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Overview of content

Director's preface

2014 has been a rewarding year for the Institute and a period of transition. Key elements are energy law, personnel, and strengthening of ties across the institute's fields of research.

We have experienced a renewed interest in legal aspects of energy and maritime research which has led to cross-departmental cooperation within the Institute. An example of this is the Institute's active participation in the University of Oslo's energy initiative, UiO: Energy. Another is the contract law research covering aspects of both maritime and petroleum activities.

The Institute has further strengthened its position within energy law through the employment of Associate Professor Catherine Banet and PhD Candidate Daniel Arnesson.

Alla Pozdnakova has been assessed and found eligible for the position as Professor of Law. The promotion was granted retroactively from September 2013.

The Institute was also very happy to take part in the celebration of the awarding of the honorary doctorate on 2 September to professor Lena Sisula-Tulokas, University of Helsinki. Sisula-Tulokas serves as a deputy member on the Institute's Board and is a much valued partner within the area of maritime law research.

In terms of publications and activities 2014 has been a most productive year. Researchers at the Institute have contributed to eleven issues of MarIus, covering topics within EU law, energy law, maritime law and other topics. The Institute has hosted over forty events of varying size throughout 2014. The most prominent of these events was the 26th Nordic Maritime Law Seminar in Stockholm 25-25 August on the topic "Arbitration in shipping and offshore".

The Institute is also co-host at several events. The Oslo/Southampton/Tulane network arranged the yearly Colloquium in Maritime Law Research, hosted by the Maritime Law Institute in University of Tulane, New Orleans, 23-25 October on the topic «Intermediaries in shipping».

Further, members of the academic staff are, as in previous years, active participants and partly co-hosts in an array of legal seminars hosted by other institutions (e.g. the "Kiel seminar" on energy law, the Petroleum Law Seminar and the Solstrand seminar on oil and gas law).

The Institute has been a partner in the InterTran Research Project through the participation of Docent Ellen Eftestøl-Wilhelmsson. The project focuses on EU's transport policy relating to sustainable carriage of goods. The project culminated in the seminar "European Intermodal Sustainable Transport – Quo Vadis?" on 18-19 September at the University of Helsinki.

The Institute has maintained its portfolio of taught courses in 2014. This includes elective courses in petroleum law, maritime law, marine insurance, insurance law and EU substantive law within the study programme Master of Law (in addition to courses taught in Norwegian). The Institute also provides the complete study programme, Master of Maritime Law. The courses maintain their popularity within the student body. In 2014 there were 140 applicants competing for 20 places on the Master of Maritime Law programme, and accepted candidates have been recruited from thirteen countries

Approximately fifty percent of the Institutes funding in 2014 has been through external project funding. Our main sponsors and collaborators are:

- The Nordic Council of Ministers
- Research Council of Norway
- The Norwegian Oil and Gas Association
- The Ministry of Petroleum and Energy/the Research Council of Norway
- Energy 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 elective courses and the Master of Maritime Law programme.

Knut Kaasen

Acting Director

Editor's preface

We are pleased to offer a wide variety of topics in this issue of SIMPLY, reflecting the Institute's versatile activities and areas of research.

First out is Sir Bernard Rix with a paper, based on his talk held at the Institute's post-seminar 3 December, addressing fundamental aspects of contract interpretation under common and civil law. We are grateful for his consenting to having this paper published in SIMPLY.

Next, there are four articles illustrating the research areas of the Maritime Law Department of the Institute: Thor Falkanger's article discussing the concept of "shipper" in sea carriage and other transport legislation; Erik Røsæg's article reviewing the content of the Norwegian Maritime Law Commission's draft legislation implementing the Rotterdam Rules; Kristina Siig's article on jurisdiction and choice of law clauses, seen from a regulatory and law & economics perspective; and Henrik Ringbom's article discussing law of the sea jurisdictional issues relating to coastal states' rights to regulate employment terms onboard foreign ships. Henrik's article, together with Alla Pozdnakova's extensive article on law of the sea jurisdictional aspects concerning restriction of environmental activists' moves against offshore installations, may at the same time serve as a illustration of a fruitful overlap between areas covered by the Maritime Law Department and those of the Energy and Petroleum Law Department as both articles have particular relevance to the petroleum offshore sector.

