Scandinavian Institute of Maritime Law Yearbook

2013

430

SIMPLY 2013

Scandinavian Institute of Maritime Law Yearbook

MarIus nr. 430
Sjørettsfondet
Nordisk institutt for sjørett
Universitetet i Oslo

© Sjørettsfondet, 2014
ISSN: 0332-7868

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: Professor dr. juris Trond Solvang - trond.solvang@jus.uio.no

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 5

Editor's preface 9

Transport conventions and internal Norwegian regulation
– in particular regarding carriage by sea 11
Thor Falkanger, Professor Emeritus, dr. juris
Scandinavian Institute of Maritime Law, University of Oslo

Sections 299 and 300 of the Maritime Code –
carrier's liability for misleading statements in bills of lading 29
Trond Solvang, Professor, dr. juris
Scandinavian Institute of Maritime Law, University of Oslo

The impact of European Union law on freedom of contract
in the port sector 51
Alla Pozdnakova, Associate Professor, dr. juris, Centre for European Law
Scandinavian Institute of Maritime Law, University of Oslo

The Icesave judgment 69
Jonas W Myhre, Guest Researcher, Centre for European Law
Scandinavian Institute of Maritime Law, University of Oslo

Delimitation Treaty 2010 95
Sergey S. Seliverstov, PhD in Law
Partner at "Sokolov, Maslov and Partners"
Associate Professor at MGIMO-University
Life Member of Clare Hall College, University of Cambridge
Member of the Academic Advisory Group of the IBA Section on Energy,
Environment, Natural Resources and Infrastructure Law

Publications from Sjørettsfondet 105

Director's preface

In 2013 the institute celebrated its 50 year anniversary. This event took place at Grand hotel in Oslo 5. September 2013. The celebration contained three parts: A book describing the history of the institute, a half day seminar and a dinner. The event was financed by the Nordic shipping and offshore industry and several law firms working with maritime and offshore law, and 170 persons participated.

The institute had one doctoral dissertation in 2013. Wang Yang defended her PhD dissertation with the title «Direct Actions and Their Justification: A tentative Analysis on Direct Actions against Maritime Performing Parties under the Rotterdam Rules». She has been living in China for a period between her PhD period at the institute and the dissertation.

The Oslo/Southampton/Tulane network arranged the yearly Colloquium in Maritime Law Research, hosted by the Maritime Law Institute in Southampton, 26.-27. September 2013 with the topic «Third party rights and bill of lading».

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 2013.

The above events come in addition to 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 2013 the research priorities of the Institute from previous years are continued and further developed. Our focus on off shore contracts with a particular emphasis on off shore charter parties is developed in the direction of long term service contracts in general. The new focus on charter parties has re-established this topic as a major research area at the Institute. Several master papers have been written

within this topic, and in particular Ivar Alvik and Trond Solvang are working with this issue.

Also the focus on Safety at sea is continued through research on safety and liability issues, in particular the PhD project of our Russian PhD candidate Olya Gayazova on a comparative study of the national laws of oil spill liability in various Arctic States. As a further extension of this project the Institute launched in 2013 a Law of the Sea initiative to look into ocean law questions relevant for the shipping sector and the continental shelf, which can also be seen as a development 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 and Irina Fodchenko. See www.jus.uio.no/nifs/english/research/projects/law-of-the-sea

Another development in the research strategy is a strengthened focus on energy issues. Energy has for a long time been a key area at the Department of petroleum and energy law, but the approach now is to tie several of the research topics of the Institute to the Nordic political goal of carbon neutrality. This idea is developed in cooperation with Nordic Energy Research (NER), and the aim is to include legal aspects of measures to obtain carbon neutrality in NERs research strategy in order to get financing for a project on this issue

Apart from these more recent developed research directions, the Institute has during 2012 continued to pursue the research priorities of previous years.

Research during 2013 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 knock-for-knock regulation, variation mechanisms, IPR clauses and other aspects of different construction and service contracts, and R&D contracts). Two research assistants have worked on concession law implications of supplying offshore production facilities with electricity from land. 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:

- Research Council of Norway
- the Norwegian Oil and Gas Association (Norog)
- 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

In this issue of Simply the first article by Thor Falkanger gives an account of the legal position for Norwegian national transport under various modes of transport – by looking at the respective single mode transport conventions ratified by Norway, and how the legislator has chosen to adapt the substantive rules of such conventions (governing international transport) to situations of national transport.

The next article by Trond Solvang discusses misrepresentations made by the carrier in cargo documents and the remedies available to third party holders of such documents – to what extent claims against the carrier for reliance losses in tort may be made as an alternative to the (traditional) claims for expectation losses in contract. The article is based on a lecture given at the OST (Oslo, Southampton, Tulane) Qolloquium 4-5 October 2013, hosted by the University of Southampton.

Thereafter Alla Pozdnakova's article examines the impact of EU competition law on legal relationships which are generally governed by the national private law of EU Member States – addressing the legal position of owners of land and facilities located in harbours (port owners). The article is based on a lecture given at the First Private Law Consortium, hosted by Bar-Ilan University (Tel-Aviv) in June 2013, and organized in corporation with Harvard Law School, University of Oslo Law Faculty, University of Pennsylvania Law School and McGill University, June 2013.

Next, Jonas Myhre's article discusses the EFTA Court case, the Icesave, which concerns whether Iceland was economically responsible for the failure of the national Deposit Guarantee and Investor Compensation Scheme to compensate British and Dutch depositors – following the collapse in October 2008 of the Landsbanki and the later failure by most of the commercial banking sector on Iceland.

Finally, the article by Sergey S. Seliverstov concerns the treaty between Russia and Norway for Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, which entered into force in July 2011. The article discusses how this legal regime will influence government

and commercial activity in the exploration for, and production of, hydrocarbons in that area. The article is the result of a cooperation programme between the petroleum law department of the Institute and a selection of Russian legal scholars.

Trond Solvang

Transport conventions and internal Norwegian regulation – in particular regarding carriage by sea

Thor Falkanger, Professor Emeritus, dr. juris
Scandinavian Institute of Maritime Law
University of Oslo

Content

1 INTRODUCTION ... 13

2 IMPLEMENTATION TECHNIQUES ... 14

Summary ... 17

3 A SURVEY OF THE SCOPE OF APPLICATION OF THE CARRIAGE CONVENTIONS ... 18

4 NORWEGIAN IMPLEMENTATION ... 19

4.1 Sea carriage ... 19

4.2 Carriage by air ... 20

4.3 Road Carriage ... 20

4.4 Rail carriage ... 21

4.5 Summary ... 21

5 DOMESTIC CARRIAGE ... 21

5.1 Sea carriage ... 21

5.2 Road carriage ... 25

6 INTERNATIONAL CARRIAGE BY SEA OUTSIDE THE SCOPE OF THE CONVENTION ... 26

1 Introduction

Norway has ratified and implemented important international conventions regarding the carriage of goods, in particular:

- For sea carriage: *Convention internationale pour l'unification de certaines règles en matière de connaissement,* of 1924 (the Hague Rules), as amended by the 1968 Protocol (the Visby Rules).

- For air carriage: Convention for the Unification of Certain Rules for International Carriage by Air, of 1999 (the Montreal Convention), which for practical purposes replaces the Warsaw Convention of 1929 (as amended by the Hague Protocol of 1955, the Guadalajara Convention of 1961, and the Montreal Protocol of 1975).

- For road carriage: Convention on the Contract for International Carriage of Goods by Road, of 1956 (CMR).

- For railway carriage: Convention on the Contract for International Carriage of Goods by Rail, of 1980 (COTIF), with Appendix B: Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), with Protocol of 1999.

All four conventions are a compromise between the interests of the carrier and the interests of the cargo owner, and all share the characteristic feature of giving the cargo owner *a minimum level of protection* in respect of cargo damage and delay, and to some extent in respect of the documentation of the cargo. With the exception of the CMR, a national legislator is free to enact rules more beneficial to the cargo owner, and the carrier may offer better terms in the contract of carriage than those of the convention. The CMR, however, establishes a minimum and maximum regime, which means that giving the cargo owner further rights, either by law or contract, is not permissible.

The most important fact to bear in mind about these conventions is that they govern *international* carriage, i.e., (basically) carriage from one convention state to another. This means that a convention state is unhampered by its convention obligations when regulating either national carriage or (insofar as it falls outside the scope of the conventions) inter-

national carriage. This article seeks to answer two questions. Firstly, how has Norway implemented the rules of the various conventions? And, secondly, how has it regulated non-convention carriage, in particular domestic trade?

2 Implementation techniques

Under Norwegian law, mere ratification of an international convention is not sufficient to make its rules applicable as domestic law. As well as formally consenting to (ratifying) the convention, Parliament must also formally incorporate (enact) the convention's rules into domestic law.[1] There are a number of ways in which the latter requirement can be satisfied.

The method most faithful to the convention will be to enact a statute stating simply that the rules of the convention in question shall be the law of the Kingdom. A second possibility is to translate the material parts of the convention into Norwegian and then enact the translation into law. A third possibility is to transform the convention's rules so that they comply with traditional Norwegian legislative practice (with regard to phraseology, structure, readability etc.). Considerations relevant to the choice of method of implementation may be illustrated by a few words relating specifically to conventions in the maritime sector.

We start by quoting from the preparatory works to the implementation in 1938 of the Hague Rules into Norwegian law. The Ministry of Justice in its proposal to Parliament was of the opinion that the rules should not be incorporated into the Maritime Code of 1893, but should be enacted as a special law:

[1] The distinction was more obvious previously when there was a two-chamber system for incorporating international rules into Norwegian law. Today both ratification and enactment are plenary decisions by Parliament, and both requirements may be satisfied by a single Parliamentary vote, see e.g. Act No. 82 of 10 December 2004, §8: "Parliament consents that Norway ratifies [COTIF]".

> "One has not, to be sure, found the abbreviated version of the convention, which the [expert] commission has put forward in its [special] legislative proposal, to differ in substance from the convention. Absolute certainty in this respect is, due to the composition of the convention, difficult to obtain. Both in the light of this and also in order fully to achieve a *formal* correspondence between the convention and [domestic] law, it appears preferable *either* to take the text of the convention verbatim into the law *or* to let the law *refer* to the convention, simply by stating that the convention shall apply as law. … The Ministry of Justice prefers … the latter alternative, avoiding thereby the incorporation into Norwegian law of a number of stipulations that from a Norwegian perspective fail to comply with even the most elementary requirements of good enactment technique, clarity and good legal language" (Ot.prp. No. 23 (1937 p. 4).[2]

In the event, however, Parliament preferred the commission's proposal to the Ministry's suggestion of enacting a statute that simply referred to the convention. The result was a piece of special legislation (Act No. 3 of 4 February 1938 concerning the implementation of the international convention on bills of lading of 1924). This act, whose scope of application was defined in its § 9, conformed to the commission's proposal referred to in the quotation above. Carriage not covered under § 9 of the act was covered by the Maritime Code, which at the same time was given a thorough overhaul and, broadly speaking, aligned with the rules of the convention. In particular, the protections provided under the convention to the carrier in the case of fire or of errors by the master and crew, and the right to unit limitation in the case of liability, did not apply automatically; they had to be contracted for specifically (Maritime Code 1893 § 122, subparagraph 2). Another important feature of the Maritime Code rules was that they were generally supplementary in nature, although they were mandatory in domestic and inter-Scandinavian trade.[3]

---

2 All translations in this article are mine, except for translations of extracts from the Maritime Code. This are taken from MarIus No. 393 (2010), *The Norwegian Maritime Code*.

3 The special regulation of inter-Scandinavian trade has its roots in efforts to unify Scandinavian law. This is reflected in the Scandinavian countries' practically uniform

When the Hague Rules were amended by the Visby Protocol, the Ministry's attitude was quite different and the benefits of incorporating the rules into the Code were considered clearly to outweigh the disadvantages.[4] Furthermore, it was generally considered that the international rules should apply in principle also to national carriage. When the Code was modernized in the 1990s, the use of this implementation technique was not an issue – it was taken for granted. At that time the main controversy was over the treatment of the Hamburg Rules (United Nations Convention on the Carriage of Goods by Sea, 1978). The solution adopted in the Maritime Code 1994 was to reflect the Hamburg Rules to the extent that this did not conflict with Norway's obligations under the Hague-Visby Rules.[5]

As for the other branches of transport law, we may summarize the position as follows:

Air carriage: The Montreal Convention of 1999 is incorporated into Norwegian law by means of Chapter X of the Aviation Code 1993,[6] which applies also to non-convention (including national) carriage.[7]

Road carriage: The CMR of 1956 was first implemented into Norwegian law in respect of international carriage by Act No. 3 of 31 January 1969. No special law was enacted at that time in respect of national carriage. The 1969 statute was replaced by Act No. 68 of 20 December 1974 concerning road carriage contracts. This act, which is still in force, applies the same rules in principle to both convention and non-convention (including national) carriage.[8] The *travaux preparatoires*

maritime codes of the 1890s and the maintenance of this uniformity throughout subsequent amendments.

4 See Innstilling [Report] X from the Maritime Law Commission (= NOU 1972: 11) pp. 8-9.

5 In NOU 2012:10 On implementation of the Rotterdam Rules, the proposal is that the Rules should be transformed, as far as possible, to conform with Norwegian standards. The report notes that the wording of the proposed text of the Maritime Code "is close to the text of the convention in respect of the phrasing, structure and numbering of each section … Had the text primarily followed Norwegian legislative traditions, [the text] would have been differently formulated in some respects" (p. 48).

6 By Act No. 4 of 6 January 2004.

7 See Ot.prp. No. 20 (2003-2004) p. 9.

8 There is one important exception, viz. regarding the limitation amount, to which we shall revert in 5.2.

– Ot.prp. No. 39 (197374) p. 5-7 – state as follows:

> "When implementing convention rules of a legal nature on carriage, Norwegian law has, generally, given application to convention-based rules also in respect of national carriage using the relevant means of transport. …*The Ministry* has concluded, as did the commission, that the CMR's rules on carriage of goods by road generally speaking are appropriate also for domestic carriage. The interests of the carriers and of the users of their services indicate that the rules should be as similar as possible for both international and domestic carriage by the same means of transport…
>
> Domestic carriage by road, however, encompasses … a somewhat heterogeneous group [of activities] that only to a certain extent, commercially speaking, can be considered as equivalent to international carriage. This necessitates some simplifications or modifications of the CMR rules to make them better suited to domestic needs."

Rail carriage: COTIF 1980, with Appendix B: CIM, was implemented into Norwegian law by Act No. 7 of 15 June 1984, which has now – due to modifications following from the Protocol of 1999 – been replaced by Act No. 82 of 10 December 2004. This Act states in § 1 subsection 2 that COTIF "applies as Norwegian law". There is no special statute regulating domestic rail carriage, so in principle the rights and obligations of the carrier and the cargo owner depend upon the terms of the individual contract. This is a remarkable contrast to the situation in the three other main branches of transport law.[9]

Summary

The above outline shows a ratio of 3 to 1 regarding means of implementation:

In the case of maritime, air and road carriage, the convention rules

[9] The background to this is basically that, up until 1996, rail carriage was practically speaking a monopoly run by the state agency NSB, whose terms of carriage were approved by the Ministry of Transport.

have been transformed and enacted so that they comply with – or at any rate do not differ substantially from – traditional Norwegian techniques for drafting legislation. For rail carriage, however, legislators took the easy option: the rules were incorporated *en bloc* by means of a short reference in a short act. Undoubtedly, the latter method guarantees the formally correct fulfilment of Norway's convention obligations, but at the cost of the ability of an ordinary individual to ascertain what the legal position actually is. Faced with a foreign language, unfamiliar phraseology and a complex documentary structure, to mention just some of the problematic elements, this may be no simple task.

We now turn to a more detailed survey of the ways in which the Norwegian legislator has decided to regulate non-convention carriage. This requires a few initial words, in addition to the general remarks above, on the scope of application of the various conventions.[10]

3 A survey of the scope of application of the carriage conventions

The Hague Rules applied to all bills of lading issued in a convention state (article 10), albeit that this rule had to be read in conjunction with the somewhat difficult definitions in article 1. The Hague Rules' scope of application was substantially widened by the Visby Rules, although the basic criterion for application was still carriage under a bill of lading. We are within the scope of the Rules if a bill of lading is issued in a convention state; if the carriage is from a convention state; or if the bill of lading refers to (incorporates) either the Rules or legislation based upon the Rules. For our present purpose, it is sufficient to note that a significant proportion of

[10] Particular problems may arise at the interface between the different conventions. For example, where goods on a trailer are damaged either during a short ferry crossing or on a substantially longer voyage, say from Norway to England, is the situation regulated under the Hague-Visby Rules or does the CMR apply? Such questions are not dealt with here.

carriage to and from Norway falls outside the scope of the convention.[11]

The Montreal Convention, in article 2 (2), defines its scope of application as international carriage where

> "the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party."

Article 1 of the CMR sets forth a similar, but not identical scope of application. The convention applies

> "to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country."

Finally, article 1 (1) of the CIM is based on the same principle as the CMR. The rules apply when the carriage is for reward, with delivery and redelivery in different convention states.

4 Norwegian implementation

4.1 Sea carriage

Chapter 13 of the Maritime Code, "Carriage of General Cargo", satisfies the requirements of the Hague-Visby Rules, and also – as mentioned above –incorporates parts of the Hamburg Rules. The

[11] E.g., goods exported without the issuance of a bill of lading or raw materials imported from non-convention states.

mandatory provisions of the chapter – which are to the benefit of the cargo owner, reflecting the protection given by the Hague-Visby Rules – may be described briefly as follows:

- protection is not dependent upon the issuance of a bill of lading or other special transport document, but carriage under a charterparty is excluded (§ 253).
- the chapter applies to national and Scandinavian trade (§ 252 subparagraph 1),
- trade outside this area is included, if (§ 252 subparagraph 2)
- the agreed port of loading is in a convention state, or
- the agreed port of discharge is in Scandinavia, or
- several ports of discharge have been agreed and actual discharge is in a Scandinavian port, or
- the transport document is issued in a convention state, or
- the transport document refers to the convention or to the legislation of a country subject to the convention.[12]

4.2 Carriage by air

The Montreal Convention is incorporated by Chapter X of the Aviation Code, which makes the convention's rules applicable to all types of carriage, even to carriage without reward so long as the carrier is a business enterprise *(luftfartsforetak)*.

