs on the road leg, prior to the delivery at the cargo owner's terminal? And further: if this delivery attempt is unsuccessful, what is the position in the period up to warehousing?

(a) Long road transport

We assume that with a long road transport we have a multimodal transport – with the Maritime Code applicable for the sea leg while the Act on Road Transport Agreements (Act 68/1974) applies to the latter leg. The rules do not in all respects give identical rights and obligations: generally one can say that the cargo owner has better protection under the road transport rules. Differences may make it necessary to define the borderline between the two legal regimes, even if the carrier is the same.[29]

A typical situation is that a truck arrives at the terminal's loading ramp, the cargo is brought by a fork lift truck from the inside of

[28] In Transportguide 2012 there is a clause related to this, implying that one unsuccessful attempt does not necessarily relieve the carrier of the road transport obligation.

[29] The difference has been reduced, but not eliminated in inland transport, see the Maritime Code Section 276 subsection three and Section 280 subsection two and the commentaries thereto in Falkanger & Bull op. cit. pp. 280-282.

the warehouse to the ramp and the cargo is placed inside the truck by the fork lift truck. We have in other words a variety of "roll-on". It seems that the borderline is to be drawn "geographically": outside or inside the truck.[30] If the cargo falls from the fork lift truck before passing this line the maritime rules apply. The legal situation is complicated by the fact that all persons involved in this process are the servants of the carrier.[31] We shall not investigate this field further; suffice it to say that if there is e.g. a question of limitation of liability where a servant of the carrier has caused the cargo damage, the rules in the Maritime Code are decisive in the example above, not the stricter (seen from the carrier's point of view) rules in the Act on Road Transport Agreements Section 38.[32]

(b) A short road transport

With a short road transport, we are confronted by the question of whether the road leg can be seen as part of the sea carrier's undertaking and within the period of mandatory custody. Clearly, there is nothing in the Maritime Code to prevent a contractual stipulation to that effect. But the Act on Road Transport Agreements may apply with mandatory rules. Our, question is, however, about the interpretation of the Maritime Code.

In my opinion, the answer should be that a local transport is subject to the Maritime Code: the carrier has the possession – and consequently the possibility - to protect the cargo all the time, and in this period there is no significant event to which a change of liability regime could reasonably be connected. We may envisage two typical situations: the cargo is discharged directly from the vessel to a waiting truck, which thereafter brings the cargo to the customer. The other situation is that the cargo is discharged to the quay, then transported (perhaps by a fork lift truck) to the warehouse, where it rests a day or two – depending upon the delivery routines of the carrier – before it is

[30] See Wilhelmsen op. cit. pp. 64-65.

[31] See Wilhelmsen op. cit. pp. 116-117.

[32] A further complication is that Section 274 limits the mandatory period to "the port of discharge", see below.

taken by truck to the customer. There seems to be no reason to distinguish between these two situations.

This attitude implies a difficulty: how should one decide that the road leg is part of the sea carrier's undertaking (is "a local transport") and not part of a multimodal transport?

The starting point is, obviously, the contract: if the contract defines itself as a multimodal transport – typically by using a standard multimodal document – there are no grounds for questioning this, unless the road distance is minimal. A sea transport document may however, appear somewhat suspicious if it covers a road distance of a length which is disproportionate to the sea leg. The court may deem this an attempt to avoid the stricter road transport rules.[33]

The importance of this question is substantially cut down if it is accepted that *the port of discharge* formula is an effective delimitation of the carrier's liability. The background is that Section 274 defines the mandatory scope of the rules as the period when the cargo is in the carrier's custody "at the port of loading, during the carriage, and *at the port of discharge*" (my italics). But the Code omits to define what a port is in this context! Nor do the *travaux preparatoires* give much guidance.[34] Wilhelmsen op. cit. pp. 75-77 discusses the port concept without arriving at a definite conclusion.[35] If it is accepted that the Code includes local pre- and post-transports,[36] the consequences of this limitation are

---

[33] Compare the problem when carriage under a charterparty is said to be a way of avoiding the stricter liability connected with a bill of lading or a sea way bill, see e.g. Falkanger & Bull op. cit.pp. 293-294.

[34] NOU 1993: 36 p. 35.

[35] It is noteworthy that a similar limitation is not found in the Rotterdam Rules, see NOU 2012: 10 with the draft Section 273 no. 1 which (in my translation) reads: "The carrier is responsible for the goods from the time the carrier or a performing party receives the goods for carriage and to the time the goods are delivered." In the commentaries pp. 66-67 the deletion of the port-limitation is not mentioned. However, on the other hand the commentaries introduce a terminal concept which is not reflected in the proposed statutory text : "No. 1 determines the period of responsibility as the time from receiving the goods until delivery, in the same way as in the Maritime Code . Consequently, it is not only the carriage which is included, but also possible terminal periods."

[36] This is not generally accepted, see Wilhelmsen op. cit. p. 77.

no doubt strange: if the truck has a collision and the cargo is damaged one has to ascertain whether this happened before or after passing the geographic limits of the port.

(c) Unsuccessful delivery attempt

It may happen that the carrier has to return with the cargo. If this is due to circumstances for which the cargo owner bears the risk, the contractual but unsuccessful delivery attempt on the part of the carrier has the consequence that he is relieved of his mandatory Maritime Code liability. The cargo is, however, in his possession and he has a duty to pay regard to the interests of the cargo owner – the principle in Section 271 regarding "safe custody" should be applied, see above 3.3. So, if the cargo is damaged on the return transport, the maritime rules are not applicable, but the carrier may be held liable on another basis.

The lawyer's approach to safety: Law meets engineering

By Knut Kaasen, Professor dr. juris
Scandinavian Institute of Maritime Law
University of Oslo

Content

1 A dramatic illustration: Piper Alpha

In the course of about an hour, late in the evening on 6 July 1988, the platform Piper Alpha on the British continental shelf was changed from an ordinary oil and gas producing fixed platform into an unrecognizable, burned-out wreck. By early in the morning on 7 July, most of the essential parts of the platform were gone: the living quarters and the process plant had melted down, the remains lying on the bottom of the ocean 140 meters below the surface. Only parts of the drilling module were hanging on bits of the steel jacket, which was still visible above the water line. 62 people survived, most of them by jumping into the ocean. 167 people perished.[1]

This disaster may serve as an illustration of fundamental issues of safety regulations.

To get an impression of what caused the catastrophe, we need to look briefly at some technical aspectss of Piper Alpha. Onboard the platform, two large pumps were used for the transportation of condensate[2] to shore. The pumps could be used independently. On 6 July 1988, maintenance was performed on one of the pumps: a relief valve was removed for calibration and blind flanges were put on the end of the open pipes to block them off. The flow of condensate and gas was channelled through the other pump.

During the same evening, problems arose with this other pump. The night shift, which was now on duty, decided to shut off the pump and direct the flow of condensate and gas through the first pump – unaware that the dayshift had not managed to complete the maintenance and that the permit had only been suspended and not signed off. Pressure built up

---

1 The accident was investigated by Lord Cullen, see the report in The Public Inquiry into the Piper Alpha Disaster, Vols 1 and 2, Cullen, The Honourable Lord, HM Stationary Office, 1990.

2 Mixture of hydrocarbon liquids that are present as gaseous components in the raw natural gas produced from many natural gas fields. It condenses out of the raw gas if the temperature is reduced to below the hydrocarbon dew point temperature of the raw gas. (Wikipedia)

against the blind flanges, which were not constructed to resist this. Gas and condensate leaked out, immediately catching fire and exploding. This started a domino effect of fires and explosions, which in the course of about 20 minutes resulted in the pipelines transporting oil and gas to Piper Alpha from two other adjacent platforms exploding, contributing large quantities of oil and gas to escalate the fire, which burnt furiously for a long time. As a result, Piper Alpha almost melted down.

For obvious reasons, one can take into account a number of technical factors when explaining what caused the accident. If the blind flanges had been designed to resist the pressure, nothing would have happened. If the fire walls between the different process areas of the platform had resisted the first explosion, the fire would have been of a limited size – but the platform was originally constructed for oil production, and the fire walls were not modified to resist gas explosions when the platform was then modified some years earlier to also process gas. An automatic shut-down of the oil and gas supply from the neighbouring platforms would probably also have limited the damage considerably. And these were far from being the only technical weaknesses disclosed by the investigation that followed.

At a closer look, a whole range of factors is sine qua non in relation to the disaster. For example: nothing would have happened if there had been no problems with the other pump, or if the calibration had not been necessary, had been performed the day before or had taken less time. A modification to some factors would have cut the chain of events completely; others would have greatly reduced the consequences of the initial occurrence.

The perspective can, in terms of strict logic, be further expanded. Applying the sine qua non test unrestrictedly would reveal an almost indefinite number of elements leading up to the disaster. They would all be "causes" in the sense that if left out, the disaster would not have occurred or its effects would have been reduced.

But little is gained by putting the label of "cause" on all factors which, logically, were contributing to the disaster. In order for the exercise to serve a practical purpose, there is a need to identify the more important factors, those which can be said to *explain* the disaster. If one is able to

understand why the disaster happened, one has come a long way in avoiding similar occurrences, which is the main aim of the investigation.

In understanding what happened, engineering issues are obviously central, involving a holistic approach to causes and interaction between causes, as well as being open to the possibility that the relevant elements do not necessarily constitute one single line of events. However, the engineering issues are not the only ones of interest, even when deviating from the nearly all-inclusive sine qua non approach. A far more simplistic – but maybe also more challenging – explanation of the catastrophe emerges: the nightshift personnel were not informed at shift changeover of the arrangements made by the dayshift personnel. If the nightshift had been informed, they would have taken more appropriate actions as the pump failed, and little more than an ordinary operational irregularity would have occurred.

At this point, we encounter differences between the engineering and legal professions. This is to be expected: the professional upbringings and the roles are different. Indeed, both the engineer and the lawyer try to understand and explain in order to learn; the main purpose of identifying causes is to design something that works better – being it technology in a strict sense or administrative systems. But traditionally the lawyer has an additional role – that of handling legal issues rising from the accident. These could involve aspects of tort and damages, insurance and criminal sanctions. This may be a reason that while the engineer would tend to take the holistic approach to causes of accidents, the lawyer may tend instead to apply "the doctrine of the main cause".[3] In

[3] A decision from the Norwegian Supreme Court (Rt 1933.931) may illustrate this doctrine: a passenger suffering from an unknown heart disease died when the truck went off the road, down a slope and ended upside down, the passenger caught in his seat, however not suffering physical injuries explaining his death. In the insurance case brought before the Court the question was whether the passenger's death was "caused" by the accident or by his heart disease. In deciding this, the Court posed the following question (pp. 934-935): did the passenger's disease make him so much more vulnerable than any other passenger that – knowing all the facts – one would be likely to say "how unfortunate that this accident should hit precisely this sick person!" If this were to be the natural thoughtful reaction, then the disease would be seen as the predominant cause. The conclusion would be different if the thoughtful reaction were to be that this is what is likely to happen when a truck overturns and the passenger is caught wedged in his seat in the position he was in.

the Piper Alpha incident, the "main cause" could well be seen as the lack of communication between the two shifts of personnel.

Where then do the regulations come into the picture? Or, loosely cited from Tina Turner: what´s law got to do with it?[4]

Piper Alpha thus forms a dramatic picture of the range of the potential contribution by law and lawyers to safety. The picture has room for law and lawyers. The classical safety regulation, which sets a standard for technical performances, is of course relevant. Modern safety regimes, which set requirements for organisation and «safety management», are also obviously relevant.

2 Lawyers and other professionals

When the task concerns safety issues, a lawyer brings along the usual toolbox. Rules and regulations are our always present universal means. Precise legislatory requirements – leaving as little room for interpretation as possible – have to be made, and a firm legal basis has to be established for administrative decisions that can then detail and specify these requirements. Furthermore, sanctions against violations must be authorised, and these sanctions should be effective, suitable and fair. Finally, the safety legislation must provide for the fundamental needs for predictability and general legal safeguards.