The remaining four articles all cover areas under the auspices of the Energy and Petroleum Law Department. Three of them are slightly redrafted versions of newly released syllabus articles for the student elective course of petroleum law, namely: Ivar Alvik's article on fundamental principles of petroleum law; Ola Mestad's article on the managing of the wealth generated by Norwegian petroleum activities; and Catherine Banet's article on the interrelation between various regulatory schemes applicable to petroleum drilling activities. The final article, by Henrik Bjørnebye, discusses the application of the EU Gas directive to small

scale LNG markets, like those found in Norway. This article illustrates, moreover, a fruitful bridging of topics under the Energy and Petroleum Law Department and those of the third "leg" of the Institute, the Centre for European Law.

Trond Solvang

Common Law and Civil Law Approaches to Contract Interpretation

Sir Bernard Rix
Arbitrator
20 Essex Street, London

The following talk was held by Sir Bernard Rix at the Institute's postseminar 3 December 2014.

Ladies and gentlemen,

Thank you for your invitation to speak in this venue this evening. I have chosen as my topic something fundamental to the work of lawyers in international litigation and dispute resolution, namely contract interpretation. I will consider that fundamental topic as it may be found practised in both the common and civil law, and as it might be found in both the courts and in arbitration.

It is of course a big topic, but I do not intend to try your patience for too long. I will speak primarily as a common lawyer, for that is the tradition from which I come, but I intend to consider some major differences in the approach of the common law and the civil law respectively. I will also speak primarily from the point of view of the judicial tradition, for that has been my home for the last twenty years before my retirement from the English Court of Appeal last year. But I will also consider what the differences might be in arbitration, which is a world which I used to experience when I was a barrister, and with which I am now re-engaging as an arbitrator.

So, I shall first address the common law tradition of contractual interpretation or, as we say, the construction of contracts. I shall found myself on English law texts and principles, but I do not believe that there is an essential difference between the law to be found in England and other common law jurisdictions. In doing so I shall seek to pinpoint the essential differences of the common law approach from that of the civil law. The civil law of course is based in statutory Codes. The common law, at any rate in recent years, has had the important contributions of one of England's most distinguished judges, Lord Hoffmann.

The principles of the common law may have been formulated over time in slightly different ways, but I do not believe that these differences, although sometimes spoken of as being revolutionary, are in truth fundamental.

What does change over time is the spirit of interpretation, and that spirit sometimes waxes more literal and sometimes waxes more purposive. Some generations have been more caught up with the meaning of words, and some generations have been more willing to be guided by the purpose of the contract. That division, between what have been called the literal goats and the purposive sheep, is the modern battle-ground of interpretative dispute. I shall return to that subject later.

First, however, I will address the primary rules of interpretation, what might be described as the common law equivalent of the Unidroit principles, which seek to encapsulate the civil law approach to the interpretation of international commercial contracts.[1] The universal purpose of course is to ascertain the common intention of the parties, but that is to be done in England by an *objective rule* of interpretation, rather than by seeking what the parties were intending subjectively. The English view is that, because it is the *common* intention of the parties which counts, it follows that their individual *subjective* intentions are irrelevant. What counts is what they have said or written to one another as expressive of their intentions, and that language is to be interpreted for what it would convey to reasonable people positioned as the contract parties were at the time of their contract. Thus the primary rule has been expressed in modern jurisprudence as follows:

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

Investors Compensation Scheme v. West Bromwich Building Society[2]

You will find the rule expressed as the first of five principles set out in a passage extracted from Lord Hoffmann's judgment in that case.[3]

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1 Now the Unidroit Principles 2010.

2 [1998] 1 WLR 896 (HL) at 912.