4.3 Road Carriage

The CMR, which is incorporated into the Act on Road Carriage Contracts, applies to carriage for reward when the carriage "according to the agreement shall take place between places in the Kingdom (domestic transport) or to or from the Kingdom or between foreign states whereof at least one has ratified [the CMR]" (§ 1).

12 Finally, if neither the agreed place of loading nor the agreed or actual place of delivery is in Scandinavia, the parties may agree that the contract shall be subject to the law of a convention state (§ 252 subparagraph 3).

4.4 Rail carriage

The Act of 2004 incorporating COTIF-CIM states in § 2 (b) that the CIM applies to "all contracts for carriage of goods by rail for reward when the place for delivery of the goods is in Norway and redelivery of the goods is in another convention state or vice versa".

4.5 Summary

The above survey shows that extended use has been made of convention rules in the maritime sector. In the case of air transport, the legislator has gone a step further: the rules have been given general application. For road transport, the relevant convention has also been made applicable to domestic carriage. Meanwhile the COTIF Act applies rules for rail carriage in conformity with the convention.

Where a convention is given extended application, it would appear natural and rational to have complete harmony between the rules applying to both its original and extended areas of application. This is not the case with regard to sea and road transport, however. We examine the situation regarding domestic transport in more detail in section 5 below, while section 6 contains some additional remarks on the application of convention-based rules to international carriage by sea that falls outside the scope of the conventions.

5 Domestic carriage

5.1 Sea carriage

The 1938 legislation implementing the Hague Rules gave the cargo-owner in domestic trade an apparent benefit compared to his situation in international, convention-based carriage. This benefit was only apparent, however, as in practice all carriers used the appropriate language to reserve themselves the right to invoke the same advantages under do-

mestic carriage contracts as those directly afforded to the carrier by law in international trade. Today the situation is different, and in domestic trade the cargo owner is better protected in two respects.

First, the exceptions set forth in the Maritime Code § 276 subpararaph 1, cf. subparagraph 2, do not apply. These paragraphs, which contain an essential part of the original Hague Rules compromise, read:

"The carrier is not liable if the carrier can show that the loss resulted from:

> 1) fault or neglect in the navigation or management of the ship, on the part of the master, crew, pilot or tug or others performing work in the service of the ship, or
>
> 2) fire, unless caused by the fault or neglect of the carrier personally.
>
> The carrier is nevertheless liable for losses in consequence of unseaworthiness which is caused by the carrier personally or a person for whom the carrier is responsible failing to take proper care to make the ship seaworthy at the commencement of the voyage. The burden of proving that proper care was taken rests on the carrier."

Secondly, the limits on liability set forth in § 280 – i.e., 667 SDR for each package or other unit, or 2 SDR for each kilogram of the gross weight of the cargo – are substituted by a figure of 17 SDR for each kilogram, but with the restriction that liability for delay "shall not exceed the full freight according to the contract of carriage".

The background to these deviations from the Hague-Visby regime is apparent in the preparatory works for the Maritime Code 1994, viz. NOU 1993:36 Carriage of goods by sea, at pp. 13-14. Here the Maritime Law Commission points out that the Hague-Visby Rules concern international carriage where goods, generally speaking, are insured. In the commission's view, this factor weighs against the adoption of stricter rules:

> "The prevalence of cargo insurance in international transport by

> sea means that the liability rules concerning cargo damage can be formulated with a view to a proper distribution of risk between the cargo insurer and the liability insurer (the P&I clubs).
>
> In domestic transport, cargo insurance is considerably less prevalent. One reason is that the protection for the goods that follows from the liability rules for road and rail carriage is considered largely satisfactory. Another reason is that a significant proportion of the goods transported consists of consumer consignments or others of a non-commercial nature. Even in ordinary commercial relations, cargo insurance is less widespread than in international sea carriage. Structural and organizational conditions mean that, as previously mentioned, sea carriage is seen as an alternative to, or is combined with, other modes of transport – often without the cargo owner's knowledge. In such circumstances it would be unfortunate if the position of the cargo owner, due to differences in the liability regimes, should vary according to the type of transport vehicle being used when damage or loss occurs."

The result is a somewhat strange regime – a mixture of maritime and road transport law.

Instead of the strict liability system of the Road Carriage Contracts Act (objective liability with some exceptions, see § 27, cf. §§ 28 and 29), we have the traditional sea-carriage principle that liability depends upon the presence of fault or neglect. In addition – and importantly – there is a presumption of fault or neglect by the carrier, but this presumption can be rebutted (Maritime Code § 275). To take an example of the practical effect, where the cargo is damaged by sea water in the cargo compartment as a consequence of grounding, the carrier must, in order to avoid liability, convince the court that the grounding was not due to fault or neglect on the part of the mate and the helmsman on duty at the time of grounding.

The sea carrier's right to limit his liability is fixed at the same amount as in national road carriage, subject to a risk of losing the right to limitation in the event of improper behaviour on the part of the carrier "personally" (Maritime Code § 283). The Road Carriage Contracts Act

§ 32 has a much stricter rule: the behaviour of the carrier's employees may also exclude the right to invoke limitation. This rule has not been included, however, in the domestic sea carriage regime.

When does the regime outlined above apply? Both pertinent sections (§ 276 on liability and § 280 on limitation amounts) use the expression "in domestic trade in Norway".

The concept of "domestic trade" is not linked to the nationality of the carrying ship, nor the type of transport document used (a bill of lading or a way bill), nor for that matter any document at all. Domestic trade is purely a question of geography. Are the contractual places of loading and discharge within the Kingdom? According to ND 2004 p. 482 (Nord-Troms court of first instance), the Kingdom includes Svalbard.

The effect of the regulation is best described by taking a simple example. Suppose that A undertakes to carry two separate consignments from Tromsø to Bergen. Consignment 1 has Bergen as its final destination, Consignment 2 is to be carried on from Bergen to Rotterdam. If both consignments are damaged during the voyage Tromsø-Bergen, liability for the damage to Consignment 1 will depend upon Norway's domestic rules. For Consignment 2, the terms of the carriage contract will determine whether liability is governed by domestic or by international rules: If A has undertaken to bring Consignment 2 to Rotterdam, the international rules will be decisive, regardless of whether the contract obliges A to perform the voyage Bergen-Rotterdam himself or allows him to use a subcarrier (see Maritime Code § 285). On the other hand, A's undertaking may be defined as a promise to deliver the cargo in Bergen to B for further transport to Rotterdam. Such wording does not alter A's undertaking to an international one, and the same is true even if A has undertaken to arrange for the further transport on behalf of the cargo owner.

Suppose that A – rightfully – leaves the Tromsø-Bergen transport to C. Should damage occur *en route,* performing carrier C may be sued by the cargo owners, see Maritime Code § 286 stating that C is liable for his part of carriage "pursuant to the same rules as the carrier". For Consignment 1, with final destination Bergen, there is no problem: C is liable according to the domestic rules. But for Consignment 2, A is entitled to

invoke the international rules if he has undertaken to carry the cargo to Rotterdam. And this is also the position for C: he is – even though his undertaking is a domestic one – entitled to the benefits given to the carrier in international trade.

5.2 Road carriage

As already shown in this article, the rules governing domestic road transport were of great importance when Norwegian legislators were considering the regulation of domestic sea carriage. So what were the decisive factors when the rules governing domestic road carriage were drafted?

When preparing an act covering domestic road transport, the expert committee, as well as the Ministry of Justice, discussed whether the CMR rules should also apply domestically. The Ministry concluded, as did the expert committee, that the CMR rules on road carriage were suited to domestic transport. The interests of the carriers and of the consumers of carriage services argued in favour of having the same rules. An important factor was the large amount of road traffic between the Scandinavian countries, which undoubtedly was subject to the CMR rules. Enacting different rules for international and domestic transport "would in many instances introduce unnecessary uncertainty regarding the applicable rules". However, the CMR rules, implemented in the Act of 1974, were to some extent simplified or modified in particular with a view to the fact that the parties to contracts for inland road carriage were a "heterogeneous group", and only to a limited extent could be considered commercially equivalent to those involved in international transport.[13]

Of particular interest is the fact that originally the limitation amounts were practically speaking the same: 25 Germinal francs in the case of international carriage and NOK 60, which was the converted equivalent of the franc amount, in the case of domestic carriage. When the Germinal franc was replaced by SDRs and the limitation amount under the CMR fixed at 8.33 SDR per kilogram, the amount was doubled – to 17 SDR – in

13 See Ot.prp. No. 39 (197374) pp. 5-7.

respect of inland carriage.

Although some commentators argued that the limitation amount should be the same, regardless of mode of transport, internationally and domestically:

> "Experience shows that it is very difficult and time-consuming even to raise the liability amounts in the separate conventions in order to adjust for inflation. To achieve coordination between the various conventions will probably be even more difficult.
>
> The Ministry of Justice has therefore reached the conclusion that it is now necessary to increase the liability amounts for domestic carriage. By increasing the amount for domestic carriage by road to 17 SDR … per kg, one achieves both a necessary adjustment for reduced monetary value and also a common limit on liability for domestic truck, rail[14] and air carriage.[15]"

6 International carriage by sea outside the scope of the convention

The scope of the Hague-Visby Rules is indicated in section 3 above, but to recap, the two crucial factors are the nature of the transport document (which must be a bill of lading), and the existence of a link between the carriage and a convention state. In 4.1 above, we showed that Chapter 13 of the Maritime Code gives the Rules application outside the scope of the convention. We will not discuss the details here, but merely add a

[14] At that time the terms of carriage, as approved by the Ministry of Transport (see note 9), had a limitation amount of 17 SDR per kilogram. This amount now appears in the conditions of carriage of the state-owned Cargonet.

[15] At that time the Aviation Code § 10-22 fixed the amount at 17 SDR. This was altered by Act No. 75 of 10 December 2010. In order more easily to comply with article 24 of the Montreal Convention on amendments to the limitation amount, § 10-22 was changed so that the Ministry of Justice was empowered to set the limitation amount by issuing a regulation. This was done by Regulation No. 9 of 6 January 2011, which fixed the amount at 19 SDR per kilogram.

few words on the nature of this legislation. Is it possible to contract out of the rules, or are they mandatory to the same extent as is the case with carriage in the convention area proper and in inland transport?

The scope of application of the rules of Chapter 13 of the Maritime Code is defined in § 252, and is briefly dealt with in 4.1 above. Whether it is possible to contract out depends upon the rules set forth in § 254. As a general rule, contracting out is not permitted: a provision in a contract of carriage or transport document "is invalid in so far as it departs from the provisions of this Chapter". Although some exceptions exist, they do not require elaboration here, since we are concerned only with the general regulatory structure.

Sections 299 and 300 of the Maritime Code – carrier's liability for misleading statements in bills of lading

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

Content

1 INTRODUCTION 31

2 REMEDIES IN CONTRACT (THE CONCLUSIVE EVIDENCE RULE) AND TORT 31

3 THE RELATIONSHIP BETWEEN REMEDIES IN CONTRACT AND TORT 35

4 ESTOPPEL, RELIANCE LOSSES AND THE CONCLUSIVE EVIDENCE RULE 41

5 SOME REMARKS ON THE ROTTERDAM RULES 46

1 Introduction

This paper deals with misleading statements in bills of lading and describes the remedies available to third-party holders as against the issuing carrier. We analyze the respective remedies under Section 299 third paragraph and Section 300 of the Maritime Code in the light of the origins of these provisions, which lie partly in the Hague-Visby Rules and partly in Norwegian tort-law principles. We also examine the positions under English and US law for the purposes of international comparison. Lastly we include some remarks on the position under the Rotterdam Rules.

2 Remedies in contract (the conclusive evidence rule) and tort

Let us look first at one particular category of misleading statements: situations where goods are defective[1] at the time of shipment and the carrier fails properly to mark the bills of lading. In this situation, the conclusive evidence rule of the Hague-Visby Rules[2] means that a third-party acquirer of the bills, acting in good faith, is entitled to claim damages as if the defect had occurred during carriage. In other words, the carrier is estopped from later on asserting that the goods were already defective when received for shipment. In Norwegian law this concept is known as "fictitious cargo liability"[3], in reference to the fact that the cargo defects are deemed to have occurred during carriage. A carrier in this situation is not in a position to exculpate himself: there is nothing for him to excul-

1 The same applies to short delivery of goods, i.e. where a lesser quantity of cargo is received than is stated on the bill of lading. For convenience we restrict our discussion here to the example of defective goods.

2 Art. III No. 4, cf. Section 299 third paragraph of the Norwegian Maritime Code.

3 Falkanger/Bull, *Sjørett,* 2009, pp. 311; Selvig, *Fra kjøpsrettens og transportrettens grenseland,* 1975, pp. 116-117 and 153-54.

pate himself from, as the defects did not in fact occur during carriage. Moreover, where a claim is based on such "fictitious cargo liability", damages will be assessed according to the rules otherwise applicable to cargo damage, by ascertaining the difference in value between the defective goods and sound goods at the place of discharge,[4] and damages will be subject to the carrier's right of limitation of liability.[5]

This is trite law under any legislation based on the Hague-Visby Rules.[6]

Let us now look at another category of misleading statements: antedated bills. For example, the carrier might state on the bill that the goods were shipped on 1 October, when in fact they were only shipped on 5 October. Such situations usually give rise to claims of a different type than those described above. It is perhaps conceivable that the conclusive evidence rule could also come into play here. For example, the holder of the bills may assess the goods' likely time of arrival at the discharge port based on the stated time of shipment: if the voyage normally takes 10 days, the holder would calculate, on the basis of the antedated bills, that the ship would arrive at the discharge port on 10 October while it only arrives 15 October. Thus it is conceivable that the holder were to claim damages based on delayed performance of the carriage and that the conclusive evidence rule would prevent the carrier from claiming that, because the bills had been antedated, the voyage had in fact not been delayed.

Admittedly it is not clear from the Hague-Visby Rules that the conclusive evidence rule would apply to statements relating to the time of shipment. Art. III r. 4 (the conclusive evidence rule) refers back to Art. III r. 3 a)-c), which only concern the identity, quantity/weight and condition of the goods. Under English law, where the Hague-Visby Rules were adopted verbatim into the Carriage of Goods by Sea Act

[4] Hague-Visby Art. IV r. 5 b), cf. Section 279 of the Maritime Code.

[5] Hague-Visby Art. IV r. 5 a), cf. Section 280 of the Maritime Code.

[6] See, for example, Mustill, *Carriage of Goods by Sea Act* 1971, AfS 11, 1971-72, p. 705. Here Mustill describes the English-law equivalent of "fictitious cargo liability", a principle that exists in slightly different terms but to the same effect: the conclusive evidence rules "provides the consignee with ways in which he can save himself the trouble of proving what was shipped, and thus helps him to establish a cause of action in contract for loss or damage in transit."

1971, it is little scope to expand the interpretation of the rule also to cover the time of shipment.[7] Under Norwegian law, where the Hague-Visby Rules were not adopted verbatim, the generic term "statement concerning the goods" was adopted, and this may be wide enough also to cover the time of shipment.[8]

Such liability for "fictitious delay" is, however, not how claims relating to antedated bills normally arise. Instead they arise because the third-party holder has acted to his detriment through his reliance on the misleading statement. For example, the holder (as buyer) might have had the right under the sales contract to cancel for delayed tender of the goods if he had known that the goods had in fact not been shipped by 1 October. In a falling market, the holder would typically exercise such a right of cancellation and bring a claim to recover the purchase price from the carrier, on the basis that he would not have paid it had he not been misled.[9] Or the price mechanism under the sales contract might be linked to a certain number of days post-shipment. In this case the holder might seek to recover any excess paid in comparison to the price that would have been due if the bills had stated the true shipment date.

These situations fall outside the scope of the Hague-Visby conclusive evidence rule. Instead, we are dealing with general principles of tort law. While the holder in these situations may have a claim against his seller for breach under the sales contract, he may more conveniently wish to claim against the carrier.[10] Such a claim would be based on an argument

---

7 Mustill, op. cit., p. 703.

8 Selvig, op. cit., on pp. 145-46, expresses doubt as to the legal position but seems, on p. 154, to take the view that "fictitious delay" can be claimed, with reference to ND 1934.201.

9 As in the English case, *The Saudi Crown*, Lloyd's Rep. [1986] 1 261, where the cargo owners recovered damages from the carrier for the lost opportunity of rejecting the bills by reason of fraudulent antedating.

10 For example because jurisdictional considerations make it inconvenient to claim against the seller, see in general Selvig, pp 101 and 114. Moreover, if the rules on jurisdiction so allow, the holder may be able to claim to recover his losses against the carrier and the seller in one and the same suit. See, as an illustration of a similar situation, the English case *The Skopas*, Lloyd's Rep. [1983] 1 431, which involved alleged misrepresentation by the seller of a ship and where altogether 14 defendants on the

familiar under tort law: where a party knowingly or negligently gives incorrect information that is intended to be relied on, should he not be liable if losses are suffered in reliance on that information? Where misleading information is provided in the context of bills of lading, the answer is yes, under both English and Norwegian law.

Under English law, remedies are available to the holder under various headings: the tort of deceit, the tort of negligence and the Misrepresentation Act 1967.[11]

The choice of tort remedy will depend of course on the facts but, from a Norwegian perspective, these English remedies have some interesting features. For example, the scope of recoverable losses is greater when suing under the tort of deceit than under the tort of negligence,[12] while the general principle of contributory negligence by the claimant does not apply under the tort of deceit.[13] The policy considerations underlying these principles are reflected also in Norwegian law, but the different types of liability are less strictly segregated.

Under Norwegian law there is a statutory provision, Section 300 of the Maritime Code, which provides for the recovery of tortious losses and which is derived from general principles relating to the tort of negligence.[14] This provision existed long before the conclusive evidence rule was introduced into the Code in 1972, as adopted from the Hague-Visby Rules.