Lawyers are so well acquainted with their tool-box that they run the risk of forgetting that the tools are just that, not a goal in their own right. We might even ask whether all legal tools are indeed suitable and effective within the safety context. But safety has many facets. It may therefore be useful to try to identify some secondary targets: to achieve safety; what legal steps can adequately be taken?

Lawyers are unable to handle this issue on their own. Engineers play their obvious part, and looking more closely at the problem, one might

[4] Ref. Tina Turner: "What's love got to do with it" (writers Terry Britten and Graham Lyle), released as a single on 4 June 1984 on the Capitol label.

expect contributions from psychologists, organisational theorists, sociologist and economists as well as other professionals. Each on their own, and in cooperation, will have justifiable interpretations of what measures are efficient to enhance safety. And it is by no means certain that requirements based upon legislation – and the associated legal sanctions in case of breach of these requirements – will even play the central part here.

The task of enhancing the level of safety in the offshore sector is indeed challenging. This is not an exact science: assessments have to be made on the basis of unknown facts and discretionary assumptions. But in this context, even lawyers may contribute: we can participate in the discussion on which minimum goals should reasonably be set to obtain safe operations and which means to achieve them would be most suitable, and even when the topic of discussion is whether safety is enhanced by applying criminal sanctions to near accidents. But perhaps we make our main contribution when systemising the legal tools and techniques that may be relevant, without claiming exclusive competence as to predicting their *effects*. On the one hand, we have to leave room for other professionals and their justified views. On the other hand, we will learn from the experience that our legal techniques are in fact not so distant from the manner in which other professionals are working: The similarity between a regulation and a technical procedure describing how a tunnel is to be constructed under sea level can be astonishing. And the techniques of a well formulated specification on corrosion protection of offshore platforms could easily ignite the envy of a contract lawyer. (This is not to say that such a level of specification is desirable in safety regulations, as we will see below.)

The main contribution from lawyers then lies in his or her contributions to the discussion on suitable means in general, in the analysis of which legal tools are of interest in principle, and in the participation in the discussion on their effect in order to reach the final target: an acceptable level of safety. This can all be summed up in the acknowledgement that «law´s got something to do with it», but that safety is implemented in a multitude of ways.

3 The basic legal instruments

In the context of safety – as indeed in many other aspects of life – law may contribute with three basic components: norms, control systems and sanctions – all based on «rules». Views and ideas on the role of law in this regard must take all these components into consideration. In the following paragraphs, their implications in a safety context are briefly described, by distinguishing between rules on material norms (item 4 below), control systems (5) and sanctions (6).[5]

4 Norms

The basic legal components of a set of rules on safety are the ones enforcing obligations: the norms. To get an overview of the norms, different distinctions can be made, and they may well also be combined.

4.1 Immediate impact on safety?

Norms which directly aim at ensuring that installations and operations are safe may be placed on a scale, depending on the extent to which the norm is presumed to have an *immediate* impact on the level of safety.

Requirements regarding corrosion protection of a steel jacket or pipeline will presumably be well suited to reducing the risk of breakdown of the structure and thus enhancing the level of safety if the requirements are adhered to. The effect will be rather direct in both directions: adherence results in less risk of damage, and violation increases the risk.

---

[5] These issues. the related terminology and the structure of their relations are discussed in Kaasen, K. (1984): "Sikkerhetsregulering i petroleumsvirksomheten. En rettslig studie av regelverkene om sikkerhet på norsk kontinentalsokkel" *("Safety reguletion of offshore petroleum activities: A study of the legal frameworks for safety reghulation on the Norwegian Continental Shelf. With a summary in English.")* (Sjørettsfondet, Oslo 1984). See especially pp. 236 et seq. on norms, pp. 269 et seq. on control and pp. 383 et seq. on sanctions.

Laying down minimum standards for the qualifications of the person welding the jacket or the pipe may have the same effect: if the person knows what he is doing, the result is probably safer than if he were a novice. But many other factors may also influence the end result, for example, the steel quality, steel temperature during welding, surface treatment and purge gas quality and pressure. In addition, even a welder not possessing the required formal qualifications may perform a first class weld. The connection between qualification requirements and safety becomes more indirect than between e.g. the required corrosion protection and safety.

This picture gets even more complex if the norm specifies how the work is to be organised, for instance that nightshifts are not to be used or that the operation of cranes presupposes a driver's mate at ground level. Again, such requirements are likely to reduce the risk of damages, but the connection is rather weak and the implications one way or the other are less clear. Indeed, using a nightshift might even reduce the aggregate risk because fewer people are then exposed to the risk-filled activity.

A fundamentally different type of norm is one requiring the industry itself to define the safety requirements which should be followed in its own activities – an "internal prescription of norms". At the outset it seems surprising that the state authorities abdicate in this way from the task of defining safety norms themselves. We will return to that. At this stage it suffices to note that this phenomenon is closely linked to two aspects of state involvement in safety management: the reluctance to specify detailed do's and don'ts, and the wish to emphasise the industry's independent responsibility for handling all aspects of safety in its own

operations.[6] While the former observation connects to the distinction between rules specifying manuals and those just providing general goals (4.2 below), the latter is of a more general nature, in that it constitutes an important element in what may be termed "industry's safety management". Another element in the internal safety management could be that the industry itself is also required to supervise its actual compliance with all relevant requirements, including the ones internally prescribed. This may be labelled "internal control" (item 5.2 below).

Requirements on internal prescription of norms and internal control are of course designed to reduce the risk of a safety related failure. But norms amounting to such requirements are definitely of another type than norms defining how welding is to be conducted or which level of corrosion is acceptable – with the former, we are even further along on the scale spanning from norms having an immediate impact on the safety level to those having just an indirect effect. On the other hand, the safety effects of requirements regarding the industry's safety management are likely to be general, as opposed to requirements directed at specific devices, activities or qualifications. This feature of the industry's safety management makes it worth studying, especially when the state intervenes in it by laying down mandatory requirements. We will return to that.

The indirect effect on safety is also a feature of the last type of regulation we are looking at: regulations on how the control activity itself is

[6] An illustrative example is the UK move from regulations merely referring to industry norms, via detailed prescriptive norms, to the introduction of the Safety Case – requiring the industry to demonstrate that the design, construction and operation of the installation is safe. See Kaasen, "Post Piper Alpha: Some Reflections on Offshore Safety Regimes from a Norwegian Perspective", Journal of Energy & Natural Resources Law Vol. 9 No. 4, 1991 s. 281–289, at p. 286. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling recommended that the US regulatory system should adopt an approach "similar to the "safety case" approach that is used in the North Sea", see the Commission's recommendations (http://www.oilspillcommission.gov/sites/default/files/documents/OSC_Deep_Water_Summary_Recommendations_FINAL.pdf) at p. 4 and also the Commission's final report (http://www.oilspillcommission.gov/sites/default/files/documents/FinalReportChapter8.pdf) at p. 241 et seq.

to be conducted under the direction of the authorities – whether by means of state bodies or by consultants (like Det Norske Veritas) hired by the authorities. These are partly internal administrative rules on the organising of governmental activities,[7] and partly rules on the relationship between the control authority and the industry. We will deal with the latter aspect in more detailwhen returning to look again at the systems for controlling safety.

We can therefore see that the legal norms which in some way have connection to safety, cover a wide spectre of requirements, from the specific «there shall be that number of gas detectors of this type» to rules that deal with the relationship between the Petroleum Safety Authority in Norway and the Norwegian Maritime Directorate. The spectrum reaches from rules which indeed are suited to create safety to rules which may facilitate the establishing of such rules and administrative decisions.

4.2 Manuals or objectives?

Another distinction that may be made in categorising norms relates to the way in which the purpose of the regulation is defined: does it specify *actions* to be taken or avoided, or does the rule restrict itself to determining the *targets* to be achieved? Manuals or objectives?

The rule may be restricted to determining that the drilling equipment shall be operated so that no harm is done or that the organisation should be capable of identifying deviations from safety standards. Or the rule may state that longitudinal bulkheads inside tanks must be designed «in this way» or that an independent level within the organization is to control «in this way» every month. In the first scenario, it is up to the addressee of the requirement to decide what must be done to achieve the goal, while in the other scenario he gets clear instructions on what to do.

---

[7] This organisation of the relationship between state bodies may be crucial to both the general efficiency of state involvement in safety issues and to the fundamental but challenging balancing of safety against economy.

There are advantages and disadvantages to both methods. The target specification concentrates on the crucial issue, is flexible and encourages innovation, but at the same time gives very little foothold for the industry's activities and is a rather flimsy basis for a standard legal enforcement. There is not much use in a rule which requires the drilling operations to be performed "in a safe manner". Conversely, the guideline type of specification may give a firm and clear basis for the actual operations, but at the same time leaves very little room for development, based on insight and experience – and is at the mercy of the given method being a suitable means for reaching the implied target. It is not obvious that the windows of the ship's lounge must be easy to break, even if this in a given situation would make evacuation more efficient.[8]

As the examples show, the choice between «method»- and «objective»-regulation is relevant for the whole spectrum of safety-related regulations, not only with regard to the immediate safety requirements.

4.3 Legally binding or just guiding

A last division of the norms concentrates on the completely fundamental issue: whether the norms are legally binding or are merely guides, not establishing formal legal obligations.

The legally binding norms are well known in their hierarchical structure progressing from act to regulation, further on to detailed regulation and finally to individual administrative decisions. Nor are guidelines an unknown phenomenon. But a fairly new development is the formal link that has established over the last few years between the

[8] The example is from the accident «Herald of Free Enterprise» which on March 6, 1987 capsized in shallow water outside Zeebrugge. The official report can be read at http://maib.gov.uk/publications/investigation_report/sherald_of_free_enterprise/herald_of_free_enterprise_report.cfm . A total of 193 people perished. Many were caught inside the ship and after the accident requirements that windows should be breakable for easier evacuation were put forth. But in the case of fire in the lounge and with the boat deck above, the absence of stronger, more fireproof glass could be a catastrophe, see page 29 of the report.

legally binding norms and the non-binding guidelines, specifically in the offshore sector.[9]

The common pattern is like this: the regulation provides relatively imprecise requirements or restricts itself to just identifying the goals which are to be met, and refers to an enclosed guideline (or to an industry standard) which gives a detailed instruction on how to proceed in order to fulfil the requirement of the regulation, and – which is the legal aspect of it – determines that behaviour in accordance with the guideline is acceptable without further discussion, but that the industry must provide further documentation and justification should it choose to fulfil the legal requirements in another manner.[10]

By not making the guideline legally binding, one avoids having the negative effects which typically characterise the distinctly "manual type" of regulation. At the same time, the guidelines provide a norm for what alternatives are acceptable – including the degree of detail which must be presented in order for the alternative to be accepted. Apparently the better of two worlds, then: freedom and firmness.

From a legal perspective, this hybrid of binding requirements and non-binding manuals might perhaps feel a bit unfamiliar. To a lawyer the legally binding rule is often perceived as the basis for organising everything. But at a closer look, our ordinary legal tool comes in handy here as well. The base is the perhaps vague legally binding requirement, but the guideline becomes an accessory which fills out, colours and mildly controls – without legally enforcing. After all, «soft law» is not an unknown phenomenon outside the universe of safety regulation.

---

9 The considerations resulting in the use of guidelines as alternatives or supplements to binding requirements may differ between jurisdictions and – more importantly – in the course of the different phases of regulatory development. Under the Norwegian system, the guidelines serve as examples of how the unspecified requirements of regulations may be met – opening the option for the industry to choose another method, provided it can demonstrate that it is equally good or better.

10 This system has developed under several jurisdictions. An example is the UK sector, where we find "Approved Codes of Conduct" often supplemented by "Notes of guidance", providing acceptable solutions which may be deviated from if the industry can prove that an alternative approach is equal or better. The Norwegian system is structured in a similar way.