3 [1998] 1 WLR 896 (HL) at 912/913. Other leading modern judgments listed in my

To revert to Lord Hoffmann's first rule, that is the primary rule and the rest may be said to be commentary, even if Lord Hoffmann, went on to enumerate four other rules.

Let us take a minute to deconstruct the primary rule. You will note that:

i) The parties and their intentions have been disembodied: the parties are not central; the central person is the reasonable interpreter. That is typical of the common law, which, save where honesty is in question, always seeks to objectify the problem.

ii) But the reasonable interpreter is no longer, if he ever was, but as he has sometimes been expressed to be, "the man on the Clapham omnibus". The reasonable interpreter is the person who is put back into the position of the parties, with their knowledge, at the time of contract.

iii) The parties' knowledge at the time of contract is often referred to as the "matrix" of the contract. The matrix is that background of knowledge and aspiration which is *mutual* to the parties. Because of the primary rule of objective interpretation, the court is only interested in what is known mutually to both parties.

iv) The emphasis is on the time of contract. Therefore the courts are not interested in how the parties may conduct themselves to one another after the contract has been made. Post-contractual conduct is sometimes said to be entirely irrelevant to contractual interpretation. *Pre*-contractual negotiations are also irrelevant, but under

hand out are *Bank of Credit and Commerce International SA v. Ali* [2001] UKHL 8, [2002] 1 AC 251; *Fiona Trust and Holding Corp v. Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254; *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101; *ING Bank NV v. Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472; *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900. I would also refer to *Owners of The Spirit of Independence v Wear Dockyard Ltd (The Spirit of Independence)* [1999] 1 Lloyd's Rep 43 not a leading authority on the interpretation of a contract, but mentioned because I there discuss the problems of a common law court addressing the interpretation of a contract under a civil law governing law, there French law. See now also *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763, described below.

a separate rule, Lord Hoffmann's rule (3), to which I will come shortly.

v) As so often in the common law, the rule is softened by the use of the epithet "reasonable" or the adverb "reasonably". You will see both words appear in Lord Hoffmann's primary rule. It again reflects the objective standpoint of the common law. But it permits the courts a degree of manoeuvre in an area which is of course, by definition, otherwise entirely within the autonomy of the parties.

vi) You may note that Lord Hoffmann's formulation does not refer to "language" at all. This is perhaps, with respect, a defect of its formulation, but you will see that he addresses this aspect only at his rule (4), to which we will come presently.[4] He also refers only to the "document". That assumes the contract is written, but then in the commercial setting it so often is. However, it might be said that the rule's formulation obscures the truth of a remark, which has been made by many judges in one form or another, that the interpretation of contracts starts with and from the language which the parties have chosen to use for themselves. In a very real sense, the first rule of contractual interpretation is to pay due regard to the parties' own choice of language. But that is a slightly unfashionable viewpoint, because of the modern fear of being seen as a literalist goat.

Lord Hoffmann's second rule (2) is an expansion of what is meant by the matrix of fact or the background to the contract. He said:

> "(2)…Subject to the requirement that it should have been reasonably available to the parties…it includes absolutely anything which would have affected the way in which the language of the document would have been understood by the reasonable man."[5]

[4] There is a glancing reference to "language" also at rule (2), but only for the purpose of stressing the importance of matrix or background.

[5] [1998] 1 WLR 896 (HL) at 912.

In a subsequent case, *BCCI v. Ali,* Lord Hoffmann explained that his "absolutely anything" was of course limited by *relevance*.[6] But matrix or background can include the state of the parties' relations, the state of the law, the state of the market, market usages, shared assumptions, and so on.