Moreover, under both Norwegian and English law, claims for tortious losses are not subject to the carrier's right of limitation of liability. This

seller's side were sued in one and the same suit.

11 Cooke et al, *Voyage Charters,* 2007, pp. 460-61, and Mustill, op. cit., p. 705. Regarding the tort of negligence, it seems that a carrier's misleading statements in bills would be a good illustration of the application of the criterion of "assumption of responsibility" in relation to the requirement of duty of care towards third parties, see *Hedley Burn & Co Ltd v. Heller & Partners Ltd,* [1964] A.C. 465 and the account of the case given in Winfield/Jolowicz, *Tort,* 2010, pp. 209.

12 Winfield/Jolowicz, op. cit., p. 536.

13 Winfield/Jolowicz, op. cit., p. 367 with reference to a case involving antedated bills of lading, *Standard Chartered Bank v. Pakistan National Shipping Corp (Nos 2 and 4),* [2003] 1 A.C. 959.

14 Regarding the contents of the predecessor to the current Section 300 (i.e., the earlier Section 162), see Selvig, op. cit., pp. 153.

is because these tort remedies are considered to be outside the scope of the Hague-Visby liability rules, including that of conclusive evidence and "fictitious cargo liability".[15]

3 The relationship between remedies in contract and tort

Following these introductory remarks, we now move on to our next question, concerning the relationship between the two sets of rules. For example, if the carrier has given misleading statements as to the condition of the cargo, can the holder claim to recover his losses in tort rather than, by invoking the conclusive evidence rule, in contract?[16]

Generally the answer seems again to be yes, under both Norwegian and English law. This perhaps makes good sense from a legal policy perspective: if the act of misdescription otherwise fulfills the requirements for liability in tort, why should the carrier not be liable? Why should he be any better off for making a wrongful statement relating to the condition of the cargo than for making a wrongful statement relating to the time of shipment? On the other hand, when the Hague-Visby Rules provide a remedy to recover losses arising from a misdescription of the goods in contract (by invoking the conclusive evidence rule), why should an alternative remedy exist for the same misdescription based on tort and derived from national law?

Under Norwegian law this question has caused some debate. When the conclusive evidence rule was implemented into the Code in 1972, the Law Commission suggested that the tort remedy should only be available

15 For Norwegian law, see Section 300, first paragraph, et seq., and Falkanger/Bull, op. cit., p. 312; Selvig, op. cit., p. 159. For English law, see Mustill, op. cit., p. 705.

16 We are not here concerned with the basis of liability (degree of negligence etc.), which under given circumstances may differ depending on the interests the respective sanctions are designed to serve, see Falkanger/Bull, op. cit., p .312; Selvig, op. cit., pp. 157-58.

in cases where the conclusive evidence rule did not apply.[17] Practically speaking this would mean that availability of the tort remedy would be restricted to cases of antedated bills and misrepresentation of the place of origin of the cargo. However, this suggestion was abandoned later on in the legislative process, inter alia in view of the Swedish preparatory works and the aim of achieving uniform Scandinavian legislation.[18] It therefore seems clear that a cargo claimant has the right to choose – always assuming that the facts of the case make it suitable for either remedy.[19]

Similar questions are raised under English law. To quote from Cooke et al:

> "*The transferee of a bill of lading who has suffered loss as a result of taking up the bill of lading in reliance upon negligent or fraudulent statements contained in it, will have a cause of action for damages for tort against the carrier … The damages will place him in the position as if the representation had never been made, not as if it had been true. This may generate consequences which some may regard as startling: for example, shipments of steel are frequently the subject of some superficial corrosion or damage on loading but clean bills of lading are nonetheless issued and, if damage is suffered after loading for reasons for which the carrier is not liable in contract, the receiver who has paid against the clean bill may still be entitled to recover from the carrier the full purchase price he has paid.*"[20]

---

[17] NOU 1972: 11 p. 23 and Ot.prp. no. 28 (1972-73) p. 14, see the account given by Falkanger/Bull, op. cit., p. 313

[18] Falkanger/Bull, op. cit.; Selvig, op. cit., p. 156, footnote 144.

[19] Selvig (pp. 157-58, cf. p. 155) suggests a solution whereby qualified (gross) negligence by the carrier is required for the holder to be able to claim in tort, on the footing that in such cases of qualified misdescription the holder has the greatest needs for a remedy against the carrier (in addition to his remedy against the seller). Moreover, Selvig points out that the test of negligence in tort will apply not only to the misdescription itself (negligent failure to detect defects which ought to have been marked on the bills) but also to the question whether it is foreseeable that a third party holder might be misled by the misdescription – a point that is familiar to English law and the constituents of a "duty of care" (to whom is a duty owed, etc.). See the similar considerations by Falkanger/Bull, op. cit., p. 312 and Hagstrøm, *Obligasjonsrett*, 2002, pp. 808.

[20] Cooke et al, op. cit., p. 461.

The thinking behind the example quoted above seems to be as follows: the carrier has performed the carriage and in doing so he has caused some cargo damage, but this is covered by a liability regime, the effect of which is that the carrier is not liable. In this situation, why should the holder become entitled, to "change horses" and avoid the consequence of the liability regime by invoking rules relating to the marking of the bills? Furthermore, if the holder invokes the "ordinary" rules relating to the marking of bills (i.e. the conclusive evidence rule), his claim for damages might in this example be nil – because whatever pre-shipment damage might be consumed by more severe damage suffered in-transit, to which no liability is attached. And again, why in this situation should an alternative remedy in tort based on the marking of the bills suddenly provide the holder with a right to recover the full purchase price?

On the other hand, if we accept the premise of Cooke's example and assume that the failure to mark the bills had a causative effect – in that it induced the holder to become the holder in the first place, then the example makes good legal sense. In other words, if the holder would have been entitled to cancel the sales contract had the bills been properly marked, the legal analysis is fairly clear: Why should what happened to the cargo during the voyage be relevant to the holder's claim for tortious (reliance) losses? If the holder had not been misled into accepting the bills he would not have been the holder, so the risk of sustaining losses would have been none of his concern.

A separate matter is, however, that Cooke's example may not be illustrative since a failure to mark superficial corrosion on a steel cargo would rarely have the kind of grave consequences accounted for. For example hot rolled steel sheeting (coils or bundles) would ordinarily be intended for further processing so that superficial corrosion would hardly be considered a defect even under the relevant sales contract. This would be different with respect to cold rolled steel but even so a failure to mark superficial corrosion does not necessarily mean that a carrier would be held to have acted negligently, thus liable in tort.

An American case, *The Alaska Maru*, dating back to 1928,[21] may further illustrate the intricacies involved in the interplay between the two sets of rules.

A cargo of hemp braid was to be carried from Yokohama to New York. Bills of lading, which stated "cargo shipped onboard", were issued on 29 August. This statement was incorrect as the cargo at that time was still at the carrier's shore terminal. The next day there was an earthquake and the cargo was lost (due to a combination of damage and looting) while still in storage on shore. The holder of the bills, having paid against the documents, claimed successfully to recover the purchase price from the carrier. The carrier purported to invoke the defence in the bills of Act of God, but to no avail.

This case was decided on the basis of the American doctrine of estoppel, which operates in a similar manner to the later Hague-Visby conclusive evidence rule.[22] The holder claimed for expectation losses,[23] in other words for damages that would put him in the same position as if the bill of lading contract had been properly fulfilled – by the cargo having been carried to the destination port. The carrier, on the other hand, claimed that the cargo had been destroyed by Act of God while in its custody on shore, and that liability for such an event was excluded. Moreover, the carrier argued that it was no breach of contract to issue "shipped on board" rather than, for example, "received for shipment" bills of lading. The holder's claim succeeded, however, on the basis that the carrier was estopped from claiming that the "shipped onboard" statement was incorrect.

Part of the court's reasoning was that had the "shipped onboard" statement been true, then the cargo would not have been affected by the earthquake. This factual point obviously makes sense in the context of

---

21 *The Alaska Maru,* A.M.C. 1928, 1027.

22 A general account of the doctrine is given by Selvig, op. cit., p. 130.

23 The term expectation losses is here used to refer to losses resulting from the conclusive evidence/estoppel rule: the expectation of receiving what is stated on the bills ("positiv kontraktsinteresse"), as opposed to tortious (reliance) losses, i.e., the losses incurred by acting upon the misleading statements to adverse effect ("negativ kontraktsinteresse").

expectation losses and the conclusive evidence rule. On the other hand, if we change the facts, for example assuming that the earthquake would also have destroyed the cargo even if it had been shipped (due to a tsunami following the earthquake or similar), then the answer would probably be different; a claim for expectation losses means that the holder seeks to be put in the same position as if the statement were true, hence in this example the holder would recover nothing, as the cargo would have been destroyed by an Act of God, for which liability was excluded.[24]

But if we take the same example and consider instead the alternative basis of recovery – in tort for reliance losses – the outcome would presumably once again be different. In this case the holder would argue that if the true position had been stated on the bills, he would have rejected them. Accordingly he would not have been owner of the cargo under the sales contract at the time of the earthquake, hence it would be irrelevant where or how the cargo was destroyed.

A similar situation arose in a Norwegian case from 1971 (ND 1971.165 Oslo City Court). The master had issued clean bills for a shipment of lumber that was in fact damp and mouldy and also contained a sub-standard type of wood (bombax rather than mahogany). The carrier argued that even if the bills had been properly marked, the marking would not have covered the sub-standard wood, as this was something that the master could not be expected to have discerned, hence this was a loss that the holder would have to bear. The court accepted the factual point that the proper marking of the bills would not have covered the sub-standard nature of the wood, but held this point to be irrelevant: had the bills been properly marked (i.e., noting that the lumber was damp and mouldy) the bills would have been rejected, hence the holder would not have become the buyer of the sub-standard wood.

One might well ask whether it is fair to make a carrier subject to such dramatic consequences based on tort. And one might perhaps add that a holder's motivation to bring such claims in tort typically depends on market fluctuations: a buyer will exercise a right to cancel a sales contract

24 The case is discussed by Jantzen, op. cit., p. 484, who expresses doubt as to the correct answer under such alternative facts.

in a falling market, but not in a rising market. Furthermore, the holder will have the remedy of claiming back the purchase price from the seller, who induced him into paying for the goods by submitting incorrect bills.[25] Why should the same claim be recoverable against the carrier, a party outside the scope of the sales transaction?[26] On the other hand, the joint liability of joint tortfeasors is a well-known legal phenomenon – as are those of foreseeability and remoteness of damages, in both tort and contract.

The principles of foreseeability and remoteness are illustrated in a Norwegian case from 1907 (ND 1907.220 Oslo City Court). The master issued "shipped on board" bills on a Saturday for the entire shipment, even though part of the cargo was still at the quay. In normal circumstances the remainder would have been loaded the same day but an accident prevented this from happening until the following Monday. The third-party holder (buyer) claimed damages on the basis that he would have rejected the bills if they had been correctly dated. This claim did not succeed. The court held that the master could not have foreseen that the antedating would have the effect of enabling the buyer to cancel his sales contract, and that the issuance of the antedated bills was in accordance with local custom. The result was criticized by legal theorists at the time[27] and does not seem sustainable today.

---

[25] In *The Alaska Maru,* the Court stated (p. 1036): "While [the holder] may have a cause of action against [its seller], it is not compelled to pursue it, but may rely on the estoppel and assert its rights against the respondent because of the representations in the bill of lading." Although that case was based on the doctrine of estoppel, the point about the holder's potential remedy against its seller would be no different under a claim based on tort.

[26] The holder obviously cannot recover the same amount of damages twice, as was illustrated in a Norwegian Supreme Court case from 1949 (ND 1949.32), where a claim against the carrier failed since the holder had already recovered its losses from the seller/shipper (the master had issued clean bills for a cargo of potatoes which were visibly damaged by frost).

[27] Jantzen, op. cit., states (p. 483, in my translation): "I think masters generally will be best served by not trusting that they will get away with things as easily as on this occasion."

4 Estoppel, reliance losses and the conclusive evidence rule

Following the above reflections on the pros and cons of recovering losses due to misrepresentation by actions in tort, as opposed to by invoking the conclusive evidence rule, we now turn to a slightly different topic, namely the doctrine of estoppel under English and U.S. law and its relationship to the Hague-Visby conclusive evidence rule. This topic is of particular relevance to Norwegian law, although it may also be of interest for other Hague-Visby states, as it illustrates how Norwegian law-makers may look to English law when implementing a feature of a convention that forms no part of Norwegian law tradition.

As readers will know, the Hague Rules from 1924 did not contain a conclusive evidence rule; statements on the bills constituted merely prima facie evidence. To accommodate the needs of third-party acquirers of bills, these prima-facie evidence rules were supplemented by the doctrine of estoppel in England and the U.S.[28] This doctrine essentially means that a party who has stated certain facts with knowledge that the statement may be relied on, is estopped from asserting otherwise if the statement is in fact relied on and it would be inequitable to allow him to resile from the statement. In our context, this requirement of reliance means that the third party must have acted upon the statement, typically

[28] Norway was party to the Hague Rules, which were implemented – verbatim – by the Bill of Lading Act of 4 February 1938. The prima facie evidence rule thus implemented was, however, supplemented by the liability rules, as they then existed, in Sections 161 and 162 of the Maritime Code. This essentially meant that the carrier was liable for negligent misrepresentation in the bills. These liability rules were to a large extent influenced by German rather than English law, see Jantzen, pp. 490-92. Later, when Norway ratified the Visby Protocol, the legislative approach was redesigned in that the Hague-Visby Rules, including those relating to conclusive evidence, were incorporated into the Maritime Code in 1972. Thus the earlier liability rule in Section 161 was replaced by the conclusive evidence rule from the Visby Protocol (constituting the current Section 299 third paragraph), while the earlier Section 162 (now Section 300) was retained as the basis for claiming reliance losses in tort, see e.g. Selvig pp. 143.

by having paid against the bills under the relevant sales contract.[29]

However, the Hague-Visby Rules do not expressly refer to any such requirement of reliance. Art. III, r. 4 merely states (after the wording concerning prima facie evidence, which was adopted from the Hague Rules): "*However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith*".

When the Maritime Code was revised in 1994, the view of the Norwegian Law Commission was that the Hague-Visby Rules on this point must be read in the light of the English doctrine of estoppel, including the doctrine's requirement of reliance.[30] To cater for this interpretation, the wording of the Hague-Visby Rules was slightly amended when translated into the Code.[31]

In Norwegian, Section 299 third paragraph contains a requirement that the document must have been "innløst" by the third-party holder. "Innløst" indicates that the document has been acted upon in the sense that payment has been made against the document, cf. the English expression that the document has been "taken up", as used in the quotation above from Cooke et al. p. 461. In the English translation of the Code (MarIus No. 393, 2010), "innløst" is translated as "acquired", which would appear to be inaccurate. "Acquired" would be better translated as "ervervet", but that was the very word that was used in the earlier Section 161 and that was deliberately replaced by "innløst" when the Code was amended in 1993-94 (NOU 1993:36 pp. 48-49). Notably, the same word, "innløst", is used in Section 300 in relation to reliance losses in tort, and in that context the term clearly makes sense: in accordance with general requirements in tort law concerning causation and losses suffered, the document must have been "taken up" (i.e. relied upon), not merely "acquired".

But if we look to English law, the doctrine of estoppel seems to operate as a separate remedy, requiring reliance, while the Hague-Visby rules, as implemented in the English Carriage of Goods by Sea Act 1992

[29] As illustrated above by the *Alaska Maru* case.

[30] NOU 1993: 36 p. 48.

[31] NOU 1993:36 pp. 48-49.

(COGSA), do not.[32] To quote from Cooke et al. (p. 460), when commenting on the COGSA Section 4:

> "*The section operates in favour of "a person who has become the lawful holder of the bill", which appears to include any lawful holder other than the shipper;* ***it imposes no requirement of reliance.***" (emphasis added)

Hence it would appear that the Hague-Visby Rules are attributed different meanings under Norwegian and English law. This leads us to our next question: What does "reliance" mean in the context of the conclusive evidence rule?

The reasoning of the Norwegian Law Commission seems to have been that the holder deserves the protection of the rule only if he has acted to his detriment by paying against the bills.[33] If for example the relevant sales contract contains a deferred payment scheme, the buyer/holder has no need for protection, as he typically will have received the goods and learned about the defect before any payment falls due.[34] This means that he will be in a position to take the necessary steps vis-à-vis his seller by exercising a right of cancellation (thus not paying the price) or by making an appropriate deduction from the price.

Although this does, perhaps, make good commercial sense, it seems questionable whether the commission's view was, all in all, well founded.

Firstly, the terms of the particular deferred payment scheme will of course determine whether the holder is in fact able to ascertain the condition of the goods before payment becomes due.

Secondly, it may not always be easy to determine whether a cargo defect existed pre-shipment or was caused during the carriage. In practice,

---

32 The U.S. never ratified the Visby Protocol, hence in the U.S. the prima facie rule of the Hague Rules prevails – as adopted by Article 3 (4) of the U.S. COGSA 1924 – as supplemented by the above-mentioned doctrine of estoppel, including its requirement of reliance.

33 NOU 1993: 36 pp. 48-49.

34 Selvig pp. 113-17 and 151-53. Although these considerations are not elaborated in the preparatory works to the 1994 revision of the Code, it can reasonably be assumed that they were important to the discussion since Professor Selvig served as Chairman of the Maritime Law Commission.

a cargo claimant may simply claim damages, leaving it to the carrier to exculpate himself, something the carrier will be unable to do if the defect existed pre-shipment. In such circumstances it may seem artificial to require a cargo claimant to demonstrate that he has relied on the bill of lading, so to speak, to cater for the possibility that the defect existed pre-shipment.[35]

Thirdly, establishing reliance may involve complex questions of causation relating to the holder's/buyer's conduct in view of the terms of the relevant sales contract. If the terms of the sales contract state that the buyer, in the first instance, has to pay the full price regardless of any defects in quality marked on the bills, should the carrier then be entitled to rely on such provisions as a defence to the holder's/buyer's damages claim? In other words, can a carrier who has wrongfully issued clean bills that have been taken up (paid for) by the holder, say that even if the bills had been properly marked, this would have made no difference, as the holder would (or at least should) have taken up the bills in any event? Under English law, opposing decisions on this point illustrate the complexities involved in operating with a requirement of reliance.