However, lawyers are far from being alone in the arena. And our well-developed/well-honed taste for the basic difference – in all relations – between the binding rule and the guiding advice is not always as developed within other groups of experts who are involved in the safety norm system. On the governmental side, one may find that guidelines are treated as regulations or that the terminology of guidelines does not precisely reflect the fact that they are not meant to be binding. And from the user's side, the distinction between regulation and manuals may sometimes appear unmanageably subtle.

5 The control regimes

Central parts of safety regulations impose duties upon the industry. All human experience points to such rules not being effective unless they are followed up by a regime checking whether they are being complied with. This regime serves several functions: it is educational in that the subject of the requirement knows she is being checked; the regime may give insights which provide the basis for refining or amending safety requirements; it offers a psychological state of contentment to all involved because "we have done all what could be done", and finally the regime may reveal any non-compliance which may result in sanctions being imposed and possibly also revised (improved) norms being implemented – further increasing the efficiency of the system. The overriding observation is thus that a control regime is suited to enhancing the level of safety.

The legal tool is not the only one available in the context of safety control. Nonetheless, the rule of law makes important contributions: it organises the control system (who, what, when, how), and it gives the basis for intervention (individual administrative decisions, e.g. stopping hazardous work, amendments to general regulations). Below, we will first look at the control regimes; we return to the sanctions in item 6.

5.1 Object of control

In view of its purpose, the *objects* of the control regime should, as a starting point, be all issues which are made subject to requirements founded in safety considerations – that is to say, the entire range from corrosion protection via qualification requirements to organisational issues.

For practical and economic reasons, the control regime can and should not cover this field wall to wall. But the psychological reasons for not providing such wall to wall coverage are even more important: knowing that all issues are subject to subsequent control could conceivably reduce the alertness exercised when performing the relevant action. The immediate subject could be rendered passive and thus the control could imply a false sense of an effective double check. Instead, control objects should be selected randomly or according to some system. Again, it is the role of the legal rules to set frames for this: the selection of control objects can be left to the discretion of the controller or – as the complete opposite – be precisely defined beforehand/in advance. In practice, one operates somewhere between these two poles.

The object of control is defined by two techniques in particular: by rules on who performs the control, and by rules on the formal role of the control regime – is it a condition for an activity to be allowed to take place, or does it apply to an ongoing activity?

5.2 Who performs the control?

It is not a given who performs the actual control. Traditionally, safety control has been a matter for the state, institutionalised among others by the (long since repealed) Factory Supervision Act 1892. The state is still in charge of essential parts of the control, but two other actors are now also in the picture. One is the private consultants who traditionally constitute an important part of safety control in e.g. the shipping industry. Historically, their role was organised by the ship-owner and insurer, but they have become more and more a part of the state safety control through assignments given by the legislation. They usually constitute

an element of a certification system, but they may also take a more general role in relation to safety control, as defined by the state or industry in their respective systems.

The other actor in the controlling activities is the controlled industry itself: Since the end of the last century, regulations have to an increasing degree imposed on the industry an obligation to ensure that its own activities are performed in accordance with the relevant safety requirements ("internal safety control", 4.1 above). The industry has also been required to report to the state safety control authorities how its safety management is organised, together with its findings and corrective measures. Through this system, a symbiotic relationship has emerged: the industry itself provides an important foundation for the state safety control by means of activities which are themselves regulated and – as a separate object – controlled by the state authorities. This development has taken place in parallel with another development: to an increasing degree the efforts to establish dedicated safety requirements have been left to the industry itself, within the vague framework defined by the function requirements ("internal prescription of norms", 4.1 above).

An important aspect of this development is that the state safety control increasingly concentrates – though not exclusively – on the industries' "organisational *prerequisites*" to operate its activities safely and in accordance with the framework set by the regulations, as opposed to the state directly checking if this is actually happening. The industry's «safety management», comprising internal prescription of norms and internal control, thus constitutes a key element of safety control, in addition to the state's own safety management – which as we have seen also comprises state prescription of norms and state safety control.

In effect, this system implies that the state safety control comprises two fundamentally different elements: checking that safety requirements are actually observed in the workplace and also checking that the operator's safety management system is established and operating according to requirements laid down by the state. This combination is likely to be more effective than if the state were to concentrate its control efforts on just one of these issues.

An obvious objection to this development is that industry safety management means that the fox is set to mind the geese. Balancing safety versus economy, the industry may emphasise different aspects from those that a governmental body would select, and it is unrealistic to expect that an «indirect state control», based on information from the industry itself, is capable of revealing every tendency of lopsided industry assessment. Thus, parts of the state «safety control» may be impaired – the state therefore taking a considerable step back from the attitude which was the hallmark of the Factory Supervision Act.

But the counterargument may also be summarized in a Norwegian saying: "No one knows where the shoe pinches like the wearer". Laying down formal requirements as to how the industry is to operate its own safety management – in its own right and as a contributor to state safety management – may operate to increase the industry's sense of having an independent responsibility for safety issues.

Maybe one of the most difficult and complex questions with regards to safety regulation is how the roles in safety management should be allocated between the state and the industry. This discussion must also take into account the many types of expertise. This includes that of the lawyers, whose contribution often brings us on to the questions of sanctions, to which we will return, but also to the various types of safety norms, see item 4 above.

5.3 Control before or after the fact?

Regardless of who performs the control, and what they are controlling, the control concerns either something which *has happened,* or something which *could be about to happen.* In addition to the obvious difference that a control after the fact will often be too late to prevent accidents, these forms of control serve different purposes in the control system: A preventive control may easily be included in an approval arrangement, where the criteria for passing a predefined milestone in a given activity is that the planned activity must first be approved on the basis of assessments of plans, the qualifications of the involved person-

nel and the organizational aspects of the activity. Such a «go-stop-go» arrangement has many advantages compared to the classical form of control, where the controlling body only looks over the industry's shoulder during its operations, and only steps in – perhaps a bit too late – if they detect something of which they do not approve. A disadvantage is that the arrangement is very resource-demanding: positive approval requires more effort by all involved than does an on-going auditing type of control.

When preventive control is a prerequisite for an activity, one gets a clearer legal anchoring of the administrative powers vested in the control agency. Conditions may be tied to an approval, making the control more definite and detailed than when the activity goes on undisturbed until the authorities choose to intervene under an auditing type of control. However, there is a price tag to this because there is a connection between competence and responsibility: The use of approval arrangements may tend to weaken the industry's independent responsibility for the safety of its activities.

6 The sanctioning systems

Even in Toyland, there is a constable, and he might even be a lawyer – somewhere deep within. It is through the sanctioning system that the law truly shows its clout, because under the constitution legal sanctions *must* have a legal fundament.

The sanctions that ensue from breach of safety rules cover a broad register from criminal to administrative sanctions: punishment may be targeted towards persons or businesses, and may take the shape of imprisonment or fines, based on general conditions for penalty. This is all based on the well established ideas of general and individual deterrence. Such considerations may also be the reasoning behind administrative sanctions. However, they may often be more directly based on safety considerations, as when a coercive fine is imposed, a halt of operations

is ordered or necessary permits and approvals are revoked because safety regulations have been violated.

While the effectiveness of safety requirements is normally supported by the authorities having the power to invoke sanctions against non-compliance, the reliance on sanctions as a means to obtain adherence may differ between jurisdictions. Opposite examples in this respect appear to be the US and Norway. At the two extremes, the Norwegian approach may be said to rely greatly on trust between regulators and companies and confidence in PSA expertise and supervision, whereas the "Macondo" accident may seem to indicate that the then current US approach reflected mistrust of industry and relied instead on fear of sanctions and liability.[11]

Because what is sanctioned is the compliance with obligations, there is usually a complete concurrence between those who are subjects of safety requirements and who are subjects of sanctions.

Sanctions presume fact and statutory basis. While few can defeat lawyers on the issues of statutory basis, it might be argued that lawyers do not possess all that it takes to deal with the factual aspects. The same goes for the final, definitive question on sanctioning: should they always be used, even if the actual and legal conditions for using them are satisfied? In considering this, the differences between the approach of lawyers and that of other groups of experts are easily demonstrated.

A keyword in this setting is *near accidents*. For instance, should penalty be used when there has certainly been a violation of a safety regulation supported by criminal sanctions, but where the violation has not resulted in an accident or the like?[12] According to the Criminal Procedures Act 1981, the prosecuting authority has the discretionary

---

[11] See the findings and recommendations of the National Commission (see footnote 6 above).

[12] Some regulations impose upon the industry the obligation to report near accidents, see for instance the Diving Regulations (Reg. 30 November 1990 No. 944) Sect. 120: "All fatal accidents and threatening serious accidents shall immediately be reported to the Norwegian Labour Inspection Authority."

power to decline from instigating criminal proceedings.[13] Should this power be used?

The Director General of Public Prosecutions says no, in general: «When a serious violation of safety regulations is revealed, this must be reacted upon even if no accident has yet occurred or any damage has yet been identified."[14] Others have opposed: «We still believe that offenders should be punished. But should there have to be made a choice between an offender getting away on one hand and the continuous repetition of serious accidents because the learning process has stopped on the other, we will choose the first».[15]

Recognizing that safety work and safety regulation are not static, it is easy to agree to the importance of the learning process running its course, and it is unfortunate if the use of sanctions against near accidents poses a hindrance to experiences being used as a basis for improving the systems. But then the central idea must be just that – whether or not there is something to learn from the occurrence.

This may be illustrated by an example: when a new gallery of a mine is to be connected to an existing gallery, it is important to measure the quality of air of the existing gallery before the breakthrough to ensure against inadvertently letting toxic gases into the new gallery at breakthrough. This was not done in 2005 in a mine at Svalbard, resulting in the death of a worker in the mine. As could be expected, the occurrence resulted in criminal proceedings against the responsible person.[16] But what if no one had been injured but everything else had remained unchanged – should it then be regarded as a near-accident which should

---

13 See the Criminal Procedures Act 1981 Sect. 69, first paragraph: «Even though guilt is deemed to be proved, a prosecution may be waived provided that such special circumstances exist that the prosecuting authority on an overall evaluation finds that there are weighty reasons for not prosecuting the act..»

14 See The Office of the Public Prosecutor´s circular letter RA-1996-1 on working environment crime, item III.2.

15 «Safety on the shelf» no. 1/1982 p. 2, released by the project bearing the same name, Trondheim. Based on similar statements in The Director General of public Prosecutions´ previous circular R 768/80.

16 See Hålogaland Court of Appeal´s sentence of 4 June 2007 in case No. LH-2007-32323.

be prosecuted? It would seem hard to argue against it. There would be no need for a learning process as both the requirement to control the air and the reasons for it were indisputable and well-founded – knowledge derived from a near-accident could be hardly likely to result in any changes to the regulations. However, two other considerations may work in the opposite direction. Firstly, by prosecuting the immediately responsible person, a clear signal is sent that reporting near misses involves a personal risk, which in turn is likely to reduce the volume of such reporting. Secondly, by concentrating on the immediately responsible person, sight might be lost of distal factors having a potential bearing on the near miss.[17] In both cases the learning process might suffer.

The situation might be different if one is faced with new challenges where there are no specified requirements as to how they should be handled, but instead just general and unspecified definition of targets. Should a near-accident occur as a result of violation of rules identifying such targets, valuable insight might be lost if the information on the occurrence is hidden because of a threat of prosecution. On this point lawyers and engineers might have somewhat different approaches – the lawyer's kneejerk reflex may be that « a discovered criminal offence should lead to punishment».

Another aspect of this is that lawyers are traditionally often not as concerned about systems of norms which are not sanctioned – because they are not considered to be «proper rules». An example is the ISM (International Safety Management)-code[18] in the shipping industry, which is regarded as a central requirement in many shipping environments, but which some shipping lawyers might be likely to shrug at because the code itself does not contain sanctions. It helps that parts of

---

[17] Railway accidents offer an example: Often the prosecution targets the immediately responsible (e.g. the engine driver having passed a red signal light without stopping) rather than possible weaknesses in the safety management on the organisational level. For an illustration see NOU 2000.30 "Åsta-ulykken, 4. januar 2000" at pp. 252-253 highlighting the relevance and importance of such distal factors.