Lord Hoffmann's third rule (3) is one of the most distinct rules of English law and differs from the approach of the civil law. It is an exclusionary rule which prevents recourse to the parties' negotiations. Thus –

> "The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy…"[7]

That exclusionary rule was reconsidered by the Supreme Court recently in *Chartbrook v. Persimmon Homes*, but was reaffirmed.[8] In the course of his judgment in *Chartbrook*, Lord Hoffmann contrasted the English rule with the rule in civil law jurisdictions, at his para 39. There he said this:

> "Supporters of the admissibility of pre-contractual negotiations draw attention to the fact that Continental legal systems seem to have little difficulty in taking them into account. Both the Unidroit Principles of International Commercial Contracts (1994 and 2004 revision) and the Principles of European Contract Law (1999) provide that in ascertaining the "common intention of the parties", regard shall be had to prior negotiations: articles 4.3 and 5.102 respectively. The same is true of the United Nations Convention on Contracts for the International Sale of Goods (1980). But these instruments reflect the French philosophy of contractual interpretation, which is altogether different from that of English law. As Professor Catherine Valcke explains in an illuminating article ("On comparing French and English Contract Law: Insights from

6 [2002] 1 AC 251 at 269.

7 [1998] 1 WLR 896 (HL) at 913.

8 [2009] UKHL 38, [2009] AC 1101.

> Social Contract Theory") (16 January 2009), French law regards the intentions of the parties as a pure question of subjective fact, their volonté psychologique, uninfluenced by any rules of law. It follows that any evidence of what they said or did, whether to each other or to third parties, may be relevant to establishing what their intentions actually were. There is in French law a sharp distinction between the ascertainment of their intentions and the application of legal rules which may, in the interests of fairness to other parties or otherwise, limit the extent to which those intentions are given effect. English law, on the other hand, mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be. One cannot in my opinion simply transpose rules based on one philosophy of contractual interpretation to another, or assume that the practical effect of admitting such evidence under the English system of civil procedure will be the same as that under a Continental system."[9]

Lord Hoffmann then went on to explain the English approach of excluding reference to pre-contractual negotiations, at paras 41, where he said this:

> "The conclusion I would reach is that there is no clearly established case for departing from the exclusionary rule. The rule may well mean, as Lord Nicholls has argued, that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended. But a system which sometimes allows this to happen may be justified in the general interest of economy and predictability in obtaining advice and adjudicating disputes. It is, after all, usually possible to avoid surprises by carefully reading the documents before signing them and there are the safety nets of rectification and estoppel by convention. Your Lordships do not have the material on which to form a view. It is possible that empirical study (for example, by the Law Commission) may show that the alleged disadvantages of admissibility are not in practice very significant or that they are outweighed by the advantages of doing more

9 [2009] UKHL 38 at 39, [2009] AC 1101 at 1119/1120.

> precise justice in exceptional cases or falling into line with international conventions. But the determination of where the balance of advantage lies is not in my opinion suitable for judicial decision."[10]

In effect, Lord Hoffmann says that, because the *civil* law is interested in subjective intent, it makes sense to look for it in the negotiations for the contract. From the *common* law point of view, however, negotiations are not necessary as a source of the parties' intentions, and then a number of pragmatic reasons combine to produce a rule, which is centuries old, to exclude as generally unhelpful a rummage through all the detritus of negotiations. It is accepted that now and then a nugget of gold might be found, but what Lord Hoffmann called the chance of "more precise justice in exceptional cases" is outweighed by the practical disadvantages in the general run. He added:

> "42. The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."[11]

I come to Lord Hoffmann's principle (4). This is where he, finally, comes to language, but he refers in this context not so much to language as to a contrast between the meaning of a document and the meaning of words. He says:

> "(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would

[10] [2009] UKHL 38 at 41; [2009] AC 1101 at 1120.

[11] [2009] AC 1101 at 1121

> reasonably have been understood to mean."[1]

It is to be observed that when Lord Hoffmann comes to the parties' language, he refers to "words" and "dictionaries". Of course, language is made up of words, but we all know that the meaning of words depends on their *context*, and that language merely interpreted through a dictionary, with their lists of many different meanings, would be a very unsatisfactory process: as may be witnessed where an unskilled interpreter translates from one language to another by simply relying on a dictionary. I would therefore prefer to defer to the parties' language rather than just to their words.