In *The Skarp* from 1935[36] the c.i.f. sales contract obliged the buyer to take up the bills in the following terms: "*Should any dispute arise respecting the fulfillment of this contract or should any shipment be delayed beyond the time stipulated, the buyers … shall not reject the goods, nor refuse immediate payment … When due payment has been made, the dispute shall be referred to two arbitrators for settlement …*". The carrier failed to mark the bills properly upon shipment of a substandard cargo of logs. Although the carrier was held to be estopped from asserting pre-shipment damage, the holder's claim for damages nevertheless failed on the basis that under the sales contract he would in any event have had to take up the bills and claim recourse subsequently against his seller.

35 Clearly, if an event that causes a defect occurs during carriage, there will normally be no question of reliance since the defect will have occurred after the risk passed to the buyer under the sales contract – unless the occurrence of a defect during carriage is attributable to defective packing or similar, which is the seller's responsibility, Selvig p. 113.

36 Lloyd's Rep [1935] 52 152.

In *The Dona Mari* from 1973[37] the outcome was different. Here the c.i.f. sales contract stated: Quality. Guarantee: "*… Moisture max. 14%. The buyers have the right to reject the parcel should the analysis show … moisture more than 14%. Shipped quality and analysis to be final … Should any dispute arise respecting the fulfillment of this contract … the buyers … shall not reject the goods nor refuse immediate payment for same in manner stipulated*." The carrier, who had wrongfully issued clean bills for a cargo of tapioca chips that were visibly moist, put up as a defence to the buyer's damages claim that even if the bills had been marked the buyers could not have rejected them in the light of the stated terms. The Court rejected this argument, holding as a fact: "*In this situation [the bills having been marked] I conclude on the balance of probability that some compromise would have been reached between the shippers and the first plaintiff whereby the first plaintiff would have taken up the document but without being required to pay the full price. The goods would have been surveyed on arrival (as they were) and found to be damaged … The first plaintiff would then either have disposed of the goods for the account of the shippers … or only paid a lower price consistent with the actual condition...*" (p. 370) Apart from these case-specific facts, the Court stated: "*[T]he defendant carrier knew nothing about the various contracts for the sale of these goods. Why, as a matter of principle, should the defendants then be entitled to rely on the terms of these contracts of sale and thereby obtain a windfall which enables them to escape liability…*?" (p. 373).

For these and perhaps other reasons it seems that in practice shipowners and their P&I clubs generally do not require cargo claimants to disclose the payment terms of their sales contracts, nor to produce evidence that they have actually paid against the document. The only decisive question seems to be whether the holder was acting in good faith with regard to the relevant statement when he acquired the bills?[38]

---

[37] Lloyd's Rep. [1973] 2 366.

[38] If he is in bad faith, i.e. he is aware of the true condition of the cargo irrespective of the contents of the bills, he clearly has no grounds for claiming against the carrier as he must be taken to have acted according to his knowledge vis-á-vis the seller; if despite such knowledge he takes up the bills, thus waiving his right to reject vis-à-vis the seller, such waiver cannot be "reversed" in a claim against the carrier. The question of good or bad faith may, however, not always be clear-cut, as in the Finnish Supreme Court case, ND 1998.84. See also Selvig pp. 106-107 where he discusses a buyer's right, under principles of sales of goods law, to reject documents (thus the goods) when he has knowledge of defects or delayed shipment, not being ascertainable from the bills themselves.

In conclusion, it seems reasonable to ask whether the Maritime Law Commission, back in 1993, should not have looked more closely to English law. It is paradoxical that the Hague-Visby Rules under Norwegian law are given a meaning that refers to the English doctrine of estoppel, while English law itself attaches no such understanding to the Rules.[39]

5 Some remarks on the Rotterdam Rules

As we have seen, this is a fairly complex area of law, particularly with regard to misleading statements that fall within the scope both of the law of tort and of the conclusive evidence rule. Accordingly one might perhaps have expected that the Rotterdam Rules, when introduced in 2009, would have sorted the matter out in an orderly fashion. That seems, however, not to be the case.

Firstly, there is uncertainty as to the issues just discussed, i.e., whether an element of reliance is required for the application of the conclusive evidence rule. Based on the wording of Article 41, the solution seems to vary depending on the type of cargo document in question. In Article 41 b), relating to bills of lading,[40] the requirement is similar to that under the Hague-Visby rules, in that it is merely a requirement of having acted in good faith with no element of reliance: "*Proof to the contrary … shall not be admissible when such contract particulars are included in … a document … that is transferred to a third party acting in good faith*". On the other hand, Article 41 c) relating to sea waybills sets forth a requirement that the "*consignee [has] in good faith … acted in reliance on … any*

[39] Note that the Maritime Law Commission established in 2009 for the purpose of producing draft legislation based on the Rotterdam Rules, proposed a reversal of the existing law on the reliance point in order to bring Norwegian law into line with the wording of the Rotterdam Rules and that of the Hague-Visby Rules, NOU 2012:10 p. 94

[40] The Rotterdam Rules discard the currently used term "bills of lading" and introduce instead the term "transport document", which may be "negotiable" or "non-negotiable". For present purposes, the traditional terminology is used.

of the … contract particulars". Such a difference may perhaps make commercial sense[41] but the reasons for the difference are not explained the preparatory works.[42]

Secondly, it is uncertain whether tort claims for damages, such as, for example, claims relating to antedated bills, are intended to be subject to the limitation rules of the convention. On this point the convention contains mixed signals. On the one hand, the only sanction relating to misrepresentation by the carrier is that of conclusive evidence and "fictitious cargo liability", in the same way as under the Hague-Visby. On the other hand, Article 59 contains sweeping wording to the effect that the carrier's liability for whatever "*breaches of its obligations under this Convention*" is subject to the carrier's right of limitation. Does this mean that those acts or omissions, which typically have led to tortious liability under national law, should be considered part of the carrier's "*breaches of its obligations under this Convention*"?[43]

The cargo information to be inserted into transport documents is not referred to as an "obligation" imposed on the carrier but rather as the carrier's right of reservation in respect of information provided by the shipper, and with the consequence

---

41 In that, for example, the merchantability of bills of lading is enhanced if there is no requirement of reliance, while such enhancement is not required for sea waybills, see the discussion in the previous chapter.

42 UNCITRAL Document A/CN.9/526 and A/CN.9/645 para 140-42 where (in para 141) it seems clear that the draftsmen were of the view that the Hague-Visby Rules contain no requirement of reliance: "It was further observed that an additional reliance requirement … with regard to [bills of lading] would result in a substantial change to that common understanding", i.e. that there was merely a requirement of good faith.

43 In A/CN.9/645 para 181-90; A/CN.9/642 para 152-53; A/CN.9/WG.III/WP.101 (footnote 169) it is stated that misinformation by the carrier is intended to be covered, in order to clarify what is stated to have been uncertainty under national law as to the scope of the Hague-Visby Rules in this respect. It is, however, not clear what was intended by such statement since there has been no uncertainty that e.g. antedating of bills of lading is not covered by the conclusive evidence rules of the Hague-Visby, and the Hague Visby clearly does not contain any sanctions in tort covering such liability – hence national tort law has been applied, as described above. Possibly what is meant by the statement is that misdescription which fits within the scope of the conclusive evidence rule of the Rotterdam Rules, shall exclusively be dealt with under that rule, and not be subject to national tort law, but also that is not clearly spelled out.

of estoppel if reservations are not made, see Article 36 and Article 40. The important feature of tort rules – whereby a duty is imposed on the issuer of statements to avoid third parties being misled by wrongful statements – is not really formulated anywhere in the Rotterdam Rules. Similarly, under French law, the notion of conclusive evidence is apparently not necessarily linked to notions of obligations on the carrier's part, but rather to the failure by the carrier to make use of a right to make reservations in cargo documents, see Selvig, op. cit. p. 126.

Is, for example, the English tort of deceit thereby set aside – or perhaps more precisely; is it sufficiently clearly set aside?[44]

Thirdly, the Rotterdam Rules provide no guidance as to whether a cargo claimant may choose between bringing a claim in tort for reliance losses or invoking the conclusive evidence rule and bringing a claim for expectation losses under the contract, assuming the misrepresentation is potentially actionable in both tort and contract.[45] But, of course, if the Rotterdam Rules were to be understood to mean that also claims in tort are subject to the carrier's right of limitation, this will affect the attractiveness for cargo claimants of pursuing such an alternative route in tort.

To conclude, these areas of law remain unclear under the Rotterdam Rules.[46] When the Norwegian and Danish Law Commissions prepared draft legislation based on the Rotterdam Rules, the question whether to make tortious liability for reliance losses subject to the carrier's limitation rights caused a fair amount of debate. The result is a compromise solution whereby, on the one hand, a misrepresentation in cargo documents is considered a breach of the carrier's obligations under the convention, which means that the carrier has a right to limit his liability. On the other hand, a novel provision was introduced that imposed a secondary duty on the carrier to prevent losses from being suffered as a result of misre-

---

44 See *The Saudi Crown*, above, where the Court applied tort rules irrespective of whether the tort involved bills of lading: "It was immaterial that the misdated document was a bill of lading. The plaintiffs suffered loss as a result of a false statement made by the defendants' agents … It was a fraud committed by the defendants' representatives in the course of their employment." (p. 265).

45 See footnote 43.

46 Apart from the reference in footnote 43, see A/CN.9/552 paras 41-43; A/CN.9/594 paras 118-19; A/CN.9/WG.3/WP.72.

presentation. Such a secondary duty to prevent losses was considered as falling outside the scope of the carrier's obligations under the convention, with the effect that liability for breach of this secondary duty was made unlimited.[47]

Much could be said about this solution, which perhaps was successful in that it brought about a compromise, but it certainly did not reduce the complexity of the law in this area.

[47] Section 307 of the draft legislation, see NOU 2012.10 p. 96.

The impact of European Union law on freedom of contract in the port sector

Alla Pozdnakova, Associate Professor, dr. juris
Centre for European Law
Scandinavian Institute of Maritime Law
University of Oslo

Content

1 INTRODUCTION 53

2 IS THE TRADITIONAL DIVISION BETWEEN PUBLIC AND PRIVATE LAW USEFUL FROM AN EU LAW PERSPECTIVE? 54

3 EU COMPETITION LAW RESTRICTIONS ON PORT OWNERS' AUTONOMY 57

4 PUBLIC FUNCTIONS VS. COMMERCIAL ACTIVITIES OF PORT OWNERS 62

5 LIMITS ON THE PORT OWNER'S AUTONOMY UNDER NATIONAL LAW (TAKING NORWAY AS AN EXAMPLE) 65

6 LIMITS ON PORT OWNERS' AUTONOMY IN THE LIGHT OF GENERAL PRINCIPLES OF EU LAW (NON-DISCRIMINATION AND GOOD ADMINISTRATION) 66

7 FINAL REMARKS 67

1 Introduction

This article examines the impact of EU competition law on legal relationships that in general are governed by the national private laws of the EU Member States. An owner's right to dispose of property as he or she wishes, in particular by granting third parties the right to use that property, is inherent to the private-law notions of private autonomy and freedom of contract. EU law imposes restrictions on a party's private autonomy, however, where such autonomy may result in an infringement of competition rules or endanger the functioning of the internal market.

One example discussed in this article concerns the limitations imposed on the exercise of property rights by owners of land and facilities located within harbour areas. In some cases, access to port facilities may be crucial for the ability of market operators to provide maritime transport services in a particular region. Owners may not be interested in providing access to their facilities, however, especially if they have already concluded long-term agreements with other undertakings.

Even though such a refusal may be perfectly justified under national law given the port owner's property rights and commercial priorities, it may still be considered an abuse of a dominant position within the meaning of Article 102 TFEU[1] and corresponding national competition rules. An agreement between the owner of such land or facilities and a maritime service provider granting the latter rights to use port facilities, especially on an exclusive basis, may also infringe Article 101 TFEU. The question is how to strike the appropriate balance between, on the one hand, the owner's right to decide whether or not to deal with other parties and, on the other hand, the protection of competition.[2]

1 Treaty on the Functioning of the European Union.

2 This study was initiated by the Norwegian Ministry of Fisheries and Coastal Affairs in response to many Norwegian port owners' concerns as to the precise scope of their obligation to grant carriers access to port facilities. *NB*: Norway is not an EU Member State. As a a member of EFTA (the European Free Trade Association), however, Norway is bound by the competition provisions of Articles 53 and 54 of the European Economic Area (EEA) Agreement. Norway is also bound by the internal market provisions, including the four freedoms, set forth in the EEA Agreement.

Before we turn to the subject-matter of this paper, Section 2 attempts to clarify where the borders lie between private and public law, and the impact of EU law on the traditional division of law into public and private fields.

Section 3 examines EU competition-law restrictions on port owners' autonomy in the light of EU case law, European Commission decisions, and the Color Line decision by the EFTA Surveillance Authority (ESA). The latter case in particular sheds some light on this issue.

Section 4 examines the distinction between the commercial (economic) and public functions of port authorities. This distinction is crucial for determining the applicability of competition rules.

Not all conduct that hinders access to port facilities will be caught by competition rules: there will be no infringement where the impact on competition is only minimal or entirely non-existent. This article submits that limitations on a port owner's rights to refuse an undertaking's request for access may also be imposed by national rules other than competition rules. Section 5 examines a Norwegian example of such legislation.

It is also submitted that EU law regarding the freedom to provide cross-border services and the principle of non-discrimination may impose some limitations on port owners' property rights. Section 6 discusses non-competition-law restrictions on private autonomy arising from EU law.

Section 7 contains the author's conclusions on the questions raised in this article.

2 Is the traditional division between public and private law useful from an EU law perspective?

Generally speaking, public law regulates relationships between public authorities (state or municipal authorities) and other parties, including other public authorities. Public law also lays down the conditions for,

and limitations on, public authorities' exercise of their powers in relation to private individuals and companies. In contrast, private law addresses relationships between private individuals and companies, such as the law of contracts and torts.

Drawing a clear borderline between the spheres of public and private law is becoming increasingly difficult as there are many overlapping areas between private and public legal relationships in the modern world. For example, when state or municipal entities enter into commercial transactions with private undertakings, it may be difficult to determine whether the relationship is of a purely private-law nature, or whether it is an exercise of public authority vis-à-vis a private undertaking (or a combination of both). Consequently it may be difficult to determine whether the principle of autonomy governs a relationship vis-à-vis both parties, or whether the operation of the principle is restricted by other rules promulgated by the state. This complex situation is well illustrated by the port sector, as shown in this paper.

Some authors propose abandoning altogether the traditional division between public and private law, while others suggest replacing the traditional division with a series of horizontal and vertical relationships.[3]

In the Norwegian legal system, the law is traditionally divided into public and private spheres. According to O. Mestad and F .Arnesen in *Knoph's Overview of Norwegian Law*, a legal relationship involving a state actor or a municipality is characterized as 'public', whereas a relationship between private parties, such as a commercial transaction or a situation governed by the law of torts, is characterized as 'private'.[4]

Competition law has elements of both public and private law. O. Mestad and F. Arnesen in *Knoph's Overview of Norwegian Law* place competition law formally within the category of private law, while pointing out that in reality competition law lies somewhere between the domains of private and public law. On the one hand, competition law

3 Leczykiewicz, Dorota and Weatherhill, Stephen. "Private Law Relationships and EU Law", p. 1 et seq. in Leczykiewicz and Weatherhill (eds), *The Involvement of EU Law in Private Law Relationships*, Oxford (2013), also available from the Legal Research Paper Series, available at http://www.ssrn.com.

4 *Knophs Oversikt over Norges Rett.* Universitetsforlaget (2009) , pp. 41-42.

has clear public-law characteristics, as it is imposed, monitored and enforced by the state. On the other hand, competition law takes as its starting point the free market, where parties exercise their private autonomy in the way that is commercially reasonable for them.

Infringements of competition law may have implications under both public and private law. Infringements of competition rules may result in administrative fines and, in some States, in criminal liability. At the same time, a party to a dispute arising out of a commercial contract may argue that the contract is void because it violates competition rules. Furthermore, private individuals or companies may be entitled to compensation for losses suffered as a result of a competition-law infringement. These parties may resort to private enforcement measures in national tribunals.

In so far as EU law is concerned, it is impossible to classify EU law as exclusively "public" or "private", as it regulates a wide range of legal relationships falling into both these fields. EU law has had a major impact on the spheres of both public and private law in the national systems of the Member States, and a comprehensive overview of this impact lies beyond the scope of this paper.

Suffice it to say that EU competition-law rules apply in all EU Member States and in all EFTA States (such as Norway) through the European Economic Area (EEA) Agreement (Articles 53 and 54 corresponding to Articles 101 and 102 TFEU). The national competition laws of the Member States are generally identical to EU competition-law rules. Thus the EU has played a major role in shaping the current national competition rules of Member States.

Furthermore, general principles of EU law, such as the principles of non-discrimination and good administration, apply to vertical relationships, i.e., relationships involving the state and municipalities as well as to undertakings exercising public authority on their behalf. Some scholars argue that the same principles may also apply to horizontal relationships, i.e., relationships between private undertakings and/or individuals.[5]

---

[5] Dougan, Michael. *The Impact of the General Principles of Union Law upon Private Relationships*. Pp. 71 et seq. in Leczykiewicz, Weatherhill (see footnote 3 above).

However, the latter view is not yet generally accepted.

In any event, EU law has undoubtedly had a profound impact on the private-law spheres of the national laws of the Member States. The discussion below takes a closer look at the restrictions imposed by EU competition law on port owners' freedom of contract. We also look at issues arising from the application of general principles of EU law, such as the principle of good administration, to the exercise of port owners' private autonomy, and the relationship between these EU law principles and national laws of Member States.