[18] See http://www.imo.org/ourwork/humanelement/safetymanagement/pages/ismcode.aspx

the code could be seen as sanctioned on a national level by being implemented in acts or regulations.[19] But even if this were not the case, the code could still carry legal significance, for instance as a relevant norm when assessing issues of tort law – in line with the non-binding guidelines mentioned in item 4.3 above. This also illustrates the interweaving relationship between classical legal instruments and the – legally speaking – more obscure norm systems in the safety sector. Even with no direct legal relevance e.g. under tort law, sets of general norms not containing any means of legal sanction may be relevant in a legal context. For example: in exercising her discretionary authority to prosecute on the basis of a near accident or not, the prosecutor may take into account whether the company involved was certified under (and actually has complied with) the industry standard ISO 9001. As a consequence other actors will naturally pay attention to the standard – no matter that it is not a mandatory legal requirement.

Do criminal sanctions improve safety? This is a classic topic of individual and general deterrence, but also poses the more basic question on the connection between the ability to manage risk and the liability for irregularities and responsibilities – insight into who is affected by a threat of penalty should be essential for determining who should be punished. A variant which has become more widespread in recent years is the concept of criminal liability for enterprises. Under this concept it is not a condition for criminal sanctions that the liable subject can be held guilty on the basis of any individual's fault . But the decision as to whether this type of criminal sanction should be applied in a specific case should explicitly take into consideration «whether the offence has

[19] The Norwegian Maritime Authority´s regulation of concerning a Safety Management System on Norwegian Ships and Mobile Offshore Units (14 March 2008 No. 306) Sect. 2 first subsection imposes on «Every company [to] establish a Safety Management System at all levels of the company's organisation and on each individual ship or mobile offshore unit in accordance with the ISM Code.». The requirements are criminally sanctioned in accordance with the Ship Safety and Security Act (16 February 2007 No. 9) Sect. 58: « Any person who, on behalf of the company, wilfully or negligently substantially fails to establish, implement and develop a safety management system in accordance with section 7 and regulations issued pursuant to the provision shall be liable to fines or imprisonment for a term not exceeding two years.»

been committed in order to promote the interests of the enterprise» and «if the enterprise could by guidelines, instructions, training, control or other measures have prevented the offence.»[20] The concept of criminal liability of enterprises makes it possible to obtain a more thorough influence over the decision-making systems (premises, trade-offs, ranking of priorities) than would be the case if one had to identify persons who could be held criminally liable under the ordinary rules of such sanctions. It also makes it easier to influence aspects of the organisation of the enterprise which might be critical for whether or not accidents occur.[21]

However, it is important to note that sanctions are not always the most important possible consequence of safety norms being violated. In particular, when it comes to general and unspecified norms like function requirements without specified identification of the methods to be used, the violation often reveals a need for revision of the regulatory framework, e.g. by issuing method requirements or guidelines at the very least. Thus, violations may cause the same effects as do control activities.

---

[20] The general provisions on criminal liability for enterprises are to be found in the General Civil Penal Code (22 May 1902 No. 10, as amended) Sect. 48 a: «When a penal provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be held liable to a penalty. This applies even if no individual person may be punished for the contravention». A more precise guideline is given in Sect. 48 b: «In deciding whether a penalty shall be imposed on an enterprise pursuant to section 48 a, and in assessing the penalty vis-à-vis the enterprise, particular consideration shall be paid to […] c) whether the enterprise could by guidelines, instruction, training, control or other measures have prevented the offence, d) whether the offence has been committed in order to promote the interests of the enterprise, e) whether the enterprise has had or could have obtained any advantage by the offence, […] g) whether other sanctions have as a consequence of the offence been imposed on the enterprise or on any person who has acted on its behalf […].»

[21] As an illustration, see the remarks from the investigating commission of the Åsta accident, where two trains collided: « Regardless of the actual cause of the north going train 2369 by mistake passing the departure signal at Rudstad station on January 4, 2000, the review of the causes that such a passing could at all take place, and that the situation was not discovered and stopped much earlier, has shown a basic lack of systematic approach to safety questions, in particular within the Norwegian National Rail Administration which are to ensure that the overall safety on a railway track is acceptable.» (NOU 2000: 30 paragraph 12.3.2.2.)

7 Lawyers and Engineers

After having considered some aspects of the law's contribution in a safety context, with both its possibilities and limitations, we are now ready to look again at the interaction between law and technology in the service of safety. And let us lawyers gaze at our own navel for a short while: Do the engineers understand us?

They probably see the need for legal tools. But possibly they perceive the effects of these tools a little differently from how lawyers often do, and thus they may have other perceptions of how applicable the tools are. One fundamental difference may result from the effects being evaluated *ex ante* or *ex post*: Many will be of the opinion that the law's central function is to be applied to the situation after the fact – sanctioning ex post based on assessments of which requirements were relevant and not complied with – the operation was not safe so we back-track to find someone to blame and hold liable.

Such considerations *are* of essence, and the principle of the rule of law (legal sanctions must be vested in applicable legislation) implies that they are naturally dominated by lawyers. But, as we have seen, this is by no means the only way in which law may contribute.

To tie these somewhat floating perceptions to the ground, we can conclude as we started – with an example. This time fortunately less dramatic than the Piper Alpha, but on the other hand based on personal experience.

A mechanical wharf in northern Norway employed (the then young) Kaasen as a "rust- treater", and made him apply red lead to the interior of a narrow forepeak tank of a trawler. It was hard to identify the chemical components of the stuff that the rust-treater applied to the bulkhead after having made his way through the little manhole into the tank. But it smelled as if it was highly flammable. Back in 1973 one took no notice of that. But then again the worries came as the bulkhead unmistakably became warmer and warmer. The authorized rust-treater managed to creep backwardsout of the manhole notably faster than

coming in. Safely on the outside, he could establish that another equally determined person was performing a weld on the very same bulkhead that was subject to the unmistakably flammable rust-proofing a minute ago.

What is to be done with such incidents?

Had the rust-treater already been a lawyer at the time, he might have suggested several possible measures. The first one coming to mind would presumably have been to issue a statutory rule that no welding should be performed in areas where work with fluids with flammable vapours takes place. Perhaps this rule should be spelled out less casuistically, for instance by ordering that welding is to be performed in a controlled setting so no harm is caused. But it might be that such a measure would not solve every problem – it might just be that neither the welder nor the rust-treater would be able to draw any operative conclusion from this rule, just glancing at it on the bulletin board the previous week. But the rule would make an excellent starting point for a criminal follow-up if the rust-treater had reported the rule breach, and then the welder would hardly be likely to do the same thing again. Still, this approach may carry some feature of after-the-fact intervention.

Perhaps it would be a little more operationally practical to impose a requirement on the welder always to check his immediate surroundings before commencing the welding operations. But that could entail having to walk long distances to get below a deck or around a tank. It is not realistic to assume that this would form part of his daily routine.

Another solution might be to make use of organisational tools. The requirement could be that welding requires written permission, issued by someone with an overview of all work going on in the relevant area. Admittedly, more chefs in the kitchen might imply fragmentation of responsibility, but it might be easier to place the responsibility on a person who is entrusted with a particular safety function than to rely on the assumption that everyone who is somehow involved in any activity can be trusted and motivated to implement safety thinking every hour of the day.

No one knows which one of these – and certainly many more – alternatives or combinations of alternatives is the most likely to result in the least possible risk of the young rust-treater ending his days as just that. But two general observations appear convincing. First, the lawyer plays a role in this assessment. He may bring in important pieces of the puzzle by pointing to possible effects of setting different *types of requirements* directed to different *levels* of the organisation, followed by different *control- and sanctioning mechanisms*. Second, the lawyer can obviously not complete the puzzle alone.

One of our challenges as lawyers is to put our own house in order: As professionals, we must keep our toolbox tidy – this will enable us to contribute meaningful inputs to safety management in cooperation with other professionals. But this in itself is not enough. The other professionals carry their own toolboxes and the tools they retrieve from *their* boxes have an impact on the effects of our beloved legal tools as well. They do not operate in splendid isolation. In order to achieve the best possible total effect on the overall level of safety, we lawyers therefore need to consider this reiterative process – even if it forces us to reconsider our basic ideas about our legal tools and their effects. The proper handling of safety aspects in the offshore activities calls for joint efforts by a multitude of professions, preferably all stripped of conventional exclusive monodisciplinary expert thinking.

Liability and insurance clauses in contracts for vessel services in the Norwegian offshore sector - the knock for knock principle

Trine-Lise Wilhelmsen, Professor dr. juris
Scandinavian Institute of Maritime Law
University of Oslo

Content

1 Introduction

The topic of this article is liability and insurance clauses in contracts for vessel services in the Norwegian offshore sector. In this article, "Contracts for vessel services" means offshore charter parties and contracts for drill and well services. The contracts referred to in this contextt are the Supplytime 05[1] and the OLF[2] Proposal New conditions for drilling and well services.[3]

The main feature of such liability and insurance clauses is that they aim to establish a systematic liability and insurance system throughout all the contracts involved in a particular project, whereby all risk of damage is financed by insurance effected by the contractual party sustaining the damage. The principle that damage should stay where it occurs is called the "knock for knock" principle. Nonetheless, the liability system may also regulate damage to third parties.

The knock for knock principle is easy to establish in the contractual relationship between two parties. The parties to a contract are free to regulate the risk of causing damage to each other, including both limiting liability for damage caused to the other party and waiving the right to claim damages from the other party. However, this freedom of contract principle will only allow for the regulation of damage to economic interests held by the two parties, that is to say damage to their goods, loss of income and other losses sustained by either of them. However, the parties to the contract do not have contractual freedom to regulate the tort position of an injured third party. This position is regulated by tort law governing the relationship between the injurer and the victim,

---

1 Supplytime 2005 Time Charter for Offshore Service Vessels http://maritimeknowhow.com/wp-content/uploads/image/Charterparties/Time-CP/SUPPLYTIME_2005.pdf

2 Norwegian Oil & Gas (Previously Oljeindustriens Landsforening) http://www.norskoljeoggass.no/PageFiles/1459/drilling%20and%20well%20services.pdf

3 Some references will also be made to the Norwegian Fabrication Contract 2007, which contain a similar regulation, cf. http://www.norskindustri.no/getfile.php/Dokumenter/PDF/NF_07_NorskFabrikasjonskontrakt.pdf

and this tort law position cannot be departed from by a contract to which the victim is not a party. If the knock for knock principle is to be extended to apply to damage to personnel employed by the contractual parties, this must therefore be achieved through indemnity and subrogation clauses. The same is true if the principle is to be extended to apply to sub-contractors or other cooperative parties on each side of the contract. The regulation of liability in the knock for knock principle is therefore constructed partly as liability clauses and partly as indemnity and recourse clauses.

Much has been written about the knock for knock principle in Norwegian law.[4] The main focus of this article is to discuss the validity of the clauses. In order to do that, however, it is necessary to provide an overview of the main content and structure of the clauses, as well as the rationale behind them. Furthermore, a brief presentation of the relevant tort law and insurance law framework is also necessary.

2 Overview of the relevant tort law and insurance legislation

2.1 Tort law

According to Norwegian tort law, a person is liable for damage to another person if three conditions are fulfilled: there must be a legal basis for liability, there must be an economic loss, and there must be legally relevant causation between the act or the omission of the injurer and the loss. These rules are mainly developed and stated in court practice and are not reflected in general legislation.

The rules on the basis for liability may be divided into three: liability

[4] Hans Jacob Bull, *Tredjemannsdekninger i forsikringsforhold*, Oslo 1988, Del IV, (Bull) Knut Kaasen, *Petroleumskontrakter,* 2006, Del VIII (Kaasen), Monika Zak, "Ansvarsregulering i borekontrakter –Gyldighetssensur i norsk, engelsk og amerikansk rett", *MarIus 415*, 2013.

for negligence, strict liability and vicarious liability. The main rule is that negligence is required to invoke liability for damages. Strict liability will normally require an act of legislation. Vicarious liability is regulated by the Compensation Act[5] § 2-1, which states that an employer is liable for any damage caused by negligence or a deliberate act by his employees. This is therefore a combination of strict liability and negligence.