Lord Hoffmann's fifth principle (5) is also relevant to language. He said:

> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."[2]

Now, I do not think that any of this is controversial. Lord Hoffmann's five principles are but a restatement of well established common law, while emphasising that what one is ultimately seeking is the common intention of the parties. One could debate, but perhaps without profit, where one enters this net of principle. I would respectfully suggest that what is important to remember is that –

i) the autonomy of parties over their own contract means that one should always start with their own language and with due respect for it; particularly in formal contracts written by lawyers;

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1 [1998] 1 WLR 896 (HL) at 913.

2 [1998] 1 WLR 896 (HL) at 913.

ii) although language is the tool of all of us, the parties contract against a private background of mutual knowledge and aspirations, which has to be taken into account;

iii) the interpretative function of the courts is to find the parties' common intention from an objective viewpoint;

iv) it follows that private knowledge and private intentions are of no relevance;

v) negotiations are excluded because they are regarded as generally being an unprofitable source for finding a common intention;

vi) the intention to be found is that of the date of the contract: therefore what comes after the contract can only be of assistance to the extent that it can throw light on a common intention at the time of contract;

vii) where interpretative problems arise, the logic of the contract and its purposes can be highly instructive and may well be determinative;

viii) in any event it is the contract as a whole, and not just individual words in it, which have to be interpreted. In this respect, as has been said on many occasions, "Context is everything".

There are a myriad of other rules and maxims of construction, which fill a thick book, Lord Justice Lewison's *The Interpretation of Contracts*, written by a one-time colleague of mine in the Court of Appeal.[3] One of those maxims of construction is that of *contra proferentem*, which in the civil law is highlighted in Unidroit article 4.6.[4] That is the principle that the language of the person who has put forward the text under consideration will be held, in case of doubt or ambiguity, more strictly against him. In English law it is not a rule of such importance that it would figure in such a brief expose of principles of construction. But it is there.

[3] LJ Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 2011)

[4] Unidroit Principles 2010.

Let us now consider, perhaps more briefly – as befits my lesser familiarity to it! - the civilian law approach, to see where it is similar and where it differs from the approach of the common law. The great, and magnificently terse and elegant statement of the Code Napoleon, which is repeated in various languages in so many of the fundamental codes of civil law nations all over the world, and which has survived unchanged for over 200 years. In the English translation of the Code Napoleon which I have in my library at home, article 1156 is rendered thus:

> "In agreements it is necessary to search into the mutual intention of the contracting parties, rather than to stop at the literal sense of the terms."[5]

In the original French it reads:

> "On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des terms."[6]

I was intrigued to discover that my translation is dated 1824, it was made by an unnamed "Barrister of the Inner Temple", which is my own Inn of Court, where I was called to the Bar so many years ago, and the bibliographical notes slipped inside the front cover of the book states that this translation was a first edition of the first English translation from the original 1804 Code. It is interesting to note that the title page of my book advertises it as "Literally translated" from the French text.

I would just pause for a moment over the wonderful wording of this wonderfully brief statement. Article 1156 is the first of a handful of articles which deal with the Interpretation of Agreements and which comprise section 5 of Book III of the Code: in all there are only 9 articles which take up only a page and a half of my book. The first and most important article, which I have just read, takes only two lines of text to make a

[5] G. Spence, *The Code Napoleon or The French Civil Code* (London: Charles Hunter, 1824), Book III, Chapter 3, Section 5 at 316.

[6] Code Civil des Français (À Paris: Imprimerie de la République, 1804) Book III, Chapter 3, Section 5 at 280

number of critically important points:[7]

i) It refers to language, but with the warning that the interpreter must not "stop" (arreter) at the "literal" sense of the terms.

ii) It follows, although it is a matter of implicit interpretation rather than express language, that one must at least "start" with the language, even if one does not "stop" with its literal sense.

iii) What one must concentrate on, however, is what the article begins with, which is not the language of the contract itself, but "the common intention of the parties".

iv) That common intention, and I emphasise that, as in the common law, it is of course the *common* intention of the parties which is referred to, is to be "sought": the French word is "rechercher". That suggests an active and compelling process for the search: it is a case of research, a digging out, a careful sorting out: in the sense in which one commonly talks of the "search for truth".

v) In a very real sense, what article 1156 tells you is that you must be careful not to be a literalist goat.