3 EU competition law restrictions on port owners' autonomy

In general, port owners enjoy freedom to enter into such contractual arrangements with undertakings as they find appropriate in light of their commercial interests. For example, a port owner will likely find it more profitable to conclude long-term contracts with large carriers than short-term arrangements with smaller carriers due to the nature of the investments required to develop the port . Unsurprisingly, therefore, ports tend to prefer long-term contracts with large carriers, meaning that other shipping companies will have less favourable conditions for port access.

A port owner is also unlikely to be willing to deal with an undertaking with a poor financial record, as problems with payments for the use of the port will put the port's profitability at risk.

A port owner may also be operating in the neighbouring downstream market, i.e., maritime transport services. Such a port owner will not want to have competing carriers gaining access to its port facilities, at least not on equally favourable conditions.

Since ports and port facilities are usually in limited supply, any denial of, or restrictions to, access, irrespective of the grounds for such a decision, may in practice result in the exclusion of undertakings from the market, or at least in competition being made considerably more difficult.

In view of the above, competition rules determine the limits of port owners' freedom to exercise their private autonomy when dealing with undertakings requesting access to port facilities. Of course, it is debatable whether a port may be considered an entirely "private" undertaking where it is owned by a state or municipality. In Norway, for example, ports open to general vessel traffic[6] are owned by municipalities and run by municipally-owned and -controlled undertakings.

For competition-law purposes, it makes a difference whether a port owner is acting as an official (public) authority or as an "economic" entity. This is because it is only in the latter case that Articles 101 and 102 TFEU will apply . At the same time, it is well-established that state- or municipally-owned undertakings do not automatically fall outside EU competition rules. We return to the exercise of "public authority" by port owners in Section 3 below.

Port owners' discretion to give or refuse third parties access to quays and sailing times, port facilities, terminals, and other assets can be circumscribed by competition rules. Although the applicability of EU competition rules to the port sector is nothing new, there remains a degree of uncertainty as to the lawful limits of a dominant port owner's discretion when dealing with undertakings.

Where should we strike the balance between the private autonomy of port owners and their commercial interests on the one hand, and the objective of effective competition in ports on the other? The case law of the EU Court and a number of European Commission decisions shed some light on this question.

The concept of "essential facilities" has been applied to resolve the situation where a dominant port owner that is also involved in providing maritime services refuses to grant access to its competitors. This concept addresses the situation where a dominant undertaking's refusal to supply its competitor on a neighbouring market (where the former undertaking is not dominant) actually or potentially will lead to the elimination of the competitor.[7]

6 I.e., not small private ports.

7 Case 6/73 *Commercial Solvents* is the seminal case.

The Commission decisions in *Port of Rødby* and *Sea Containers v. Stena Sealink* illustrate the application of the "essential facilities" doctrine in the port sector.

In *Port of Rødby,*[8] a Danish public company (DSB) owned and operated the port and also operated ferry services from the same port. DSB refused permission to another ferry company, Stena, to use the port on the grounds that such use would prevent other companies already operating on the market from expanding their activities. At the same time, the Danish government also refused Stena permission to build another port nearby. The purpose and effect of these refusals were to protect DSB from competition.

The European Commission condemned the refusals as abusive and rejected arguments that the market for maritime transport services was already saturated. The Commission found that the port was an essential facility, that is, "a facility or infrastructure without which competitors are unable to offer their services to customers".

In *Sea Containers v Stena Sealink (Interim Measures),*[9] the Commission insisted that the port owner had an obligation to disregard its own interests as the user of the essential facility and to compete on equal terms in order to give an opportunity to other undertakings. According to the Commission, in addition to its obligation to give access, the port owner must even consider "modest" adjustments in slots and sailing schedules to accommodate the interests of the existing and new users.

The ruling of the ECJ in *Bronner* supports in principle the Commission's approach in *Port of Rødby* and *Sea Containers v Stena Sealink*.[10] The crucial point is that the port owner may not discriminate against other undertakings in order to protect its own position on a neighbouring market. Apparently, EU competition rules introduce a stricter approach to the port owner's autonomy than that set forth in the Norwegian Ports and Navigable Waters Act, which contains a provision on the port owner's obligation to allow access to the port, as discussed

---

8 *Rødby Havn*, Official Journal (OJ) L 55/52 1994.

9 OJ L 15/8 1994.

10 C-7/97 *Oscar Bronner v Mediaprint*.

in Section 5 below. However, the Norwegian Competition Act generally follows the EU approach in so far as the interpretation of the prohibition against abuse of a dominant position is concerned.

The *Bronner* ruling clarifies that the "essential facilities" doctrine lays down very strict criteria for finding an abuse of a dominant position and thereby protects port owners from excessive limitations on their autonomy. Thus, an obligation to deal exists only where access is absolutely necessary for operating on the relevant market, i.e., it is not possible to duplicate the facilities. In addition, the market power of the owner of the facilities must be super-dominant rather than simply dominant, i.e., approaching a de facto monopoly.[11]

In principle, the "essential facilities" doctrine appears to establish a relatively high threshold for new entrants to satisfy in order to be protected. In practice, however, it is relatively easy to prove that duplicating port infrastructure would be extremely difficult and costly. In the *Port of Rødby*, the Danish government refused permission for the building of a new port and in *Sea Containers,* the Commission held that building a new port was unrealistic.

So does this interpretation of the "essential facilities" doctrine in practice give a "green light" to new entrants to argue that the doctrine will apply to any refusal to deal with competitors in the port sector because the building of a new port is by definition extremely costly? The answer to this question is probably not completely clear-cut in practice: it is reasonably likely that conduct that fails to satisfy all the criteria established by the "essential facilities" test may still be caught by Article 102 TFEU on other grounds. For example, such conduct may be discriminatory or it may distort competition on the market in some other way.

This is illustrated by the recent *Color Line* decision, which involved the application of both Articles 53 and 54 EEA (analogous to Articles 101 and 102 TFEU).[12] The Swedish port of Strömstad had entered into a

---

11 See also Evrard, "Essential Facilitie s in the European Union: Bronner and Beyond", 10 *Colum. J. Eur. L.* 498 (2003-2004).

12 ESA decision of 14 December 2011. The ESA imposed a fine of EUR 18.811 million on Color Line AS and Color Group AS.

long-term exclusive contract with the ferry company Color Line, which resulted in the elimination of all competitors from the route between Strömstad and the Norwegian port of Sandefjord. After some years, the Strömstad harbour authority had second thoughts about the agreement and lifted some of its restrictions.

The EFTA Surveillance Authority (ESA) objected to the long-term exclusivity agreement and found that both the conclusion of the agreement and the active steps taken by Color Line to enforce it amounted to an abuse of a dominant position.

The ESA rejected Color Line's defence that the case fell within the doctrine of "essential facilities". The ESA found that the doctrine did not apply because the case was not about a refusal by Color Line to supply a competitor on the downstream market, i.e., it had not precluded a competitor from entering the downstream market. Accordingly the case failed to satisfy the strict criteria necessary for the doctrine of "essential facilities" to apply.[13]

To assess whether Color Line had acted abusively, the ESA took as its starting point the *special responsibility* of dominant undertakings (which Color Line was in the present case) *not to allow their conduct to impair genuine undistorted competition in the internal market*.[14]

Although the decision in *Color Line,* was addressed only to Color Line, and not also to the port owner, Strömstad municipality, it shows port owners once again that they do not have complete freedom to enter into any contractual arrangement that seems commercially feasible. Factors to consider are not only whether the arrangement grants an exclusive right to use the whole, or a significant part of, the port, but also the duration of the prospective agreement and the actual or potential effects it may have on the counterparty's competitors. Even less restrictive arrangements may, in principle, infringe competition rules and result in liability for the port owner.

[13] A discussion of Article 101 TFEU is outside the scope of this paper.

[14] Case 322/81 *Michelin* v *Commission (Michelin I)* [1983] ECR 3461; Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA and Others v Commission* [2000] ECR I-1365; Case T-83/91 *Tetra Pak International SA v Commission (Tetra Pak II)* [1994] ECR-II 755.

It is also well-established in EU case law that the scope of Article 102 TFEU is not restricted to unilateral conduct. Contracts such as the one concluded between Color Line and the Port of Strömstad may be caught by both Article 101 and Article 102 TFEU.

However, competition rules do not completely disregard a port owner's interest in benefitting from the investments into the development of the port which long-term contracts with large undertakings may bring about. Article 102 TFEU allows for a possibility to justify seemingly anticompetitive conduct on objective grounds. In particular, such conduct may be justified if the undertaking acquiring special rights to use the port has to make *real* investments in order to develop the port, improve transport services, modernize terminals and so on.

Nevertheless, it is improbable that even such investments could justify an agreement resulting in excessive restrictions on competitors.

Lastly, the EU competition rules set forth in Articles 101 and 102 TFEU do not apply to purely domestic competition violations. An additional criterion for application of the *EU (and EEA)* competition rules is that the anticompetitive conduct must have produced certain effects on "trade between Member States". Competition restrictions in the port sector may well affect trade between Member States because of ports' importance for international trade. Accordingly such restrictions are likely to constitute a threat to freedom of trade between Member States, especially if the relevant geographic market constitutes a substantial part of the Common Market.[15]

4 Public functions vs. commercial activities of port owners

In Europe, ports and port facilities are commonly owned by state or municipal entities, and this is generally the case in Norway. However,

15 Case 56&58/64 *Consten&Grundig*. See also *Port of Rødby*, *Sea Containers v. Stena Sealink* in foonotes 8 and 9 above.

recent changes in the legislation regulating port activities in Norway encourage port owners to be more focused on profitability and on commercial activities, and to cooperate more actively with other municipally-owned and private undertakings. At the same time, port authorities retain their traditional administrative (public) functions.

Port owners have a broad spectrum of public and commercial interests. As public undertakings, they have an obligation to ensure an effective and secure transport infrastructure. To that end, port owners monitor transport activities, supervise potentially dangerous operations in their ports, and ensure the unhindered flow of cargo and safe conditions for passengers.

At the same time, port owners have to pursue commercial interests and ensure that port activities are profitable. This means that the public and private tasks of the port owner are tightly interwoven and, as a consequence, it may be difficult to categorize port owners' functions as public or private (commercial).

For example, is a decision to reject a contract with a carrier an ordinary business decision, which as such will be caught by competition rules, or is it an exercise of the public authority of the port owner? Such a decision may be justified by economic considerations even though it also has some direct legal consequences on the carrier's position. After all, the right of port access is essential for a carrier and needs to be protected by the law.

In *Fjord Line v. Municipality/Port of Kristiansand* (2011), the Norwegian Court of Appeal ruled that there was a right of port access. The decision of the port owner to make access to its port subject to certain unacceptable conditions constituted an exercise of public authority within the meaning of administrative law. The case, however, did not concern competition law issues. We shall return to this ruling in Section 5.

The classification of port owners' activities as either private or public is very important for determining the limits of port owners' discretion under competition law. To the extent that a port owner is acting as a public authority and exercising its authority vis-à-vis private persons, its decisions will generally fall outside competition rules.

In principle, state or municipal ownership, or even the fact that the port owner is not financed by its commercial activities, does not automatically exempt the port owner from the scope of EU competition rules.[16] However, if the port owner does not bear directly the economic consequences of losses incurred as a result of unprofitable operations, this may indicate that its activities do not pursue commercial objectives and may fall outside competition rules.[17]

It is the nature of the port owner's activities that will be decisive for this evaluation (functional approach).[18] In practice, port owners' activities have generally been viewed as economic for the purposes of EU competition rules.[19]

In *Cali & Figli*, the ECJ ruled that activities falling within the "essential functions of the State" and "typically those of the public authority" are not economic by nature and thus will fall outside competition rules. In this particular case, the activity in question was anti-pollution surveillance.[20]

In *Color Line*, the ESA rejected the argument that the long-term agreement between Strömstad municipality and the ferry company Color Line represented an exercise of public authority by the municipality (the port owner). The ESA pointed out that the contract with Color Line (including the exclusivity clause) was neither imposed by the municipality, nor was it made in pursuance of general interest objectives. On the contrary, it had been negotiated between the parties and was commercial by nature.[21]'

16 Case C-41/90 *Höfner og Elsner v Macrotron*.

17 Case 118/85 *Commission v Italy*.

18 *Höfner og Elsner v Macrotron* cited in footnote 18 above.

19 *Port of Rødby; Sea Containers v Stena Sealink; Color Line*.

20 Case C-343/95 *Diego Cali & Figli Srl*.

21 *Color Line* decision, paras 143-145.

5 Limits on the port owner's autonomy under national law (taking Norway as an example)

Even if competition rules do not apply to the exercise of "public authority" by port owners, this is not to say that port owners have complete freedom of action in their capacity as public institutions. On the contrary, they must follow national rules for administrative procedure. These rules as designed to protect private individuals and companies from the wrongful exercise of public authority by guaranteeing the right to be heard, protection against discrimination and the right to appeal an unfavourable decision.

In Norway, the consequences for the port owner of not observing good administrative practices when taking decisions about port use are well illustrated by *Fjord Line v. Municipality/Port of Kristiansand.22* At the time of the case, carriers did not have an express statutory right of port access (this has now changed[23]). The Court of First Instance found, however, that there was an implied right to this effect. Due to violations of good administrative practice, a decision by the port owner imposing certain burdensome conditions for access to the Port of Kristiansand was held to be invalid. The Court of Appeal upheld the decision in the ferry company's (Fjord Line's) favour, finding that the port owner's violation of national administrative law principles rendered the decision invalid and constituted grounds for the payment of compensation to the ferry company for losses suffered.

But what about cases *where the port owner acts as a private (commercial) entity vis-à-vis private undertakings?* Can port owners' counterparts rely on rules and principles of good administration in these situations as well?

In Norway, certain limitations on port owners' discretion are expressly set forth in the Norwegian Ports and Navigable Waters Act.[24] Section 39

22 RG-2011-810 (available in Norwegian at LOVDATA).

23 See text accompanied by footnotes 25 and 26 below.

24 Norwegian title of the statute is *Lov om havner og farvann (Havne- og farvannsloven)*

of the Act contains a provision requiring port and terminal owners and operators (except for small private ports not open to the public) to “accept vessels at the port to the extent that there is capacity and where the vessel does not constitute an unreasonable burden in the light of the owner or operator’s own needs for use of the port, or the needs of others who have been secured the right to use the port”.

The same provision adds that “owners and operators of ports and terminals may impose restrictions on access to call at the port on the grounds of safety, environmental protection, or fisheries management.”[25]

On the one hand, the provision safeguards port owners’ right of private autonomy to decide whether or not to deal with a carrier, in particular the right to reject a ship that represents “an unreasonable burden” for the port owner. On the other hand, it does impose an express obligation on the port owner to allow access to the port where no unreasonable burden exists.

The provision does not expressly state, however, whether it applies only to situations where the port owner is acting as a public authority or whether it applies to *all* activities, including commercial transactions. Consequently it fails to resolve the question whether, and if so to what extent, port owners are bound by the duty of good administration vis-à-vis their counterparties in ordinary business relationships.

6 Limits on port owners’ autonomy in the light of general principles of EU law (non-discrimination and good administration)

EU law has had a profound impact on the national administrative laws of the Member States, in particular through its role in establishing the

(“Act concerning ports and navigable waters – the Ports and Navigable Waters Act”). The Act was passed on 17 April 2009.

[25] Section 39, first paragraph, of the Ports and Navigable Waters Act (2009), author’s translation.

principles of non-discrimination and good administration. It is well-established that the general principles of EU law apply to vertical relationships, such as where a port owner exercises its official authority vis-à-vis a private undertaking.[26]

Any extension of these principles of EU law to horizontal relationships, such as where a port owner is dealing as a commercial entity with a private undertaking, would undoubtedly affect the port owner's right of private autonomy, which is protected by both EU and national law.[27]

The extension of the general principles and fundamental rights established under EU law to the sphere of private legal relations (especially giving these principles and rights horizontal direct effect) is a controversial matter. Such extension could easily result in a direct conflict between the principles, which would lead to even more uncertainty for all the parties involved. For example, imposing limitations on port owners' discretion in commercial matters could lead to a conflict between the principles of private autonomy and freedom of contract on the one hand, and the principles of non-discrimination and protection of procedural rights (good administration) on the other. Some authors suggest that the ECJ will most likely leave it to the Member States to protect, through appropriate national legislation, procedural rights and other interests in horizontal relationships.[28]

7 Final remarks

The impact of general principles of EU law on commercial relations between port owners and private undertakings is far from certain.

26 The same is generally true in Norway, which is a party to the EEA Agreement. The principle of non-discrimination is laid down in the EEA. The impact of EU principles of good administration on EEA law is less certain but Norwegian administrative law contains the same level of protection.

27 Safjan, Mikłaszewicz, "Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law", *European Review of Private Law* 3-2010, 475-486.

28 Cherednychenko, "EU Fundamental Rights, EC Fundamental Freedoms and Private Law", *European Review of Private Law*, 1-2006, 23-61, at p. 58.

However, the author argues in this section in favour of increased protection for undertakings entering into commercial transactions with port owners.

The doctrine of private autonomy is based on the assumption that the parties to a transaction are on an equal footing. The fact that one party fails to achieve its desired contractual conditions does not necessarily mean that the parties are unequal. Ports have a special position, however, due to the fact that port owners act in both commercial and official capacities, and it is often very difficult to distinguish precisely in which capacity they are acting at any one time. In addition, port owners' bargaining power may be very strong due to the fact that access to port infrastructure is a limited good.

In some cases, of course, port owners may not be in such a strong position vis-à-vis a large shipowner, as illustrated by the above-mentioned decision in *Color Line/Port of Strömstad*. Nevertheless, in many cases the position of private persons is considerably weaker than that of port owners. Consequently private persons need stronger protection from possible discrimination and other unfair practices than is generally the case in private transactions. This means that port owners' autonomy and freedom of contract should be more restricted than that of "ordinary" commercial undertakings, even if a port owner is acting in a private capacity vis-à-vis another private person.