However, in several areas there is legislation providing for non-fault liability. Of interest here is the regulation of the petroleum and maritime legislation.

The Petroleum Act[6] § 10-9 provides for extended liability of the licensees operating on the Norwegian Continental Shelf:

> "If liability in respect of a third party is incurred by anyone undertaking tasks for a licensee, the licensee shall be liable for damages to the same extent as, and jointly and severally with, the perpetrator and, if applicable, his employer."

This means that if, for instance, a contractor performing drilling services for a licensee on the Norwegian Shelf causes damage while performing the services, the licensee is jointly and severally liable with the contractor. The liability of the contractor is regulated by ordinary tort law as outlined above.

Furthermore, both the Petroleum Act and the Maritime Code[7] contain rules on strict liability for pollution. A general feature of these rules is that the licensee or the shipowner has strict liability for pollution[8], that the liability is specifically directed against these persons so that claims may not be raised against other persons, and that the licensee or shipowner, having settled the claim, may not raise a subrogated claim against the persons protected against claims in the first place, unless any such protected person has acted deliberately or with gross

5 Norwegian Compensation Act (Skadeserstatningsloven) 13 June 1969 no. 26.

6 Petroleum Act 1996 no. 72 (PA).

7 Maritime Code 1994 no. 39 (MC).

8 PA § 7-3, MC § 191.

negligence.[9] However, even if the charterer is protected against a pollution claim from a third party, he is not protected against a claim for subrogation.[10] The licensee, on the other hand, may not claim recourse against anyone who by agreement with the licensee or his contractors has performed tasks or work in connection with the petroleum activities.[11]

The starting point is therefore that the licensee and the contractor are jointly liable for damage caused during operations on the Norwegian continental shelf, and that liability for pollution is specifically channelled against the licensee and the shipowner respectively.

2.2 Insurance law

Insurance in Norway is regulated by the Insurance Contract Act (ICA).[12] The provisions of the ICA are generally mandatory.[13] There are, however, several exceptions for insurance relating to commercial activities. The exclusions relevant here are for ships and offshore units, as well as for goods being transported internationally, where this includes transport to and from the Norwegian Continental Shelf.[14] As a starting point, therefore, the insurer and the parties to the charter parties or the drilling contracts have full contractual freedom in relation to the content of the insurance contract.

Norwegian marine insurance is regulated by the Norwegian Marine Insurance Plan 1996 Version 2010 ("NP")[15]. This is a document with agreed terms very similar to those of private legislation, and it is used for most marine insurance contracts in Norway. The NP contains conditions for, inter alia, hull and loss of hire insurance for ocean-going ships and offshore units. Hull insurance includes liability for collision,

9 PA § 7-4, MC 193.

10 MC § 193 (c).

11 PA § 7-4 (a).

12 Act no. 69 of 16 June 1989 relating to insurance contracts.

13 ICA section 1-3 first subparagraph.

14 ICA section 1-3 second subparagraph (c) and (d).

15 From January 2013 amended to Nordic Marine Insurance Plan 2013.

but ordinary liability insurance is regulated by Protection and Indemnity insurance contracted in the P&I Clubs. Of particular relevance here is that NP chapter 18, which regulates insurance for Mobile Offshore Units has special rules on subrogation and co-insurance which are relevant for the knock for knock regulation.

3 The content and structure of the knock for knock principle

3.1 Type of loss and basis for liability

Both Supplytime and the OLF Proposal apply to the following groups of damage and loss:

i) Damage to property, including the vessel[16]

ii) Personal injury or damage[17]

iii) Consequential damage[18]

iv) Pollution damage[19].

Supplytime also addresses liability for Hazardous and Noxious Substances.[20] In the OLF Proposal, the principle also applies to loss of or damage to in-hole equipment, loss of hole, blowout, damage to reservoir and use of radioactive tools and infringement of patents/property rights.[21]

However, even if the core of the knock for knock principle is that

16 Supplytime 2005 cl. 14 (b) (i) and (ii) , OFL proposal cl. 8.1 (b) and 8 (2) b.
17 Supplytime 2005 cl. 14 (b) (i) and (ii), OLF proposal cl. 8.1 (a) and 8.2 (a).
18 Supplytime 2005 cl. 14 (c), OLF proposal 8.10.
19 Supplytime 2005 cl. 15 (a) and (b), OLF cl. 8.4 and 8.5.
20 Supplytime 2005 cl. 14 (f).
21 OLF cl. 8.6, 8.7, 8.8 and 8.9.

each party carries the damage that it has sustained, some losses will nonetheless be channelled against one of the parties or divided between the two parties. This may be necessary to comply with the mandatory pollution regulation.[22]

The knock for knock regulation applies regardless of the basis of liability that may be invoked against the injurer, i.e. it applies to both strict liability and negligence. This means that the regulation applies to liability which is based on either the licensee's contractor's liability according to the Petroleum Act 10-9, on strict liability for pollution according to the petroleum or maritime regulation, or on negligence. Furthermore, it applies to ordinary negligence, gross negligence and damage caused by intent. In addition there is no distinction between faults made by an employee and faults made by those representing the company.

3.2 Who is included in the liability provisions – "the group concept"

The standard liability provisions first and foremost apply to the parties to the contract. In the charter party, this will be the "Owner"[23] and the "Charterer".[24] In the OLF proposal, the parties are the "Contractor"[25] and the "Company".[26] However, the provisions also apply to other parties.

Firstly, the provisions address both damage to property as well as personal damage to the employees of the parties to the contract. Secondly, the provisions apply not only to the parties to the contract, but to others who are in a contractual relationship with these parties. In the OLF Proposal, this follows directly from the wording of the clauses, where the Contractor and Company shall "indemnify" not each other,

22 According to OLF cl. 8.4 the Company is liable for pollution from reservoir and property of the company, whereas the Owner according to Supplytime 15 is liable for all pollution from discharge, spills or leaks from the vessel caused by the Owners.

23 The Owner is the party stated in Box 2, Supplytime 2005 Part II Definitions.

24 The Charterer is the party stated in Box 3, Supplytime 2005 Part II Definitions.

25 The "Company" means X as operator on behalf of one or more Licence Groups as specified, cf. OLF proposal General conditions 1.1. Definitions.

26 The Contractor is identified by name, cf. OLF proposal General conditions 1.1. Definitions. See similarly NF Part 1 Art 1 1.14 (contractor) and 1.22 (Company).

but instead the "Company Group" and "Contractor Group".[27] In Supplytime, the result is more indirect as the clause only states that the Owner and Charterer shall not be liable for damage to the Charter Group/Owner Group, but where according to a Himalaya clause this freedom from liability shall apply also to the benefit of other members of the respective Groups.[28]

The "group concept" in this context is used to define so called risk zones, being the zones for which each party carries the tort risk. The point here is that the Owner/Company or Charterer/Contractor not only agrees to be responsible for any damage that befalls the property of the company or the property or persons of the employees, but also assumes responsibility for such damage throughout the group.

The extent of the risk zones has varied over time[29], but both the Supplytime and the OLF Proposal apply a rather wide group concept, or a "big family group" concept.[30] The definitions vary somewhat, but the main point is that the groups consist of the contractual party and the parties with whom they cooperate on a particular project, including all the employees of such third parties.

> The "Owner Group" is "the Owners, and their contractors and employees of all the foregoing.[31] The Company Group means the Licensee Group, each of the participants herein, their affiliated companies, the Company's other contractors and their contractors or subcontractors, the Company's invitees, and personnel employed in or engaged by the aforementioned corporate entities, and others whose services are used by the Company.[32] The Charterers Group is "the charterers, and their contractors and, sub-contractors, co ventures and customers". [33] The contractors Group is the

[27] OLF proposal cl. 8.1 and 8.2, NF art. 30.1 and 30.2.

[28] Supplytime cl. 14 (b) (i) and (ii) cf. 14 (e).

[29] Bull p. 333 ff., Sofia Lazaridis, *Maritime offshore contracts Compendium*, Sjørettsfondet 2011, p.51.

[30] Bull p. 347.

[31] Supplytime cl. 14 (a).

[32] OLF proposal cl. 1.1 third paragraph. See similarly NF art. 1.26.

[33] Supplytime cl. 14 (a).

> "Contractor, Contractor's Affiliated Companies participating in the Work, its Subcontractors and their contractors and subcontractors, participants in a joint venture or similar partnership involved in the Work, Contractor's invitees, and personnel employed in or engaged by the aforementioned cooperate entities."[34]

In the contract between Owner/Company and Charterer/Contractor, the parties may agree to waive the right to make a claim against a third party for liability for damage to his property or person. This will then constitute a promise not to make any claim against the named third party. However, the parties may not, through their contract, require the other members of their respective groups to accept a similar waiver of their rights. If matching waiver provisions are not included throughout the contractual chain, a contractual party who has not agreed to a knock for knock provision may refuse to accept responsibility for damage to his property and personnel and may instead make a claim against the injurer. This will disrupt the system and can easily lead to a chain of subrogated claims.[35]

To obtain an overall knock for knock governing provision in all the contracts relating to a particular project or work, the Company/Owner and Contractor/Charterer must therefore include equivalent agreed liability terms in all their other contracts tied to the same project or work, and induce their contractual partners to do the same. To the extent the same contractual terms are used throughout, this should secure a consistent approach to liability. But such "back to back" regulation is not always agreed. NF 07 therefore includes a duty on the Company and Contractor to "ensure as far as practicable that other companies" in the group agree to waive their right in an equivalent way.[36] Supplytime 2005 and the OLF Proposal do not include a duty to secure equivalent provisions in other contracts.

The aim of the knock for knock principle is thus to allocate the risk for liability for all the parties that are involved in the same project. But

---

[34] OLF cl. 1.1 sub paragraph 10, see similarly NF art. 1.16. Cf further on the group principle in drilling contracts Zak p. 29 ff.

[35] So called loss carousel, cf. Bull p. 341.

[36] NF art 30.2 and 30.2 second paragraph.

the project may also result in damage or loss to a third party, that is to say a party outside the mentioned groups. Liability to third parties is also included in the standard provisions, but less so in the charter party than in the other contracts. In the charter party, only loss suffered by third parties by the vessel's carriage of hazardous or noxious substances is regulated. This risk shall be carried by the Charterer.[37]

The regulation of third party liability is more extensive in the OLF Proposal 8.3:

> "Subject to clause Article 8.4 – Pollution from reservoir and property of Company,
>
> Contractor shall indemnify Company Group from and against any claim arising out of loss or damage suffered by a Third Party in connection with the Work, to the extent that any such loss or damage is caused by the negligence or breach of duty (whether statutory or otherwise) of Contractor Group.
>
> Subject to Article 8.5 - Pollution from Contractor's property, Company shall indemnify
>
> Contractor Group from and against any claim arising out of loss or damage suffered by a Third Party in connection with the Work, to the extent that any such loss or damage is caused by the negligence or breach of duty (whether statutory or otherwise) of Company Group".[38]

These provisions mean that each party or group is liable for damage caused by their own negligence. As a starting point this division of liability conforms to ordinary contract law. However, as it follows from PA § 10-8 that the licensee (Company) is severally and jointly liable with the Contractor for all damage for which the Contractor is liable, it means that this risk is transferred back to the Contractor.

---

37 Supplytime cl. 14 (f).

38 Third party liability is also regulated in NF art 30.3, but here with a different model.

3.3 Freedom of liability, indemnity and subrogation

The starting point is that parties to the contract may only regulate their own duties and rights in accordance with the contract. They are therefore free to limit their liability against a contractual party, and waive their right to claim any liability in tort from this party.[39] As mentioned, they are also free to waive their right to claim any liability from a third party, and thus waive such right in regard to the whole group.