That is a good note on which to return to the current tension between a literal and a purposive approach to interpretation. I would respectfully suggest, however, that this is a false dichotomy. There is to my mind no doubt that the interpreter has to take into account *both* the language adopted by the parties, *and* the purposes for which they contract. Sometimes those purposes are usefully stated in the contract itself, sometimes they have to be discovered by a process of analysis of the contract. Often that analysis is the hardest and also the most important part of contractual interpretation. A purposive construction will often enable the court to decide between two or more possible alternatives. But the weight to be ascribed to language and to purpose in any particular case can never be a matter of rule. The fascination of contractual interpretation is that

7 G. Spence, *The Code Napoleon* (1824) Book III, Section 5 at 316-317.

each problem is a world on its own. This is not only because each contract is different, but also because the causes of dispute vary.

Sometimes the contract is deliberately ambiguous, because it is the only way the parties could reach agreement. The parties themselves do not know how it is meant to operate in certain circumstances, even if they have their own, often conflicting ideas, about that. Sometimes the problem arises from a gap in the contract, because not everything has been foreseen, or covered, or even thought as being necessary to state, since it is so obvious. Sometimes, there are errors of draftsmanship, as where definitions are misdrafted, or references misstated. Sometimes there are errors of misunderstanding. Sometimes the contract simply does not provide for some unexpected turn of events, and then the way in which the contract operates in the new circumstances may be awkward. But the solution still has to be found in the contract itself. The courts, under their interpretative function, cannot make a new contract for the parties.

But it is often the case that in such circumstances, where the parties did not anticipate the problem that has arisen, it is almost impossible to speak sensibly of a common intention of the parties save in the most disembodied, or as we say, objective sense. In such circumstances, since contracts are primarily about the allocation of risk, the courts have to make a judgment about where, in the light of the parties' contract as a whole, the risk is intended to fall.

Before I turn to say something, in concluding, about contract interpretation in arbitration, let me draw this section of my brief talk to a close by highlighting two points by way of contrasting the common and civil law approaches. First, the common law approach excludes, as you have heard, both pre-contractual negotiations and post-contractual performance as being relevant to the process of contractual interpretation. It excludes pre-contractual negotiations, not so much as being irrelevant, but, as Lord Hoffmann explained, from pragmatic considerations. It is considered that, by and large, not much help is to be gained from what would otherwise be the immense burden of going into the whole process of negotiation: what matters is what emerges as the finally agreed contract, and it is thought to be merely distracting, like some will o' the wisp, to

be taken up with the conflicting and ever changing feints and tactics of parties who are still negotiating, but not yet agreed.

It excludes post-contractual performance, on the basis that what has to be sought is the intention at the time of contracting.

In both respects, the civil law differs, for the civil law excludes nothing in its search for the intention of the parties, and, as we know, is even willing to take into account the subjective intentions of individual parties, in its attempt to discover the common intention of the contracting parties.

The second point I would make, however, is that it always has to be remembered that the common law and the civil law also differ in their procedure as well as in their substantive law. When it comes to procedure, the common law favours discovery of documents on a substantial scale, and it also favours live cross-examination of witnesses. The civil law, as I understand it, favours neither.

Now, if the civil law were to pursue the common intention of the parties in pre-contractual negotiations and post-contractual performance by the common law procedure of extensive disclosure of documents and cross-examination of witnesses, then it would never get to the end of the matter! And similarly, if the common law were to adopt the civil law approach to the interpretation of contracts and still retain its procedural liberality, it too would never get to the end of the matter. So the civil law has an extensively speculative substantive law of contract interpretation, but controls it by a more stringent approach to procedural opportunities; while the common law has a narrower approach to the substantive question of contract interpretation in part for the very reason that otherwise it would have to curtail its procedural approach to the search for truth.