The problem could be solved at national level, for example, by requiring port owners to adopt rules or guidelines for dealing with private undertakings. While these would not impose excessive restrictions on a port owner's discretion, at the same time they would ensure transparency, protection against discrimination, and the right to be heard, as well as ensuring expeditious procedures.

Given the international nature of the port sector, it would be important to ensure similar levels of protection in all Member States. This suggests that EU harmonization of such rules would be highly desirable.

The Icesave judgment

Iceland did not fail to comply with the obligations in the Iceland Act No 98/1999, implementing Directive 94/19/EC of 30 May 1994 on deposit-guarantee schemes

Jonas W Myhre, Guest Researcher
Centre for European Law
Scandinavian Institute of Maritime Law
University of Oslo

Content

1 FACTS AND PROCEDURE 71

2 JUDGMENT 73

2.1 Regarding the first plea: The obligation of result 73

2.1.1 Submissions by the parties 73

2.1.2 Findings of the Court 76

2.2 The second and third pleas: Discrimination contrary to Articles 4(1) and 7(1) of the Directive and (or) Article 4 EEA. 83

2.2.1 Arguments of the parties 83

2.2.2 Findings of the Court: 84

3 COMMENT 86

3.1 General 86

3.2 Particulars 87

3.2.1 The first plea 87

3.2.2 The second plea, discrimination in contravention of the Directive 92

3.2.3 The third plea, discrimination contrary to Article 4 EEA 93

3.3 Conclusion 93

EFTA Surveillance Authority, supported by the *Commission* as intervener *v. Iceland*, Case E- 16/11 EFTA Court, Judgment of 28 January 2013.

This article was originally published in ELR (European Law Reporter) 2/2013.

1 Facts and Procedure

On 1 January 2000, Iceland implemented Directive 94/19 («the Directive») through the enactment of Act No. 98/1999 on a Deposit Guarantee and Investor Compensation Scheme. The Depositors' and investors' Guarantee Fund began operating on the same day. In October 2006, Landsbanki Íslands hf («Landsbanki») launched a branch in the United Kingdom which provided online savings accounts under the brand name *«Icesave»*. A similar Icesave *online deposit branch* was launched in the Netherlands which began accepting deposits in Amsterdam on 29 May 2008. The Icesave accounts drew in substantial deposits both from private and public investors. As a part of a worldwide financial crisis, there was a run on Icesave accounts in the United Kingdom from February to April 2008.

According to the Directive, deposits at the British and Dutch Landsbanki branches were under the responsibility of Iceland's Depositors' and Investors' Guarantee Fund («TIF»). From May 2008, Landsbanki opted to take part in the Netherlands' deposit guarantee scheme and similarly the Landsbanki branch in the United Kingdom joined the UK's deposit-guarantee scheme for additional coverage. On 6 October 2008 Landsbanki's Icesave websites in the Netherlands and the United Kingdom ceased to work and *depositors at those branches lost access to their deposits*. On the same day, the Icelandic Parliament adopted Emergency Act No 125/2008, which provided for the creation of new banks and the granting of priority status in bankruptcy proceedings to depositors with claims upon the TIF.

On 7 October 2008 *Landsbanki collapsed* and the Icelandic Financial Supervisory Authority («FME») assumed all legal powers and appointed

a winding-up committee which assumed the full authority of the board. In the Netherlands, certain emergency regulations of Dutch law were sought. Between 6 and 9 October 2008, the Icelandic Minister of Finance established new banks under the Emergency Act. Between 9 and 22 October 2008, *domestic deposits* in Landsbanki were *transferred* to the new bank «New Landsbanki» which was established by the Icelandic Government, as part of a restructuring of the Icelandic banks. On 13 October 2008, emergency regulations in the Netherlands were activated and administrators were appointed to handle the branch's affairs, including its assets and dealings with customers.

During November and late 2008, Iceland introduced stringent capital controls, restricting in general, all transnational foreign currency movements, except those for the purchase of goods and services. The introduction of protective measures under Article 43 EEA was notified to the EFTA Standing Committee and the EEA Joint Committee. The Netherlands and the UK compensated their respective Icesave account holders. By March 2009, 93% of the commercial banking sector in Iceland had failed.

On 26 May 2010, ESA issued a letter of formal notice to Iceland alleging a failure to ensure that Icesave depositors in the Netherlands and the United Kingdom received payment of the minimum amount of compensation provided for, within prescribed time-limits.

Prior to commencement of the legal dispute before the EFTA Court, a *diplomatic dispute* erupted between the UK and the Netherlands, and Iceland. On 8 October 2008, the UK Government took action under its Anti-Terrorism, Crime and Security Act 2001 to formally freeze Landsbanki's assets. Negotiations were entered into concerning the repayment to the UK and the Netherlands of the Icelandic minimum deposit guarantees. In all three loan agreements, Icesave Bills 1, 2 and 3 were negotiated. Icesave Bill 1 was rejected by the UK and the Netherlands. Icesave Bills 2 and 3 were at first accepted by the Icelandic Parliament, but were subsequently rejected by referenda held in March 2010 and March 2011.

On 10 June 2011, ESA delivered its reasoned opinion. By application

lodged 15 December 2011, ESA brought an action against Iceland under the second paragraph of Article 31 of the Surveillance and Court Agreement («SCA») seeking a declaration that Iceland had *failed to comply* with its obligation to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and the United Kingdom. In its defence of 8 March 2012, Iceland contended that the Court should dismiss the application. Upon request, the European Commission was granted leave to intervene in support of ESA on 23 April 2012. The Governments of the United Kingdom, the Netherlands, Norway and Liechtenstein, submitted written observations.

ESA's action was based on three pleas: (1) The obligation of result: by failing to ensure compensation to Icesave depositors holding deposits in the UK and the Netherlands, Iceland had breached its obligations under Articles 3, 4, 7 and 10 of the Directive. (2) Discrimination contrary to the Directive Articles 4(1) and 7(1). (3) Discrimination contrary to Article 4 EEA.

2 Judgment

2.1 Regarding the first plea: The obligation of result

2.1.1 Submissions by the parties

ESA submitted that the Directive imposed an *obligation of result* on EEA States to ensure that a deposit –guarantee scheme was set up, capable of guaranteeing that, in the event of deposits being unavailable, the aggregate deposits of each depositor were to be covered as stipulated in Article 7(1) of the Directive. At that time, the coverage required was 20 000 Euro. Further, the obligation of result required EEA States to ensure that duly verified claims were paid within the deadline laid down in Article 10 of the Directive, *i.e.* within three months from an official determination that a credit institution is unable to repay the deposit.

ESA contended that the mere transposition into national law of the Directive and the setting up and recognition of a deposit-guarantee scheme without any regard to whether compensation to depositors in fact was secured, was not sufficient for Iceland to fulfil all its obligations under the Directive.

For its interpretation of the Directive, ESA relied on *Paul and Others v. Germany*.[1] It was further argued that in order for Iceland to discharge its duties under the Directive, the EEA State itself might be held *responsible* for the compensation of depositors, if all else failed. The exceptional circumstances such as the financial crisis of the magnitude experienced by Iceland could not alter the obligation to compensate depositors. The effect of «*exceptional circumstances*» in Article 10(2) of the Directive was limited to justifying certain payment delays. ESA considered TIF to be an emanation of the Icelandic State, within the meaning of the EEA Agreement, and that any default of that institution was directly attributable to the State, both in law and in fact. The doctrine of force majeure was in ESA's view not applicable in the present case. Finally, ESA accepted that a state injection of capital to refinance a deposit-guarantee scheme might constitute State aid within the meaning of Article 61 EEA. However, in the present case such aid would have been compatible with Article 61 EEA.

The Commission, as intervener, supported ESA's arguments regarding the obligation of result imposed by the Directive. In this connection it was inter alia argued that if a deposit-guarantee scheme did not have sufficient funding, the Member State concerned would be regarded as having infringed the Directive. In the Commission's view, any other interpretation would render the provision *ineffective* in ensuring the objective of the Directive; that depositors if need be, could rely on deposit-guarantee schemes, ensuring last resort protection. In line with ESA's argument, *Paul and Others* was referred to as a confirmation of an interpretation of the Directive inferring an obligation of result. In the Commission's opinion, the Directive was devised precisely to deal with the exceptional occurrence of a bank failure, including circumstances

1 ECJ [2004)] ECR I-9425 *Paul and Others*.

in which supervision had proved insufficient to save a bank. The European legislation did not include any additional derogation over and above what is provided for in Article 10(2) of the Directive.

Iceland denied that the Directive imposed any obligation of result on an EEA State to use its *own resources* in order to guarantee the pay-out of a deposit-guarantee scheme in the event that «all else fails». According to Iceland, the obligations incumbent upon the State were *limited* to ensuring the proper establishment, recognition and a certain supervision of a deposit-guarantee scheme. It was argued that no provision of the Directive suggested that any form of state guarantee or state funding was required, in particular where a guarantee scheme was unable to pay compensation. Recitals 4, 23 and 25 in the Preamble were said to make clear that the funding for deposit-guarantee schemes would come from the banks. It was submitted that Article 7(6) of the Directive was the only operative provision dealing with the scenario that a deposit-guarantee scheme might be unable to pay duly qualified claims. The solution contemplated by this provision, in the case of non-payment, was an action against the deposit-guarantee scheme and not the EEA State. The sole purpose of recital 24 in the preamble of the Directive was said to exclude State liability if the compensation of depositors was secured. In this regard, Iceland relied on *Paul and Others*. Iceland further contended that any attempt to underwrite a deposit-guarantee scheme using the resources of the State created problems of its own, inter alia, huge costs for the State and a linkage between the liabilities of the banks and the State's own financial exposure. A severe financial crisis may easily lead to a possible sovereign default. In Iceland's view, where widespread banking failure takes place, other policy tools are required. Iceland found support in the 2010 Commission Impact Assessment[2] that public sector funding would be subject to State aid rules and that there would be no obligation to provide such aid. There would be, according to Iceland, scope for serious distortions of competition if a state should bail out a deposit-guarantee scheme, in effect subsidising its banks.

2 Commission Staff Working document, Impact Assessment of 12 July 2010 SEC (2010) 834/2.

In their written observations, the Netherlands and the UK generally supported the position of ESA and the Commission. In particular they addressed the issue of *force majeure*, a defence they considered was not available to Iceland.

Liechtenstein supported Iceland and contended that it was not envisaged that a general and automatic State responsibility covering the costs of the failure of the whole banking system would arise from the Directive. Norway also supported Iceland and pointed to the extensive financial burden on EEA States of a possible automatic State responsibility for compensation of depositors as a last resort. It was argued that without *clear and precise* wording in the Directive, the existence of such an obligation could not be assumed. Recital 24 in the preamble to the Directive excluded, in Norway's view, automatic State responsibility.

2.1.2 Findings of the Court

This matter drew much of the Court's attention. The Court began by reiterating that a failure to fulfil obligations can be found only if there is, upon expiry of the period laid down in the reasoned opinion, a situation contrary to EEA law which is objectively attributable to the EEA State concerned.[3] The nature of the result to be achieved is determined by the substantive provisions of the individual directive in question. As directives are intended to achieve a specific result, it is left up to the EEA States how to achieve this objective. The Court recalled that the preambles of the acts referred to in the Annexes of the EEA Agreement are relevant for the proper interpretation and application of the provisions contained in such acts. [4] It further made clear that the question of state liability, as laid down in *Sveinbjørnsdóttir,* was outside the scope of the present proceedings[5].

The Court made clear that the case had to be decided based upon the *Directive as it stood at the relevant time* and not take into consideration the amendments and the improved protection of depositors introduced

3 Judgment, para. 118.

4 Judgment, para. 122.

5 Judgment, para. 123.

as a result of the general financial crisis in 2009. [6] The Court, citing the first recital in the preamble to the Directive, noted the dual objective. This *dual objective* included the harmonious development of credit institutions throughout the Community through elimination of all restrictions on the right of establishment and the freedom to provide services, and the increased stability of the banking system and protection for savers.[7] With reference to Article 3(1) of the Directive, the Court found that an EEA State is under an obligation to ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognised. Drawing on the Commission's proposal for the Directive, the Court held that the EEA States are free to introduce and recognise several deposit-guarantee schemes within their territory.[8]

The Court pointed to the wording of Article 3(2) of the Directive in which it is explicitly stated that the competent authorities shall take all appropriate measures to ensure that the credit institution complies with its obligations incumbent on it as a member of a deposit-guarantee scheme.[9] Relying on *Paul and Others*,[10] the Court found that the *purpose* of the provisions in Article 3(2) to (5) of the Directive is to guarantee to depositors that the credit institution in which they make their deposits belongs to a deposit–guarantee scheme and fulfils its obligations. In the words of *Paul and Others*[11], «[t]hose provisions (Article 3(2) to (5) and Article 7) thus relate only to the introduction and proper functioning of the deposit–guarantee scheme as provided for by Directive 94/19.»[12] Referring to the Opinion of Advocate General Stix–Hackl in *Paul and Others*,[13] the Court held that the *Directive does not exhaustively regulate*

6 Judgment, para.124.

7 Judgment, para. 126.

8 Commission Proposal for a Council Directive on deposit-guarantee schemes, COM(92) 188 final and Judgment, Para. 131.

9 Judgment, para. 132

10 ECJ [2004)] ECR I-9425 *Paul and Others*, paras. 29 and 30.

11 ECJ [2004)] ECR I-9425 *Paul and Others*, para. 29.

12 Judgment, para. 133.

13 Opinion of Advocate General Stix Hackl of 25 November 2003, C-222/02 *Paul and Others*, point 117.

the unavailability of deposits under EEA law, but simply requires EEA States to provide for a harmonised minimum level of deposit protection. The Court added that it is therefore clear that national authorities have considerable discretion as to how they organise their schemes. Based on these considerations, the Court held that it was not envisaged in Article 3 of the Directive that EEA States must ensure the payment of aggregate deposits in all circumstances.[14]

As to Article 7(1) of the Directive, the Court found that this provision provides for a minimum harmonisation as regards the level of coverage for individual deposits. The Court construed the wording «deposit-guarantee schemes shall stipulate …» to mean that an obligation is imposed on EEA States to ensure that national rules are adopted or maintained which require a coverage level of at least 20 000 Euros.[15] The Court considered the modifications of Article 7 of the Directive in 2009 as a confirmation of the need to introduce *substantial changes* and to extend the responsibility of the EEA States beyond the establishment of an effective framework. The new wording stipulates that «Member States shall ensure that the coverage for the aggregate deposits for each depositor shall be at least Euro 50 000»[16] While the 2009 modifications were not applicable in the case at hand, the Court found that the rewording of Article 7 of the Directive supported the view that the obligation of the EEA States, under the applicable version of the Directive, is limited to ensuring that national rules which require a coverage of at least 20 000 Euros are maintained or adopted.

The Court interpreted Article 7(6) of the Directive, which provides for an action by the depositor against the guarantee schemes, to also cover the scenario that a deposit-guarantee scheme might be unable to pay duly qualified claims.[17] Referring to *Paul and Others*, the Court stated that the obligation upon the EFTA States is limited to the maintenance or adoption

14 Judgment, paras. 134 and 135.

15 Judgment, paras. 136 and 137.

16 Directive 2009/14EC of the European Parliament and of the Council of 11 March 2009; Judgment para. 141.

17 Judgment, para. 142.

of rules that provide for an effective right to file an action against the guarantee scheme« particularly in the case of non-payment.[18]

This led the Court to hold that Article 7 of the Directive does not lay down an obligation on the State and its authorities to ensure compensation if a deposit-guarantee scheme is unable to cope with its obligations in the event of a systemic crisis.

The mandatory language in Article 10 of the Directive «deposit-guarantee schemes shall be in a position to pay…» established, merely a procedural obligation.[19] An *obligation on the State* to ensure compensation if a deposit–guarantee scheme is unable to cope with its obligations cannot be inferred from Article 10(2) of the Directive. The obligation upon EEA States and their competent authorities is limited to supervising and ensuring that deposit-guarantee schemes are, as a rule, not released from the short deadline in Article 10(1) of the Directive. Summing up, the Court found that the obligation on EEA States under Article 10 of the Directive is limited to providing for a mandatory and effective *procedural framework* with respect to time limits. The Court found that the Directive deals, at least primarily, with a failure of individual banks and not with systemic crises. This finding was based on references to Articles 1(3) and 9(3) and recitals 3, 10, and 25 in the preamble to the Directive. The Court found confirmation of its view in the Commission's 2010 Impact Assessment in which the biggest failure envisaged by the Commission's services was the failure of a large member bank accounting for 7.25% of eligible deposits.[20]

The Impact Assessment provided further confirmation by setting a target level of 1.96%, increasing the deposit-guarantee scheme funds sufficiently *to cope with «a medium-sized bank failure».* The Court noted that from recital 23 in the preamble that the methods of financing deposit-guarantee schemes are not harmonised and that the financing capacity of such schemes must be in proportion to their liabilities. However, there

---

18 ECJ [2004)] ECR I-9425 *Paul and Others*, para. 27;judgment, paras. 143 and 144.

19 Judgment, para. 146.

20 Judgment, para. 152.

is no definition of what is considered to be *proportionate funding.*[21] Recital 23 further states that the cost of funding such guarantee schemes must be borne, in principle, by credit institutions themselves and that the Directive aims at striking a balance between the cost of funding, the stability of the national banking system and consumer protection. The Court found that the provision of private funding enabling the guarantee scheme to cover deposits in a systemic crisis, up to the maximum level, would clearly *undermine* the objective laid down in recital 23 to not jeopardise the stability of the banking system. The Court considered that the cost of the guarantee schemes must not be too onerous for the member credit institutions. Based on these considerations, the Court concluded that the payment obligation lies with the deposit-guarantee fund and that the guarantee funds are to be *financed* entirely by the credit institutions. If, in the event of a default by a member of the scheme, the fund cannot meet depositors' claims, it is for the remaining credit institutions to make up the difference.[22]

The Court found the issue of how to proceed in a case where the guarantee scheme is unable to cope with its payment obligations to be largely unanswered by the Directive. The Court held that the only operative provision that deals with non-payment is Article 7(6) of the Directive, according to which depositors must have the possibility to bring an *action* against the relevant scheme. Thus, the Court held that an obligation on the State or a possible action against the State in such circumstances was not envisaged by the Directive.[23]

The Court noted that the question in the present case is whether EEA States are legally responsible under the Directive where the guarantee scheme is unable to cope with its payment obligations. Even without such an obligation on EEA States, the Court noted that depositors may fall within the remit of other parts of «the safety net». The Court introduced the potential *competition* and State aid issue connected to the possible state-funding of a guarantee scheme by referring to Article 3(1), second

[21] Judgment, para. 155.