The parties to a contract may not, however, weaken the rights of a third party to a contract. To the extent the third party is within the risk zones as defined in the contracts, and that this party has included a similar knock for knock regulation in his contract, this problem is solved through the matching contractual terms. However, this restrictive approach also applies to third parties who do not have a contractual relationship with the Company/Owner or the Contractor/ Charterer. This will be the case for all the employees in the groups, and for third parties outside the groups. Thus, if the Owner/Company harms an employee E of the Charterer/Contractor or causes damage to E's property, this damage shall according to the contract be compensated by the Charterer/Contractor. However, E does not have to accept that the Charterer/Contractor shall pay the claim. He may direct his claim to the Owner/Company instead. If so, the knock for knock principle is obtained through a subrogated claim from the Owner/Company against the Charterer/Contractor after E is compensated.[40]

If E accepts compensation from the Charterer/Contractor, this regulated approach further implies that the Charterer/Contractor does not have a right to claim recourse from the Owner/Company, even if the Owner/Company is at fault. This part of the principle is of particular significance for work performed on the Norwegian continental shelf. As mentioned, it follows from the PA § 10-9 that the licensee is jointly liable for any damage caused by a contractor that he uses. Thus, any party who suffers harm in Norwegian petroleum activity may always

[39] Bull p. 346, Zak pp. 31-32.

[40] Bull p. 347, Zak p. 32.

make a claim against both the Contractor and the Company. If the claim is raised against the party who is responsible according to the knock for knock principle, subrogation according to PA § 10-9 is barred.[41]

The structure of the knock for knock principle is therefore a combination of freedom from liability/acceptance of not making a claim, a basis for recourse from the party having paid the claim according to tort law, but who is not liable according to the contract, and a bar to recourse from the party having paid the claim according to the contract even if he was not liable according to ordinary tort law.

3.4 The insurance regulation

The regulation of liability is normally supplemented by a regulation of insurance. The purpose of this is partly to secure that the liability risk of each party is financed by insurance. Normally, it will be up to each contractual party to what extent he needs financial security through insurance. However, if the knock for knock principle is put into effect through indemnification after having first paid the claim, it is important for the party having paid the claim in the first place that the other party is covered by liability insurance which includes liability according to contract. Further, in the case of joint liability, in particular according to PA § 10-9, if the Contractor cannot pay for the damages, the Company will always be liable. Therefore, the contracts will provide the party with a duty to take out proper insurance protection to cover its liability under the contract.[42]

Further, in order for the liability system to be carried through the contracts as outlined above, it is important that the division of risk is not disrupted by a subrogation claim from the insurer. [43] The starting point according to Norwegian law is that the insurer, after having paid compensation for loss or damage, may claim subrogation from the

41 Bull p. 346, Zak pp. 32-33.

42 OLF cl. 8.12 paragraph 1-4, Supplytime cl. 17 (a), but duty for the Owner only.

43 Kaasen p. 242, Zak p. 43.

injurer that caused the loss in the first place.[44] However, it is also clear that the insurer does not have a wider right to subrogation than that which the injured party could have claimed from the injurer.[45] If the injured party has agreed to waive his right to claim damage against the injurer, a recourse claim from the insurer is similarly barred. However, this may in turn mean that the insurer's liability may be reduced by an amount equal to "that which he is prevented from collecting because the assured has waived his right to claim compensation from a third party, unless the waiver may be considered customary in the trade in question". [46] In order to protect the position of both the injurer and the assured, therefore, it is necessary to secure against subrogation in the contract.

Two different contractual techniques are used in this context. The first is the most direct, and simply imposes a duty on the Contractor or Owner to require the insurers to waive all rights of subrogation against the Company or Company group.[47] Such waiver of subrogation follows directly from NP § 18-9 for insurance of MOUs and probably also from NP § 5-14 for hull insurance.[48]

The second technique is more indirect: the party not effecting the insurance shall be named as co-insured under the policy.[49] Such a right is automatically included in NP § 18-9, and may be agreed in hull insurance.[50] The main content of co-insurance is that a third party with owner interest, security interest or other economic interest in the insured property is insured for this interest under an insurance effected by the "main owner" or "assured".[51] This is of lesser interest here. But the co-insured also has so called indirect liability protection. This is not regulated directly either in the NP or in the ICA, but it is presumed in

44 Compensation Act § 4-3 cf. § 4-2, cf. also NP § 5-13.

45 Bull p. 489, Knut Selmer, *Forsikringsrettt,* Oslo 1982, p. 349 and 357.

46 Norwegian Marine Insurance Plan 1996 § 5-14, Bull p. 490, Selmer p. 357.

47 OLF cl. 8.12 paragraph 7, Supplytime cl. 17 (a) (II)

48 Bull p. 490. In the NP 2013 the provisions are Cl. 5-14 and Cl. 18-1 (i) sub-clause 1.

49 OLF cl. 8.12 paragraph 6, Supplytime cl. 17 (a) (II)

50 NP § 8-1. In NP 2013 Cl. 8-1 and Cl. 18-1 (i) sub-clause 2.

51 NP § 8-1and § 7-1 and ICA § 7-1.

the preparatory documents to the ICA that the co-insured as injurer will have the same protection as the assured, if he causes damage that constitutes an insured event under the casualty insurance effected by the assured.[52] This protection means that the co-insured has the same protection against the insurer as he would have had as an assured if he had been responsible for causing an insured event through a breach of the so called duties of due care.[53] According to the NP § 3-33, the insurer may, in cases where the assured causes the damage through gross negligence, reduce his liability from 0-100 % depending on the degree of fault and circumstances generally. Among the relevant circumstances taken into account in applying this rule will be the professionality of the assured, the risk involved in the activity and the injurer's options to avoid the risk. A co-insured will then have the same protection against recourse from the insurer as he would have had if he had caused loss or damage under his own casualty insurance. This is called the co-insured's indirect liability insurance.

It follows from this that the protection for the injurer as a starting point is better with a waiver of recourse clause than with a co-insurance clause in cases where the injurer causes losses through gross negligence.

4 The rationale for the knock for knock principle

4.1 The need for contractual control of the liability risk

The regulation of liability through the knock for knock principle is rather unique for the offshore sector. Normally, contractual parties do

[52] NOU 1987:24 p. 145, cf. pp. 151-152, Bull 2008 p. 539.

[53] Bull p. 487.

not regulate the risk for tort law liability and coverage under the other party's insurance. There are however three main features in the offshore sector that makes contractual control of the liability risk important.

One feature is that the risk of causing damage during the operations is more substantial than in land based projects or ordinary transport contracts.[54] The offshore industry has always been a very risky and hazardous business, and this is more accentuated as the upstream oil and gas sector has gradually moved into deeper and more unsafe regions with adverse weather conditions.

A second feature is the huge capital sums invested, which will then easily result in enormous losses if accidents do happen. And they do - the recent Deepwater Horizon oil spill catastrophe is the best example. It is therefore important that the sharing of this risk is controlled by contractual regulation. A third feature is the involvement of many contractors and subcontractors, which again results in several potential injurers and victims.[55]

The substantial risk for damage and the number of people involved create a need for foreseeability. Without regulation, liability claims will be handled according to the ordinary tort law system. This would require investigation into which party was at fault and could result in costly litigations, causing substantial economic uncertainty.[56] For example the Piper Alpha disaster led to claims against 24 different contractors. Among those on board the platform who were killed, 134 were employed by contractors and 31 by the operator. Among those who survived, 55 were employed by contractors and 31 by the operator.[57] A clear definition of the risk allocation between the parties would transfer this uncertainty into a risk that may be calculated in a better way. This will also help to prevent the need for difficult discussions between contractual parties who are obliged to work together in long term projects.[58]

54 Kaasen p. 739.

55 Kaasen p.739.

56 Kaasen p. 740, Bull p. 353.

57 *Caledonia North Sea Ltd v London Bridge Engineering Ltd* [2002] UKHL 4; [2002] 1 Lloyd`s Rep 553, HL.

58 Bull p. 353.

4.2 Efficient insurance coverage

The principle may also be explained in terms of insurance coverage.[59] Without risk allocation, each party must purchase liability insurance to cover potential liability for damage during the project. This will then be an addition to casualty insurance covering damage to and loss of property and loss of income, and insurance covering personal damage and death of employees. In the case of an accident this could easily result in double insurance, where for instance damage to and loss of property is covered both by the injured party's casualty insurance, and also by the injurer's liability insurance. Insurance is a costly way to finance risk, and, as with all costs in the offshore sector, this cost is substantial. By channelling the risk for damage to the party where the damage occurs, the need for liability insurance and thus the premium for this insurance will be reduced.

The other side of the coin is of course a higher risk exposure under the casualty insurance. However, such insurance will normally be purchased in any case, because damage may easily occur without anybody being responsible through the tort law system. Typical examples would be damage caused by natural disasters or mistakes made within the insured's own organisation. Anyone involved in the petroleum sector therefore needs to make a risk assessment as to how best to handle and finance these risks. The need for casualty insurance is therefore not reduced even if a normal liability regime applies.

It is also generally considered cheaper to channel risk to the casualty insurance than to divide the risk between casualty insurance and liability insurance, with a right for the casualty insurer to claim recourse against the liability insurance. Recourse claims are costly to invoke, and casualty insurance is generally cheaper than liability insurance.[60]

---

[59] Cf. further Bull pp. 349-352, Kaasen pp. 741-742.

[60] Bull pp. 349-350.

4.3 Loss prevention?

4.3.1 Loss prevention and efficient liability rules

A major argument against the knock for knock principle is that it is contrary to the considerations of deterrence which are a key reason for regulation of tort liability. It does not induce the parties to avoid causing damage in the other parties' risk zone because negligence and faults have no consequences. In the Norwegian discussion on this issue in relation to the knock for knock principle in the petroleum sector, it is claimed that this consideration is exaggerated. Control over routines, the relationship with public authorities and the parties' desire to be qualified to undertake further projects on the Norwegian continental shelf are claimed to be more important.[61]

As a starting point, it is difficult to measure the effect of lack of deterrence and therefore to have a meaningful opinion on this issue. However, considerations of deterrence may be analysed in terms of law and economics, which can shed some light on the significance of this consideration. The approach in this model is to define how different rules may influence the optimal level of care, in order to minimize the sum of costs for preventive measures and damage. The main presumptions in the theory are that the liable party or injurer is acting rationally by seeking to minimize his own costs in relation to damage, that he has full information about the tort rules, and that the rules are enforced.[62]

The theory demonstrates as a starting point that no liability is never optimal, that no-fault liability will induce the injurer to choose a level of care that minimizes the sum of prevention costs and expected damage, and that liability for negligence will induce the injurer to choose the level of care necessary to avoid liability so that he is only liable for loss prevention costs.[63]

---

61 Bull p. 355, Kaasen p. 742.

62 Erling Eide and Endre Stavang, *Rettsøkonomi for privatrett og miljørett*, Oslo 2001 (Eide and Stavang 2001) pp. 101-102 and Erling Eide and Endre Stavang: *Rettsøkonomi*, Oslo 2008, (Eide and Stavang 2008) p. 236.

63 Eide and Stavang 2008 pp. 238-240 and Stephen Shavell, *Economic Analysis of Accident Law*, 1987, p. 8.

This model therefore conforms to the traditional thinking on the significance of deterrence. However, the conclusions may be different when there is a contractual relationship between the injurer and the victim.

4.3.2 The efficient basis for liability in contractual relationships

In the event of a contractual relationship, for instance between an owner and a charterer, the model must be supplemented by an assessment of the charterer's willingness to pay for the owner's services. The charterer's willingness to pay will depend on how he assesses the risk involved in chartering the ship.[64] The injurer's/owner's inducement to prevent damage will therefore depend both on the risk of damage and the possibility of charging more for the service.[65]

The model builds on a presumption that the owner maximizes his own profit. It is further presumed that he acts in a market with perfect competition, which means that the price of the service provided is equal to the total costs necessary to produce the service, including the costs connected to liability against the customers/charterers. [66] A third presumption is that the risk of damage depends on negligence or non-negligence. With these presumptions, the following table showing level of care, cost of taking such precautions, percentage of probability of an accident and expected accident losses may be used for discussion: [67]

Level of care	Cost of care	Accident probability	Expected accident losses
None	0	9 %	9
Care	2	3 %	3

64 The model is based on Shavell p. 47 ff.

65 Shavell p. 47 and pp. 51-52.

66 Shavell p. 47.

67 Taken from Shavell p. 49.

The owner's costs in producing one unit of transport = 10. This amount does not include costs in relation to care or liability against the charterer. Based on these figures, the optimal level of care may be discussed depending on the charterer's information about the risk.

In the first case the charterer has *full information about the risk of damage*. If the owner does not face liability for damage, he will not have any costs connected to duty of care or expected accident losses.[68] In this case, an owner O-1 may choose to sell one unit of transport for 10, which is the production cost. A charterer, who has full information about the risk inherent in the transport, will however know that the transport will in fact cost him 10+9=19 due to the accident costs. Another owner O-2 chooses to take due care. The cost per unit of transport will then be raised by 2 to 12. At the same time, the charterer's risk will be reduced to 3. The charterer's total cost will therefore be 15. A cost-minimizing charterer with full information about the risk of damage will select O-2 with total costs of 15 instead of O-1 with total costs of 19. The result is that the less careful O-1 will lose his customers to the more careful O-2, even if no liability is imposed.

If the owner is facing strict liability, he will be liable for the cost of care and expected accident costs. As 2+3 is less than 9, he will choose to take due care. If we presume that the norm for negligence follows the optimal care in the ordinary tort law model, the result is the same for liability for negligence. The result is therefore that the owner will choose to take care regardless of liability for damage.[69]

In the second case, the charterer *does not have sufficient information about the probability of damage* to calculate the correct price for the service from different service providers. [70] Under this presumption, the owner cannot expect the charterer to pay extra because the owner takes care, since the charterer does not know about the probability of damage. Without any potential liability, the owner will therefore not take due care. But if the owner is liable for negligence he will take optimal care

[68] Shavell p. 52.

[69] Shavell pp. 52-53.

[70] Shavell pp. 53-54.

in relation to the evaluation of negligence.[71] However, a negligence rule corresponding to the optimal level of care presumes that the judge has sufficient knowledge to evaluate the carrier's activity. If this proves difficult, the evaluation of negligence may well lead to an estimation of too much or too little care.[72] In case of no-fault liability, on the other hand, the owner will chose to take due care as long as the costs of taking such care are lower than the potential liability.[73]

The model demonstrates that if services are provided in a market with perfect competition and full information, the optimal level of care is not influenced by the liability rules. This implies that if the parties to the contracts are professionals and have sufficient volume of activity to establish their own statistics relating to the probability of accidents and accident losses, liability for the damage caused by each party is not necessary to obtain an optimal level of care. At the same time, a rule of liability for negligence will result in transaction costs in relation to the settlements, which must be calculated into the price of the transport.[74] To the extent that the offshore market satisfies these presumptions, it may be argued that the knock for knock principle conforms to economic efficiency and that a liability regime is not necessary to obtain the optimal level of care.

On the other hand, in regard to less professional or smaller market participants with limited knowledge of the risk of damage, the knock for knock principle is not defended by this model.

---

71 Shavell pp. 53-54.

72 Shavell p. 56.

73 Shavell p. 54.

74 Trine-Lise Wilhelmsen, *Rett i havn*, Oslo 2006, p. 337.

5 Validity of the regulation

5.1 Some starting points

Norwegian legislation does not contain a special rule prohibiting the parties from freeing themselves from liability for damage or from waiving their right to claim for damages in tort. The general starting point is therefore that the parties are free to agree to such freedom from liability regardless of the basis for this liability. Further, the main rule is that contracts shall be fulfilled as agreed.[75]

However, there are two general mandatory restrictions that are applicable to contracts. The first is NL 5-1-2,[76] which prohibits contracts that are against law and morality. The second is the Contract Act § 36,[77] which states that contracts that are unfair may be set aside partly or in full. Based on these rules, it is assumed in legal theory that a contractual party cannot avoid liability for damage he causes deliberately.[78]

Further, it is a general view that limitation of liability is accepted for acts or omissions committed by ordinary employees, in contrast to those committed by the leadership of a company. This is also true if the act is made deliberately or with gross negligence.[79]

What is less certain is the extent to which freedom from liability for gross negligence by the company itself may be valid. This must therefore be discussed based on the two rules mentioned. It is also necessary to address the insurance clauses according to these rules.

---

75 Kong Cristian Den Femtis Norske Lov av 25. april 1687 (NL) 5-1-1.

76 Kong Cristian Den Femtis Norske Lov av 25. april 1687 (NL) 5-1-2.

77 Act 31. mai 1918 no. 4 on "avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer (the Contracts Act).

78 Kai Krüger: *Norsk Kontraktsrett*, 1989 s. 784 with further references, Bull p. 394 and note 151 with references, and Kaasen p. 750. An illustration of this principle may be found in ND 1988.263 "Mørland 7" Norwegian Arbitration.

79 Rt. 1994.626, Rt 1948. 370, Rt. 1915.840, ND 1989.225 NA, ND 1991.180 Eidsivating, NOU 1972:32 Formuerettslig lempningsregel (NOU) p. 19, Bull p. 394 and note 152, Kaasen p. 248, Zak pp. 36-37 and pp. 41-42.

5.2 NL 5-1-2

NL 5-1-2 prohibits contracts that are contrary to the law or morality. In relation to the knock for knock principle, it is the last part about morality that is relevant. The expression "contrary to morality" means where the contract is contrary to generally accepted moral norms.[80] The concept of "generally accepted moral norms" can be static or dynamic. If the concept is static, previous Supreme Court judgments would be decisive regardless of when they were decided. We do have some older Supreme Court judgments[81] that imply that freedom from liability for gross negligence by the company is void. Based on these judgments, it is claimed in legal theory that limitation from liability for the company's own gross negligence is invalid as an absolute rule.[82] With this interpretation the knock for knock principle cannot be applied in cases where damage is caused by gross negligence by persons acting on behalf of the Owner/Company or Charterer/Contractor.

The concept of "generally accepted moral norms" can however also be given a more dynamic interpretation which presumes a reference to the time of the evaluation, and that caution in the use of old judgments is required.[83] There is some support for this view in the preparatory documents to the Contract Act § 36, which claims that the interpretation of NL 5-1-2 is uncertain in regard to limitation of liability.[84] It is also argued that invalidity is merely a guiding principle, where there is room for exceptions depending on the circumstances.[85]

If it is accepted that NL 5-1-2 only provides a guiding principle that gives room for exclusions, the question is whether such exclusion is justified for the knock for knock principle in the offshore sector. In this

---

80 Zak p. 46 with further references in note 157.

81 Rt 916.717 and Rt 1926.712.

82 Ot prp 1979:32 p. 19 and references in note 1), Viggo Hagstrøm, "Om grensene for ansvarsfraskrivelse, særlig i næringsforhold", *Tidsskrift for rettsvitenskap* 4/1996, p. 464 and p. 475.

83 Zak pp. 46-47.

84 Ot prp 1979:32 p. 19.

85 Are Brautaset, "Kontraktsreguleringen ved salg av gass", *Norsk Gassavsetning. Rettslige hovedelementer*, Sjørettsfondet 1998, pp. 117-118, Zak p. 48.

context it is natural to analyse the "morality" aspect of no liability in regard to the reasoning behind the liability rules. The most "immoral" aspect here seems to be the issue of retribution, i.e. that a lack of retribution in cases of gross negligence by the company is in itself against "morality". This may be explained by a requirement for corrective justice in the relationship between the parties. But a requirement for corrective justice is difficult to reconcile with the development in the use of liability insurance. Further, it follows from the ICA[86] that the liability insurer will also cover liability caused by gross negligence by the assured, which in this case will be the insured company. If the liability is insured, the retribution aspect is therefore reduced to the payment of insurance premium. This payment is made before the damage resulting in liability is caused. The only actual retribution will therefore be that the liability insurer may raise the premium for the next insurance period. And if they do, the assured may refuse renewal and enter into a contract with another company. There is therefore not much left of corrective justice when the liability is covered by liability insurance.

The knock for knock principle also means that the contractual partner as a victim obtains no repair of damage from the injurer. However, the knock for knock principle presumes that repair of damage to the victim's interests is financed through casualty insurance covering loss of or damage to property and income, to the extent that such financing is needed. Accidents to employees will be separately covered through employment casualty insurance which is mandatory in Norway.[87] Repair of damage is therefore secured through insurance.

The last consideration behind liability rules is deterrence. It may be argued that it is immoral not to have rules that are aimed at preventing damage. However, the deterrent effect of liability must be seen in conjunction with the developments in public safety regulation and requirements and the attitude towards safety issues within companies. This may imply that deterrence through liability is less needed, cf. above. Furthermore, if it can be demonstrated that liability is not needed in

[86] ICA § 4-9 second paragraph.

[87] Yrkesskadeforsikringsloven 1989 no. 65 § 3 cf. § 1.

reality because the market will secure optimal care in any case, it is difficult to see why a notion of morality should prevent an efficient development of risk sharing.

It may therefore be argued that the earlier view of morality in court practice and legal theory is outdated by the recent developments in the insurance and security legislation, as well as by the economic models on the deterrent effect of liability where there is a contractual relationship between the parties. However, since we do not have any decisions on this from the Supreme Court, the conclusion is uncertain.

A possible underlying reason for the disagreements on this issue is a more general conflict between corrective justice as the "raison d'etre" for liability rules, and the legal and economics-based approach where liability rules are analysed in terms of efficiency and optimal care. [88] The goal of maximizing wealth in the legal and economics-based approach is considered "immoral" because it does not consider distributive and corrective justice.[89] But even if such more fundamental considerations of justice are relevant in relation to liability regimes, they appear less useful in a professional and well organised contractual setting.

5.3 The Contract Act § 36

5.3.1 Overview and some starting points

The Norwegian Contract Act § 36 provides that:

> "An agreement may be wholly or partially set aside or amended if it would be unreasonable or conflict with generally accepted business practice to invoke it. The same applies to a unilaterally binding disposition.
>
> When making a decision, account will be taken not only of the contents of the agreement, the position of the parties

[88] Cf.for instance Mårten Schultz, *Kausalitet. Studier i skadestandsrettslig argumentation*, Stockholm 1992 p. 101 ff., and Trine-Lise Wilhelmsen, Årsakssammenheng i erstatningsretten, Oslo 2011, pp. 15-19.

[89] Schultz p. 127, p. 131 ff and p. 141 ff, Wilhelmsen 2011 p. 18.

> and the circumstances prevailing at the time of conclusion of the agreement, but also of subsequent events and circumstances in general."

The assessment according to this provision is therefore different from that according to NL 5-1-2. A contract may be invalid due to immorality even if it is totally fair between the parties, for instance because the party claiming freedom from liability has paid the other party a fair price for obtaining this right, and this payment is used to buy alternative financing for costs of damage through insurance. On the other hand, a contract may be unfair without being immoral, for instance if a change of circumstances has resulted in a shift of the risk of damage being incurred, making the knock for knock agreement unfair for one of the parties.

Even if the Contract Act § 36 first and foremost applies to consumer contracts, it is clear that the rule may also be applied to professional contracts.[90] However, the threshold for applying this rule is higher in such contracts than in consumer contracts.[91] It is also generally recognised that adjusting and rewriting contracts according to the Contract Act Section 36 in the oil and gas industry can only be done in very special circumstances.[92] However, it also follows from the preparatory documents to the Contract Act § 36 that one of the reasons for establishing this rule was some clauses used in the oil and gas sector, namely clauses giving the company a right to the benefit of technological developments made by the contractors during building projects.[93]

Even if contractual revision is not out of the question, it seems that the attitude towards contractual revision has hardened over the last 10 to 15 years. The general impression is that of a change in the attitude of

[90] NOU pp. 47 and 61, Ot. Prp. nr 5 (1982-1983) Om lov om endringer i avtaleloven 31. mai 1918 nr. 4 m.m. (Generell formuerettslig lempningsregel) p. 33, Generalklausul i förmögenhetsrätten, SOU 1974:82 p. 111, Regjeringens propositioner 247/1981 p. 14, Kai Krüger, *Kontraktsrett* 1989, p. 422, Viggo Hagstrøm, *Obligasjonsrett*, Oslo, 2003, p. 278.