[22] Judgment, paras. 156-159.

[23] Judgment, para. 160.

paragraph, third condition. There it states that one of the conditions for being exempt from belonging to a deposit-guarantee scheme is that the alternative system «must not consist of a guarantee granted to a credit institution by a Member State itself or by any of its local or regional authorities». The Court considered that the aim of this provision was to minimise the potential to distort competition, inherent in the very nature of guarantees of that kind. The Court found that the negative effect on competition would be comparable, were an EEA State to be legally obliged to ensure compensation to depositors in the case of failure by the deposit-guarantee scheme to provide such payment. The Court concluded that it was likely that should the European legislature have sought to adopt a different approach as regards the funding of deposit-guarantee schemes, this would have been expressly stated in the Directive.[24]

Recalling the Commission's 1992 proposal for the Directive, the Court stated that any public sector funding would be subject to *State aid* rules and there would be no obligation to provide such. This was further confirmed by reference to the Commission's proposal: «It did not seem appropriate, in the proposal for a Directive, to prohibit such assistance, which could prove necessary in practice, although it is not desirable as a general rule and could not be allowed to contravene the rules of the Treaty concerning State aid.»[25]The Court cited the Impact Assessment where it is stated that the recent crisis has shown that in a systemic crisis, deposit-guarantee schemes may reach their limits. However, even if in such cases governments stepped in under strict obedience of state aid rules, this would not be triggered by a legal obligation in the Directive.[26]

The Court introduced an additional aspect as to why there was no obligation of result by referring to recital 16 in the preamble to the Directive. That recital warns against imposing a level of protection «which might in certain cases have the effect of encouraging the *unsound management* of credit institutions». This, the Court found, *pointed to the*

24 Judgment, paras. 161-164.

25 Judgment, para. 165.

26 Judgment, paras. 165 and 166.

concept of «moral hazard». The Court cited *Professor Stiglitz's* work from 1983, where he contended that the more and better insurance that is provided against some contingency, the less incentive individuals have to avoid the insured event, because the less they bear the full consequence of their actions.[27] The Court found that a «moral hazard» would also occur in the case of State funding, which would immunize a deposit-guarantee scheme from the costs which have, in principle, to be borne by its members. Recitals 2 and 3 in the preamble to the Directive confirm that the Directive's aims are to provide for a minimum level of deposit protection and that foreign and domestic deposits are protected by the same guarantee scheme, irrespective of where a credit institution has its head office. Based on these considerations, the Court concluded that *consumer protection* under the Directive does not entail full protection, since increasing consumer protection may reach a point where the costs outweigh the benefits.[28]

Finally, the Court analysed recital 24 of the preamble to the Directive to determine whether the wording in this preamble can be said to support the finding of an obligation of result. Recital 24 states that the Directive may not result in the Member States or their competent authorities being made liable in respect of depositors «if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognized». The Court concluded in the negative and noting that the «conditions prescribed in this Directive» were not further defined. The funding obligation imposed on the members of a guarantee scheme is limited under the Directive and must not be too onerous in order not to jeopardize the stability of the banking system. The Court further noted that the Directive aims at minimum harmonisation in relation to the level of coverage and does not provide for any harmonisation as regards

---

27 See in Judgment, para. 167, Stiglitz, Risk, Incentives and Insurance: The Pure Theory of Moral Hazard, The Geneva Papers on Risk and Insurance (No. 26) [1983] 4, 6.

28 ECJ [1997] ECR I-2405 Germany v Parliament and Council, para. 48; judgment, paras. 168-170.

the level and mechanisms of funding. The reservation set out in recital 24 in the preamble to the Directive expressly aimed to *preclude* an excessive shifting to the State of the costs arising from a major banking failure. Consequently, the Court held that the Directive did not envisage that Iceland must ensure payments to depositors in the Icesave branches in the Netherlands and the United Kingdom, in accordance with Articles 7 and 10 of the Directive, in a systemic crisis of the magnitude experienced in Iceland.[29]

The Court distinguished *Paul and Others* on the facts. The issue in that case was whether the Directive precluded a limitation of State liability under national law in relation to defective supervision of credit institutions. The ECJ had replied in the negative.[30] Nor did the Court find that the ECJ's ruling in *Blõdel-Pawlik* supported the claim of result as claimed by the EFTA Surveillance Authority.[31]

The Court therefore dismissed the first plea.

2.2 The second and third pleas: Discrimination contrary to Articles 4(1) and 7(1) of the Directive and (or) Article 4 EEA.

2.2.1 Arguments of the parties

ESA and the Commission argued that the Landsbanki customers in branches in Iceland and their counterparts in branches in other EEA States were in a comparable situation as regards the protection granted to them by the Directive under Article 4 read in light of recital 3 in the preamble to the Directive. It was further alleged that the Icelandic Government made a distinction between domestic deposits and deposits in foreign branches. The domestic deposits were moved to new banks and were covered in full, whereas foreign depositors did not even enjoy the minimum guarantee laid down in the Directive. This amounted to in-

[29] Judgment, paras. 171-178.

[30] Judgment, para. 179.

[31] ECJ of 16 February 2012, C-134/11, *Blödel-Pawlik*, para. 20; judgment, paras. 179 and 180.

direct discrimination against the foreign depositors, based on nationality. However, the breach was explicitly said to lie in the failure of the Icelandic Government to ensure that Icesave depositors in the Netherlands and the UK received payment of the minimum amount of compensation provided for in the Directive within the time limits prescribed. The compensation of domestic and foreign depositors above and beyond that minimum amount was not an issue.[32]

Iceland rejected these pleas and argued that it was legitimate to intervene to *rescue banks*, although there was no obligation to do so. Although the Directive is a consumer protection measure, it does not address the regulation of bank insolvency and restructuring. The two groups compared by ESA, depositors at domestic branches and depositors at foreign branches were, according to Iceland, treated equally, as none of them had received any payments under the guarantee scheme.

2.2.2 Findings of the Court:

The Court distinguished between discrimination according to Article 4 EEA, only applicable where there are no specific rules prohibiting discrimination, and Article 4(1) of the Directive, read in light of recital 3 in the preamble to the Directive. The Court found that the latter required that foreign and domestic depositors be treated equally by the deposit–guarantee scheme. Thus, the Directive prohibited discrimination as regards the treatment of depositors.

However, the Court dismissed both the second and third pleas. The Court referred back to the factual situation between 9 and 22 October 2008, where domestic deposits were transferred to New Landsbanki, according to an FME decision, as part of the *restructuring* of the Icelandic banks. The TIF was not involved in this transfer. Subsequently, the FME made a statement which triggered an obligation for the TIF to make payment as regards foreign deposits in branches of the Landsbanki. Deposit protection under the Directive never applied to depositors in Icelandic branches, as these deposits never became unavailable in terms

[32] Judgment, paras. 188-190.

of the Directive, because of their transfer to New Landsbanki. The Court held that the transfer of domestic deposits did not fall within the *scope* of the non-discrimination principle set out in the Directive, no matter whether it lead to unequal treatment in general or not.[33]

The second plea was therefore rejected.

As to the third plea, the Court referred to «settled case-law» in that the principle of *non-discrimination* requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. At the time of transfer of the funds to New Landsbanki, depositors in the branches in the Netherlands and the United Kingdom and in Iceland found themselves in a comparable situation as depositors in an insolvent Icelandic bank. The Court recalled the limitation in the scope of the plea as presented by ESA, that the present case «does not concern whether Iceland was in breach of the prohibition of discrimination for not moving over the entirety of deposits of foreign Icesave depositors into «New landsbanki», as it did for domestic Landsbanki depositors.» Based on this self-limitation of the plea, the Court assessed whether Iceland was under a specific obligation to ensure that payments were made to Icesave depositors in the Netherlands and the United Kingdom.[34]

This was answered in the negative, with reference to the Court's findings regarding the first plea. That Court held that such an obligation of result could only be deemed to exist if it were to follow directly from Article 4 EEA itself. A *specific obligation* upon Iceland in this particular case could not be derived from the principle of non-discrimination. The Court added, for the sake of completeness, that even if the third plea had been formulated differently, one would have to bear in mind that the EEA States enjoy a wide margin of discretion in making fundamental choices of economic policy in the specific event of a systemic crisis. This would have to be taken into consideration as a possible ground for justification.[35]

Thus, the third plea was also rejected.

---

33 Judgment, paras. 205-216.

34 Judgment, paras. 218-223.

35 Judgment, paras. 224-227.

3 Comment

3.1 General

Icesave stands out as one of the most important cases the EFTA Court has adjudicated. This is not primarily due to the complexity of the legal issues involved, but more to the highly publicised political conflict between the tiny EFTA State Iceland, negotiating for membership in the EU, and two EU Member States. Iceland was openly criticised for only protecting its domestic depositors and abandoning foreign depositors, in a situation in which there had been a total collapse of the commercial banking sector. Evidently, many contributed to increasing *expectations* as to the extent of legal obligation on part of Iceland to cover the minimum deposit compensation to the foreign Icesave depositors. Much diplomatic pressure was exerted, with the United Kingdom even going as far as taking action under its Anti-Terrorism, Crime and Security Act.

The text of the Directive had been revised after the occurrence of the relevant facts in the present case. The *revision* introduced more specific and strict provisions, improving depositor protection.[36] However, as stated by the Court, the case had to be adjudicated according to the Directive as it stood at the relevant time. One may wonder whether the expectations as to the extent of legal obligation on part of Iceland to cover the minimum deposit compensation may have been based on the revised version of the Directive.

To what extent political or diplomatic «warning signals» had been addressed to the EFTA Court, I am not able to tell. Suffice to say that the climate in which the case was conducted was rather heated.

---

[36] See Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009, OJ 2009 L 68, p.3.

3.2 Particulars

A *procedural aspect* of the case should not be overlooked. For the first time, the European Commission requested, and was permitted, to intervene by Order of the President. In the Order it was i.a. referred to the «paramount significance for the good functioning of the EEA Agreement» that there existed a capability to intervene.[37] The granting of leave was not self-evident, as the ECJ in two cases from 2010 had denied leave to intervene for Norway and ESA respectively.[38]

3.2.1 The first plea

Based on the objective of the Directive and lack of precise wording of the relevant provisions of the Directive, the findings of the Court came as no surprise.

The Court performed a *dissecting analysis* of a piece of secondary EU legislation, duly implemented in Icelandic law. The Directive is full of good intentions, but short on clear and specific provisions.

The Court's detailed examination and interpretation of the recitals in the Preamble and in particular Articles 3, 4, 7 and 10 of the Directive, are necessary and to the point. As to Article 3(2) of the Directive, the key term is «ensure». The Court correctly interprets the obligation contained literally, to mean that the competent authorities are to «ensure» that the credit institution complies with its obligations. Here the Court found support from *Paul and Others* which interestingly had been cited by the Commission to bolster the view that there was an obligation of result on the EEA States. The case *Paul and Others* also lends support to the Court's interpretation of Article 7(1), that the obligation on the EEA states is limited to ensuring that national rules are adopted or maintained and which require a coverage level of at least 20 000 Euros.[39] The fact that the ECJ has ruled on the Directive and

[37] Order of the President on 23 April 2012, Case E-16/11, para. 33.

[38] ECJ of 14 June 2012, C-542/09 *Commission v. Netherlands*; ECJ of 6 October 2011, C-493/09 *Commission v. Portugal*.

[39] ECJ [2004)] ECR I-9425 *Paul and Others* paras. 28 and 29.

central provisions of the Directive, should not be underestimated.

The Court also correctly finds support for its interpretation in the new *Directive 2009/14* in which a new wording of Article 7(1) of the Directive was introduced. The phrasing that Member States should «ensure the coverage…» indicated an obligation of result on the Member States, or, as the Court put it, «…to extend the responsibility of the EEA States beyond the establishment of an effective framework.» This is further confirmed in recital 1 of the Preamble of Directive 2009/14, not mentioned by the Court, where it is stated that it was a priority to restore «confidence and proper functioning of the financial sector» and that all necessary measures were to be taken to «protect the deposits of individual savers…» In other words, the legislators realized after the relevant facts had occurred in the present case, that there was a need to *substantially improve* the protection of individual depositors.

The Court's interpretation of Article 7(6) of the Directive follows the same literal interpretation. The Court is correct in finding that Article 7 (6) only obliges EEA Member States to ensure that depositors have the right to instigate legal action against the deposit-guarantee scheme, a view also held in *Paul and Others*.[40]

Similarly, the Court is correct in interpreting the mandatory language in Article 10 of the Directive, «Deposit-guarantee schemes shall be in a position to pay…», in a strict manner and that it does not create an obligation on, in casu Iceland, to ensure compensation in case a deposit-guarantee scheme is unable to fulfil its duty.

The Court then turns to the scope of the Directive and finds that the Directive deals, at least primarily, with a failure of *individual banks* and not with a systemic crisis. One may question why this issue, which has a more general character, was not addressed earlier in the Court's reasoning. There is also a question as to whether this conclusion can be inferred from Articles 1(3) and 9(3) of the Directive and Recitals 3, 10 and 25 in the Preamble to the Directive, as the Court asserts. Article 1(3) deals with the definition of «unavailable deposit». The reference to «a credit institution» merely refers to the credit institution in which a deposit has

[40] Judgment, paras. 143-144.

been made. Article 9(3) addresses the possible limitation on advertisements of information on deposit-guarantee schemes, in order to prevent such use from affecting «…the stability of the banking system…» Recital 3 of the Preamble of the Directive speaks of the event of a closure of an insolvent credit institution and the equal treatment of depositors at branches situated in a Member State other than the one in which the credit institution has its head office. Recital 10 in the Preamble of the Directive deals inter alia with the right of a guarantee scheme to take any measure necessary «for the rescue of a credit institution that finds itself in difficulties». This does not exclude a situation with a systemic crisis. Recital 25 of the Preamble to the Directive describes in broad terms that deposit protection is an «essential element» in the completion of the internal market and «the solidarity it creates amongst all the institutions in a given financial market in the event of the failure of any of them». Strictly speaking, this only emphasises the importance of the solidarity of all the institutions and does not preclude an understanding which also includes a systemic crisis.

The finding that the Directive does not deal with a *systemic crisis* has to be supported by other considerations. The Court finally referred to the wording in recital 4 in the Preamble to the Directive. It addresses the issue of relative cost, the cost to credit institutions of participating in a guarantee scheme compared to the cost that would result from a massive withdrawal of bank deposits. Such massive withdrawal might occur, not only from a credit institution in difficulties, but also from healthy institutions following a loss of depositor confidence in the soundness of the banking system.[41]. It is hard to see that this can be interpreted to mean more than just an example of the magnitude of costs which may incur in the case of a general loss of depositor confidence.

The Court then turned to the Commission's Impact Assessment of 2010 to support its finding that the Directive is not meant to deal with a systemic crisis. According to the Court, the biggest failure envisaged by the Commission's services in the Impact Assessment was a large Member

[41] Judgment, para. 151.

bank accounting for 7.25% of eligible deposits.[42] The Court stated, based on the Impact Assessment, that not even after the failure of the Icelandic banks did the Commission contemplate «the funding of deposit-guarantee schemes to cover a systemic bank failure of the magnitude experienced in Iceland». Referring to the Impact Assessment, the setting of a target level for the funds of a deposit-guarantee scheme would ensure that schemes *«are credible and capable to deal with medium seized bank failures».* The target level was set at 1.96% of eligible deposits. On the face of it, this may effectively shed light on the understanding of the limitations of the Directive. However, as it is an administrative report, its authoritative effect on the Court's interpretation ought to be limited.

However, recital 23 in the Preamble of the Directive assists in the clarification and was duly cited and commented on by the Court. The financing capacity of guarantee schemes must be in proportion to their liabilities, but at the same time not jeopardize the stability of the banking system of the Member State concerned. With the cost to be borne, in principle, by the credit institutions themselves, the Court is correct in concluding that the cost of the guarantee schemes must not be too onerous for the member credit institutions.[43] This further implies that coverage in a systemic bank failure is not envisaged.

The Court was also correct in finding that an obligation on the State, or a possible action against the State in case the guarantee scheme is unable to pay, was not envisaged. The wording of Article 7(6) of the Directive, the only operative provision concerning payment, supports this.[44]

The Court bolsters its finding that no obligation is to be found in the Directive for the State to pay, by turning to the competition and State aid considerations in paragraphs 164 to 170 of the judgment. Article 3(1), second paragraph, third condition, of the Directive clearly warns against the use of state-funding of a deposit–guarantee scheme.

---

42 Judgment, para. 152.

43 Judgment, paras. 155-158.

44 Judgment, para. 160.

The Court was right in finding that the aim of this provision is to minimise the potential to distort competition and that the negative effect on competition would be comparable to where an EEA State would be legally obliged to ensure compensation to depositors in case of a failure to pay on part of the deposit-guarantee scheme. The reference to the Commission's 1992 proposal for the Directive further strengthens the finding, particularly the statement that public sector funding was not desirable as a general rule and could not be allowed to contravene the rules of the Treaty concerning state aid.[45]

The Court also drew on recital 16 in the Preamble to the Directive and the warning against a level of protection which might have the effect of «encouraging the unsound management of credit institutions». The introduction, in this context, of the concept of «moral hazard» based on references to Professor Joseph E. Stiglitz's article from 1983, represents a new element. *Never before has the ECJ or the EFTA Court made use of citations from academic writers*.[46] It will be interesting to see whether this will trigger a new era, both for the ECJ and the EFTA Court. I question the relevance of the reference for the legal reasoning in this case, but I find it to be a good example of the openness of the Court to draw on supplementary sources for its interpretations.