[91] Rt 1999. 922 at p. 932, Zak p. 52.

[92] ND 1990.204 NA Ula and ND 2000.240 NA Troll.

[93] NOU p. 47 and p. 61.

the courts in favour of predictability at the cost of fairness, in particular in relation to later events resulting in more extensive losses than expected. There are very few cases where an agreement is set aside according to § 36 over the last 15 years, and in those cases the reasoning seems less relevant in our context.[94] This development conforms to a development in Supreme Court practice in the direction of giving more weight to the objective understanding of the wording in the contract where the parties are professional.[95]

The evaluation according to § 36 is a broad evaluation of the circumstances listed in the provision in relation to the individual contract. However, not all the circumstances are of general relevance for this paper. The argument: "the position of the parties", first and foremost refers to the situation where one of the parties lacks the competence or ability to enter the agreement, or lacks the knowledge and experience to understand it, or there is a clear inequality between the parties in regard to the contract. As a general consideration this seems less relevant for the types of contracts discussed here. The same is true for the argument: "the circumstances prevailing at the time of conclusion", which refers to duress, misuse of negotiation power, exploitation and information failure. The argument that is more generally relevant is therefore that of the content of the agreement.

5.3.2 The content of the agreement

The content of the agreement as a reason for setting aside this kind of liability provision means that the knock for knock principle applied in cases of gross negligence by the company itself would be unfair. The preparatory documents to the Norwegian § 36 provision shed little light on limitation of liability clauses in general. The Swedish preparatory documents to the equivalent Swedish rule contain however some rele-

94 Rt 1995.1540 (severe psychological illness combined with an irregular security agreement), Rt 2001.603 (a continuation of an agreement seemed meaningless), Rt 2008.969 (fraud or misleading information).

95 Cf. for instance Rt 2002.1155, Rt 2000.806, Rt 2003.1132 and Rt 2010.1345.

vant remarks.[96] It is stated there that the application of limitation of liability clauses shall not be limited to a specific degree of fault, but will instead depend on a total evaluation of the specifics of the actual contract. In cases where freedom from liability is tied to financing through insurance, the main purpose will be to limit recourse from the insurer, and a convenient liability and insurance regime limiting the costs of recourse processes should not be denied through strict principles of fairness.[97]

Based on these statements, Swedish legal theory has assumed that limitation of liability clauses in professional contracts should be treated differently from other contracts, in particular if they are combined with insurance.[98]

A similar focus on professionalism and insurance is found in court practice concerning the Nordic Freight Forwarder Agreement ("NSAB"), which is an agreed standard contract with a long tradition. NSAB states that the freight forwarder's liability for damage is limited unless damage is caused deliberately.[99] In U 1993.851 this clause was set aside by the Danish Supreme Court when the freight forwarder negligently failed to follow its own established practise for delivery of the goods.[100] However, the limitation was accepted in U 2005.243 and U 2006.632. In U 2005.243 the Danish Supreme Court simply stated that the clause must equally be accepted as written even in cases of gross negligence. In U 2006.632, the situation was that the company had failed in the planning and performing of the service. It is not directly stated that the failure was grossly negligent, but this seems to be presu-

---

96 Relevant for the Norwegian § 36 also because this paragraph is a result of Nordic legislative cooperation with identical rules in all the Nordic countries, cf. Wilhelmsen, Avtaleloven § 36 og økonomisk effektivitet, TfR 1995 no. 1, pp. 13-14, Hagstrøm (2003) p. 640-641, Zak p. 51.

97 SOU 1974:83 pp. 180-181.

98 Claes-Robert von Post, *Studier kring 36 § avtalslagen med inriktning på rent kommersiella förhållanden*, Stockholm 1999, p. 207, Jan Ramberg og Christina Ramberg, *Allmän avtalsrätt*, Åttonde upplagan, Stockholm, 2010, p. 215, Thorsten Lundmark, *Friskrivingsklausuler giltighet og räckvidd*, Uppsala, 1996, p. 133, Zak p. 55.

99 NSAB 2000 § 22 cf. § 5.

100 Cf. further Hagstrøm (1996) p. 435.

med in the lower court, which set the limitation aside. The Danish Supreme Court referred to U 2005.243, and stated that the limitation could not be set aside, according to the Contract Act § 36, in cases of gross negligence. The main arguments were that the freight forwarder contract is an agreed standard contract where the limitation is part of a total liability regime, which presumably rests on a total evaluation where considerations of efficient insurance play a central role.

This result conforms to Norwegian practice, but here the negligence is tied to the employee, and not to the company. In Rt 1994.626, the same clause in the previous NSAB was accepted with a similar reasoning to that in U 2006.632. A similar view is found in previous arbitration and appeal cases with regard to towing contracts.[101]

The Norwegian theoretical discussion on this issue is divided into two factions. One faction argues that such clauses should be set aside due to traditional considerations of fairness similar to those following from the discussion on NL 5-1-2.[102] Arguments in relation to the knock for knock principle in the Norwegian Fabrication Contract are that the activity constitutes a risk for personal safety and pollution, and that transaction costs are presumably small compared to the importance of these interests. But even if they are not, efficiency considerations must be given less weight than the need for a liability regime to protect personal safety and environment.[103] This argument seems to overlook the fact that the risk for pollution damage is regulated by mandatory regulation in the MC and the PA, and that this regulation is adhered to in the contracts. Furthermore, under certain market conditions considerations of deterrence may not necessitate a liability regime.

The other faction argues that the principle should be accepted as it is described.[104] Main arguments here are that the knock for knock system

---

101 ND 1989.225 NA and ND 1991.180 Eidsivating.

102 Hagstrøm (1996) p. 422, p. 478 ff., Jo Hov and Alf Petter Høgberg, *Alminnelig avtalerett*, Oslo 2009, p. 402, Lasse Simonsen, "Kreditors mangelsbeføyeler – særlig for tilvirkningskontraktene", *Jussens Venner* 1999 p. 305 at p. 380, Zak p 53.

103 Hagstrøm (1996) p. 481.

104 Kaasen (2006) p. 749 ff, Bull p. 391 ff., Erik Røsæg, "Lastehåndterings og forvaringstjenester", *MarIus* no. 271, p. 41.

is supported by both parties to the contracts[105] and that freedom of liability is closely tied to an insurance regime securing the interests of the victim.[106]

What can be concluded here is that freedom from liability in cases where the damage is caused by gross negligence by the company itself can only be achieved if some minimum requirements are fulfilled: The contract should be agreed to secure involvement and acceptance by both parties, the freedom from liability should be tied to a systematic insurance regulation to secure that all potential victims are compensated, the liability and insurance system should reflect a thorough analysis of what combination of liability insurance and casualty insurance is most convenient for the parties, and the system should reduce transaction costs. But even when these conditions are fulfilled, acceptance by the court is still uncertain.

5.3.3 The insurance clauses

The knock for knock principle is, as mentioned, combined with waiver of subrogation clauses and co-insurance clauses in the insurance policies. The waiver of subrogation clause is, similarly to the indemnity clause, not tied to any degree of fault. The position as co-insured will, however, mean that the co-insured party obtains an indirect liability cover for ordinary negligence, but in the case of gross negligence the result may be a reduction in the compensation.

It must be presumed that these insurance clauses follow the same mandatory regime as the indemnity clauses. If the indemnity clause is deemed invalid according to NL 5-1-2 or unfair according to the Contract Act § 36, but the waiver of subrogation or co-insured's protection is upheld, the position of the party claiming to be indemnified will differ according to whether the injured party makes the claim against the injurer, or prefers to claim coverage from his own insurer. In the first case, the injurer must compensate the injured party. In the second

[105] Bull p. 393.

[106] Kaasen pp. 751-754, Bull pp. 393-394.

case, he will be free from liability. Such an arbitrary result is inconsistent and contrary to considerations of fairness.[107] The result must therefore be that the mandatory rules apply similarly to the waiver of subrogation clauses and the co-insured's indirect liability protection.

[107] Hagstrøm (1996) pp. 485-486. See also Selmer p.130 and Bull p. 319.

Publications from Sjørettsfondet

The foundation supports research within maritime law, transporation law, petroleum law, energy law and other related juridical subjects. In the periodical MarIus, specialists associated with the academic community, professionals and students publish selected works. MarIus also includes SIMPLY, the Scandinavian Institute's Maritime and Petroleum Law Yearbook.

MarIus – latest editions in English

394	SIMPLY 2009	Contributors: Trine-Lise Wilhelmsen, Donato Di Bona,Vidar Strømme, Svein H Bjørnestad, Knut Kaasen, Thor Falkanger, Erik Røsæg, Iris Østreng, Joar Holme Støylen. 2010. 342 p.
400	SIMPLY 2010	Contributors: Finn Arnesen, Ellen Eftestøl-Wilhelmsson, Thor Falkanger, Lars Gorton, Rosa Greaves, Svetlana Nasibyan, Ulf Hammer, Marian Hoeks, Hannu Honka, Svante Johansson, Knut Kaasen, Erik Røsæg, Johan Schelin, Erling Selvig, Kristina Siig, Peter Wetterstein, Trine-Lise Wilhelmsen, Kirsten Al-Araki , Inger Hamre. 2011. 490 p.
404	Articles in Petroleum Law	Contributors: Ulf Hammer, Anne-Karin Nesdam, Dagfinn Nygaard, Knut Kaasen, Jan B Jansen og Joachim M Bjerke. 2011. 374 p.
414	SIMPLY 2011	Contributors: Philip Linné, Stig André Kolstad, Knut Kaasen, Trine-Lise Wilhelmsen, David D D Syvertsen. 2012. 197 p.
418	Flexibility and risk allocation in long term contracts – an international perspective	Contributors: Jonas Rosengren, Trond Solvang, Giovanni Iudica, Giuditta Cordero-Moss. 2013. 140 p.

Distribution

Literature published by Sjørettsfondet - the Maritime Law Foundation - can be ordered online through the bookstore Bokbyen, where you will also find the prices.

How to order: At Bokbyen - The Norwegian Book Town - you can order through the web shop http://bokbyen.no/en/shop/, by e-mail to kontakt@bokbyen.no or phone (+47) 57 69 22 10.

A full overview of Sjørettsfondet's publications is found at the web-pages of the Scandinavian Institute of Maritime Law: www.jus.uio.no/nifs/

MarIus – new subscription system

As of the 2010 issues, Sjørettsfondet can offer you subscription with several options:

A: All single editions
B: Annual volumes in hard-cover
C: Maritime law (in Norwegian and English)
D: Petroleum and energy law (in Norwegian and English)
E: Editions in English, including SIMPLY (both maritime-, petroleum- and energy law)
F: SIMPLY

To subscribe, send an e-mail to: kontakt@bokbyen.no. The price of the subscription will vary according to the number of pages per publication and the number of publications per year. An invoice based on these costs are sent to subcribers twice a year. For the eight editions in 2012 of 1 220 pages in total, the retail price was about 2 100 NOK.

THE SCANDINAVIAN INSTITUTE OF MARITIME LAW is a part of the University of Oslo and hosts the faculty's Centre for European Law. It is also a part of the co-operation between Denmark, Finland, Iceland, Norway and Sweden through the Nordic Council of Ministers. The Institute offers one master programme and several graduate courses.

The core research areas of the Institute are maritime and other transport law as well as petroleum and energy law, but the members of the Institute also engage in teaching and research in general commercial law.

In SIMPLY – The Scandinavian Institute's Maritime and Petroleum Law Yearbook – the Institute would like to present some examples of the research of its members and friends in English.

ISSN: 0332-7868

07 Media