The case *Germany v. Parliament and Council*, provides support for the finding that the Directive does not provide for full consumer protection. Once again, it strengthens the EFTA Court's judgment that on central points of interpretation of the Directive, the EFTA Court may rely on case law from the ECJ. The Court is right in introducing recital 24 in the preamble to the Directive as a further support of the finding of *no obligation* of result on part of Iceland. The importance of recital 24 lies not only in the wording excluding liability, but in the fact that the Directive is silent on possible conditions that might carry an obligation on EEA States to provide compensation. However, when the Court's

45 Judgment, paras.164-170.

46 See for a further quote of literature Case E-3/12 *Stig Arne Jonsson*, para. 56 citing Prof. Catherine Barnard, EU Employment Law, fourth edition, Oxford 2012, pp. 226 and 227.

conclusion is supplemented by; «in a systemic crisis of the magnitude experienced in Iceland» the picture of the Court's understanding becomes blurred. Does the Court mean that the existence of a «systemic crisis» is decisive for the Court's conclusion? This does not follow from the narrow interpretation of the obligations on the EEA States as interpreted by the EFTA Court, basically being the «[i]ntroduction and proper functioning of the deposit–guarantee scheme.»[47] Taken in context, I choose to disregard the reference to the «systemic crisis» as decisive for the Court's conclusion.

In addition, the ECJ's ruling in *Blõdel-Pawlik*, concerning Directive 90/314/EEC on package travel, package holidays and package tours, had been introduced by ESA in order to substantiate the claim of an obligation of result. The Court rightly dismissed this argument. The case did not concern a possible state liability but the obligations of a travel organiser and its insurer. The ECJ judgment could not be construed to provide for an obligation of result on part of Iceland in the form of paying compensation to the package traveller, but merely to see to that a travel organiser was liable to pay.[48]. In other words, the findings in *Blõdel-Pawlik* were *well in line* with the findings of the EFTA Court.

3.2.2 The second plea, discrimination in contravention of the Directive

The Court held, correctly, that discrimination under the Directive was prohibited. But the Court made an important distinction when it is pointed out that the transfer of deposits to New Landsbanki was made as part of the restructuring of the Icelandic banks under the Icelandic Emergency Act. That transfer was not within the scope of the Directive. Furthermore, domestic deposits did not become unavailable as defined in the Directive. Therefore, depositor protection under the Directive never applied to domestic depositors. Consequently there was no discrimination according to the Directive.

---

47 Judgment, para. 178.

48 ECJ of 16 February 2012, C-134/11, *Blödel-Pawlik*, para. 20.

3.2.3 The third plea, discrimination contrary to Article 4 EEA

This plea of discrimination *might have been the most difficult issue* to deal with for the Court. However, ESA's specific limitation of its plea certainly made things easier for the Court. The limitation being that the breach was said to lie in the failure of Iceland to ensure that Icesave depositors in the Netherlands and the UK received payment of the minimum amount of compensation provided for in the Directive, something Iceland allegedly did for domestic depositors.

In this manner, the difference in treatment between domestic depositors being fully protected with the transfer of deposits to the New Landsbanki and foreign depositors receiving no compensation at all at the outset was only *marginally addressed*. I refer to my comments above on the second plea. In addition, the Court relied on its rejection of the first plea, that there was no obligation of result on Iceland to compensate foreign customers. It further correctly held that such obligation of result did not follow from Article 4 EEA itself.

3.3 Conclusion

The EFTA Court has provided us with a timely and thorough legal assessment introducing a more *realistic understanding* of the robustness or rather weaknesses of the safety net represented by the deposit-guarantee scheme. This is in particular the case in systemic crises. In this way the Icesave judgment may have an important impact, even if the Directive presently in force has been modified and the protection of the depositors have been strengthened. The initial bail out deal proposed by the Finance Ministers of the Eurozone to Cyprus on 16 March 2013, included a commitment on Cyprus to raise 5.8 billion Euros. This was to come about by imposing a levy on depositors, including those with deposits under the guarantee limit of 100,000 Euros. This seems to indicate that the EFTA Court and the EU authorities share a common understanding of the extent of protection offered under the Directive to depositors in a banking crisis.

Norway – Russia Delimitation Treaty 2010

Incentives and Obstacles for Oil and Gas Exploration and Production

Sergey S. Seliverstov, PhD in Law
Partner at “Sokolov, Maslov and Partners”
Associate Professor at MGIMO-University
Life Member of Clare Hall College, University of Cambridge
Member of the Academic Advisory Group of the IBA Section on Energy, Environment, Natural Resources and Infrastructure Law

Content

1 MANDATORY UNITIZATION AND ITS GENERAL CONSEQUENCES ... 97

2 EXPLORATION – INCENTIVES AND COMPETITION ... 100

3 PRODUCTION – OBSTACLES, RISKS AND COUNTERBALANCES ... 102

4 CONCLUSIONS ... 104

More than three years have now passed since the Kingdom of Norway and the Russian Federation signed the Treaty concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (the "Treaty")[1]. Following ratification by both parties, the Treaty entered into force on 7 July 2011. This means, *inter alia,* that vast areas of the Barents Sea are now covered by a specific international regime governing the exploration for, and production of, hydrocarbons. This article aims to analyze how this legal regime will influence government and commercial activity.

1 Mandatory unitization and its general consequences

As the Treaty's title indicates, its main objective is the delimitation of marine areas, putting to an end more than 20 years of negotiations and finally establishing the maritime boundary between Norway and Russia. The delimitation in turn opens the way to the exploitation of mineral resources in these previously disputed areas.

Apart from this, the Treaty envisages certain conditions with respect to the future exploration for, and production of, hydrocarbons, which will be facilitated by the establishment of a clear and undisputed border. Article 5 of the Treaty introduces a unitization requirement for all transboundary hydrocarbon deposits and Annex II to the Treaty further sets forth detailed rules concerning the Unitization Agreement to be concluded between Norway and Russia.

Unitization in this context is the term used to refer to a legal regime governing the joint exploration for, and exploitation of, oil and gas deposits (as well as other types of mineral deposits) that are crossed by

1 The Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, Murmansk, 15 September 2010 (ratified by the Russian Federation by the Federal Law №57-FZ dd. 5 April 2011).

various types of borders, (e.g., borders between states, municipalities or simply different landowners). Unitization in respect of onshore oil fields first gained ground in Europe in the 1860s[2] when it was put into practice by enabling legislation in the relevant jurisdictions. In the United States it has been practised since the 1930s[3] when enabling legislation was enacted there. The unitization of offshore oil and gas fields is a more recent phenomenon. Here it is worth mentioning that Norway has substantial experience in this area of international law, beginning with its involvement in the pioneering Agreement between the Government of the United Kingdom and the Government of the Kingdom of Norway relating to the delimitation of the continental shelf between the two countries (the "UK-Norway Agreement"). This was concluded back in 1965 and has formed the basis of, and been followed up by, a number of North Sea unitization agreements. The most well-known of these, which was concluded between Norway and the UK in 1976, relates to the giant Frigg field[4] (the "Frigg Agreement").

Unlike the UK-Norway Agreement, where the unitization formula is not very sophisticated, the unitization requirement envisaged in the Treaty is rather detailed:

> "2. If the existence of a hydrocarbon deposit on the continental shelf of one of the Parties is established and the other Party is of the opinion that the said deposit extends to its continental shelf, the latter Party may notify the former Party and shall submit the data on which it bases its opinion.
>
> If such an opinion is submitted, the Parties shall initiate discussions on the extent of the hydrocarbon deposit and the possibility for

[2] *S. Mareeva "Pravovoy rejim osvoyeniya mestorojdeniy nefti i gaza, peresekaemyh raznymi vidami granits" ("Legal Regime for the Exploitation of Oil and Gas Fields Divided by Different Types of Boundaries"*), (Moscow, Nestor Academic Publishers, 2006) 100-101.

[3] Ibid. at 113.

[4] Agreement relating to the Exploitation of the Frigg Field Reservoir and the Transmission of Gas Therefrom to the United Kingdom, adopted in London, United Kingdom on 10 May 1976.

> exploitation of the deposit as a unit. In the course of these discussions, the Party initiating them shall support its opinion with evidence from geophysical data and/or geological data, including any existing drilling data and both Parties shall make their best efforts to ensure that all relevant information is made available for the purposes of these discussions. If the hydrocarbon deposit extends to the continental shelf of each of the Parties and the deposit on the continental shelf of one Party can be exploited wholly or in part from the continental shelf of the other Party, or the exploitation of the hydrocarbon deposit on the continental shelf of one Party would affect the possibility of exploitation of the hydrocarbon deposit on the continental shelf of the other Party, agreement on the exploitation of the hydrocarbon deposit as a unit, including its apportionment between the Parties, shall be reached at the request of one of the Parties (hereinafter "the Unitisation Agreement") in accordance with Annex II.[5]
>
> 3. Exploitation of any hydrocarbon deposit which extends to the continental shelf of the other Party may only begin as provided for in the Unitisation Agreement."[6]

As is evident from the provisions quoted above, the requirement for a Unitization Agreement may be triggered by geophysical and/or geological data obtained by either of the Parties to the Treaty. This brings us to the question of the role of such data and of the legal regime for obtaining it.

At the same time, it is important to stress the necessity for the Parties – following the discovery of a deposit – of reaching agreement on the deposit's exploitation, which may only take place by mutual consent. In order to be able to start joint production of the hydrocarbons, the Parties will need to reach agreement on a wide range of issues. This is likely to be no easy task and Annex II of the Treaty provides a framework for resolving difficulties that may arise.

---

5 See Section 2 below for further analysis of Annex II of the Treaty and the exploration regime.

6 Items 2 and 3 of Article 5 of the Treaty.

2 Exploration – incentives and competition

Taking advantage of developments in offshore exploration techniques, both Norway and Russia have conducted a number of seismic and geological surveys in the Arctic over the past few decades. These have resulted *inter alia* in the discovery of the giant Shtokman gas field in the Russian part of the Barents Sea. Nevertheless, no substantial discoveries have been made (at least officially) in the areas that were disputed prior to the conclusion of the Treaty. As a result the maritime boundaries, including the boundaries of the continental shelf, have been determined prior to the discovery of any transboundary hydrocarbon deposits.

The lack of existing geophysical data on the previously disputed areas significantly increases the importance of exploration activities. Suppose that one Party is able to establish the existence of a hydrocarbon deposit on its continental shelf. Unless the other Party produces some data to prove that the deposit lies on both sides of the border, and as such is covered by the mandatory unitization rule outlined above, it may miss, or at least significantly delay, its opportunities to require the conclusion of a Unitization Agreement.

Secondly, the initial assessments of the amounts of reserves on each side of the border will play an important role in the negotiation of both the Unitization Agreement and the Joint Exploitation Agreement. These assessments may also influence technological aspects of the production plan and, ultimately, the profits distribution ratio.

The latter is especially true if the profits from joint exploitation are to be divided on the basis of the apportionment of the total reserves (as opposed to the overall production). This consideration may not be of importance, however, if the Parties agree in the Unitization Agreement on a revision mechanism similar to the one applied in the Frigg Agreement. According to the provisions of the latter agreement, "The licensees shall be required to conduct all operations necessary for each revision and to secure that at the time the production from the Frigg Field Reservoir ceases the share in the total volume of Frigg Gas received by the

licensees of the Government of the United Kingdom and the share thereof received by the licensees of the Government of the Kingdom of Norway shall each correspond to the final apportionment of the reserves in place".[7] In this case the initial apportionment of the reserves is less important, since by the time production terminates, the shares of hydrocarbons received by the licensees of each Party should correspond to the finally apportioned share of reserves.

Nevertheless, the value of geological information concerning offshore areas adjacent to the borderline may be significantly greater if it is received sooner rather than later. Moreover, the Treaty allows the Parties to undertake exploration activities independently of each other, suggesting that there will be a degree of competition at both an inter-government and inter-company level. Accordingly the Treaty provisions would appear to provide a significant incentive for accelerated exploration activities on both sides.

It is important to note here that the distinction between unilateral actions and joint activities (with the latter permitted solely within the framework of the Unitization Agreement) lies at the point where exploration drilling ends and production drilling begins. Paragraph 2 of Article 5 of the Treaty, as quoted above, mentions *'existing drilling data'* as an example of evidence of the transboundary character of the deposit. At the same time, Annex II, in paragraph 7 of Article 1, prohibits each Party from withholding a drilling permit from a legal person who has a right to explore for and produce hydrocarbons on that Party's respective side of the delimitation line, so long as the proposed drilling is for purposes relating to the determination and apportionment of the transboundary deposit. Such a prohibition should be envisaged and, if necessary, specified in detail in the Unitisation Agreement.

The distinction described above is similar to that employed in the Frigg field unitization, where drilling activities were a precondition for recognizing the transboundary character of the field and the follow-up conclusion of the Frigg Agreement.[8]

---

[7] Paragraph (3) of Article 3 of the Frigg Agreement

[8] Paragraph 2 of the Preamble to the Frigg Agreement

3 Production – obstacles, risks and counterbalances

According to the Treaty, the commencement of production activities (as opposed to exploration activities) in relation to a hydrocarbon deposit that is considered transboundary in nature is conditional upon the conclusion of two agreements: a Unitization Agreement between the Parties; and a Joint Operating Agreement between such companies as have exploration and/or production rights in the area in question, in accordance with each Party's national legislation.

Annex II lists 13 items upon which the parties to the Unitization Agreement (the States) and the parties to the Joint Operating Agreement (the companies) must agree. Some of these items involve issues that are very substantial and extremely sensitive for the Parties.

For example, agreement will have to be reached on the following points: the geographical and geological characteristics of the transboundary hydrocarbon deposit and the methodology used for data classification; a statement of the total amount of the reserves in place in the deposit and the methodology used for such calculations; apportionment of the hydrocarbon reserves between the Parties; approval of a unit operator to be appointed by the companies holding the rights to exploit the deposit; and sharing and exchange of information (including geological data) and inspection of the offshore installations of each Party[9]. The Joint Operating Agreement between the companies will also need to be approved by each Party before production start-up.

Annex II also envisages a consultation requirement that will apply to each Party with respect to such health, safety and environmental measures as are required by its national laws and regulations. Specifically, a Joint Commission shall be established in connection with such consultations.

It is positive that the Treaty contains such an extensive list of prerequisites in respect of the Unitization Agreement. It is interesting to note

9 Article 1 of Annex II to the Treaty

that some such prerequisites were present in the Frigg Agreement and other similar agreements, whereas the earlier UK-Norway Agreement did not impose any specific list of requirements in respect of future unitization agreements. It does seem, however, that it may be difficult to Norway and Russia to reach a compromise on at least some of the above issues. Different technological approaches and business cultures may significantly hinder the negotiating process, especially bearing in mind differences in resource evaluation methodologies and the necessity to build unique infrastructure for each project. An absence of consent on just one of the mandatory elements will delay the conclusion of the Unitization Agreement and consequently delay the start of production.

The Parties' mutual interest in receiving profits sooner rather than later should be, of course, the key driver in the negotiating process. Apart from that, the arbitration mechanism envisaged in Article 3 of Annex II is intended to counterbalance any unwillingness by one of the Parties to enter into a Unitization Agreement. The article provides that an *ad hoc* international arbitration will take place if the Parties have failed to resolve an issue relating to the Unitization Agreement within six months of the date on which either Party requested negotiations.

Article 4 of the Annex II sets forth an additional dispute-resolution mechanism applicable to apportionment disputes. This involves the appointment of an independent expert empowered to issue a binding decision.

These dispute-resolution procedures have inherent risks for both Parties and accordingly act as an incentive to reach agreement on the substantial elements of the Unitization Agreement without resorting to arbitration or the appointment of an independent expert. As a result, the Treaty should operate successfully in practice.

4 Conclusions

The overall structure of Treaty provisions governing the exploration for, and production of, transboundary hydrocarbon deposits represents a solid basis for cooperation between the Parties, who now have a significant incentive for joint exploitation of the subsea resources.

The Treaty regime will lead inevitably to an increase in demand for offshore seismic services and exploration drilling. Possible asymmetries in geological information may give rise to competition between the Parties and accelerated exploration, unless the Parties (or the companies/licensees) agree to conduct joint exploration activities.

Difficulties and delays may occur in reaching a compromise on the substantial conditions of the Unitization Agreement, which is a mandatory precondition for the start-up of exploration. However the Treaty's dispute-resolution mechanisms provide an incentive to reach agreement, as the risks associated with the third-party arbitration or independent expert appraisals should encourage the Parties to overcome their disagreements. Ultimately, however, cooperation is not merely an option – it is the only viable solution.

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

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.
419	SIMPLY 2012	Contributors: Trond Solvang, Thor Falkanger, Knut Kaasen, Trine-Lise Wilhelmsen. 2013. 114 p.
420	Sundry master theses in maritime law	Contributors: Monika Midteng, Erik Tuvey, Laura Borz, Zhihe Ji, Randmil Kranda, Synne Hathway. 2013. 392 p.
424	The VII ECMLR – Contracts in shipping: flexibility, oreseeability, reasonableness	Contributors: Francesca Pellegrino, Philippe Delebecque, Trine-Lise Wilhelmsen, Francesco Berlingieri, Yvonne Baatz, Andrew Tettenborn, Kathleen S Goddard, Trond Solvang, D Rhidian Thomas, Anastasiya Kozubovskaya-Pellé, Talal Aladwani, Donato Di Bona, Simone Lamont-Black, José Manuel Martín Osante, Olena Bokareva, Maria Piera Rizzo, Mišo Mudrić, Peter Ivar Sandell, Julia Constantino Chagas Lessa, Olga Fotinopoulou Basurko. 2013. 574 p.
429	Selected master theses Utvalgte studentoppgaver 2013	Contributors: Tesfaye T Abebe, Rusudan Tchukuaseli, Vegard A Nymoen, Christopher Huitfeld. 2014. 274 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 subscribers twice a year. For the twelve editions in 2013 of 2892 pages in total, the retail price was about 5 190 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