It is possible that in our very different ways, we arrive at the same answer. But that is going to be the final subject of this brief tour, when I turn now to the subject of contract interpretation in the courts and in arbitration.

In that context, allow me to mention the case of *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan*, a case which has troubled the three worlds of arbitration, the English courts (and thus the common law) and the French courts

(and thus the civil law).[8] It is therefore an interesting testing ground for our comparative enquiry. Those of you who know it well will please forgive me while I briefly set the scene.

Dallah was a Saudi company which had entered into a memorandum of understanding (MOU) with the *Government of Pakistan* to acquire land in Mecca and there construct housing for pilgrims performing Hajj. Pursuant to that MOU, Dallah proceeded to enter into a construction agreement with a *Trust* created by the *GoP*, and that was the contract in question. The *GoP* was not a signatory to the contract. There had been talk of a Government guarantee, but none had been obtained.

Unfortunately, the government ordinance which had created the *Trust* lapsed automatically at the end of three months, unless it was renewed, which it was not, with the result that *Dallah* lost its contract partner and its contract. On the other hand, the Secretary of the GoP's Ministry of Religious Affairs, who had also been the secretary of the Trust's board, wrote to Dallah, on the Ministry's notepaper, shortly after the expiry of the Trust, to give notice of termination of the contract citing a failure by Dallah to submit timely specifications.

The contract contained an arbitration clause, providing for ICC arbitration in Paris. *Dallah* claimed against the Ministry, ie against the *GoP*, in arbitration, and the *GoP* asserted that it was not a party to the contract or to the arbitration agreement, and so the distinguished tribunal, which included a retired Law Lord from England, Lord Mustill, rendered an initial award on its jurisdiction. It found that the *GoP* was a party to the contract. It applied "those transnational principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business". The tribunal did so, having decided that it did not need to determine the applicable law of the contract. As for good faith, you will recall that the concept of good

[8] *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763; *Government of Pakistan, Ministry of Religious Affairs v. Dallah Real Estate and Tourism Holding Co*, Cour d'Appel, Paris, First Chamber, 17 February 2011 in (2011) XXXVI *Yearbook of International Commercial Arbitration* 590.

faith is an inherent and express part of the civil law, it is to be found for instance in article 4.8 of the *Unidroit* principles[9]; but that it is not an expressly recognised part of English law (although a case has recently been decided in the Commercial Court, called *Yam Seng v. International Trade Corporation Ltd* in which the doctrine of good faith has been expressly invoked in order to supply an implied term).[10] Anyway, having established its jurisdiction under the doctrine of *kompetenz kompetenz*, the arbitral tribunal in *Dallah* went on to make a second award, against the *GoP*, for $20 million, and it was that award which was taken to England for enforcement under the New York Convention.

Enter the English courts. The enforcement claim came before the Commercial Court, the Court of Appeal and the Supreme Court. Each court held that the arbitrators had been wrong to find that the *GoP* was a party to the contract and arbitration agreement, and they therefore refused to enforce the second award. In doing so, they applied French law, as mandated by the New York Convention, on the ground that that was the law of the country in which the award had been made. Evidence of French law was given by distinguished experts before the Commercial Court.

In the Supreme Court it was common ground that the applicable French legal principles had been correctly assessed in the lower courts. What remained at issue was how those principles were applied. Lord Collins, in his judgment in the Supreme Court, put the matter in this way:

> "There was, in the event, a large measure of agreement between the experts on French law…they agreed that…it is necessary to find out whether all the parties to the arbitration proceedings…had the common intention (whether express or implied) to be bound by the agreement and, as a result, by the arbitration clause; the existence of a common intention of the parties is determined in the light of the facts of the case; the courts will consider the involvement and behaviour of all the parties during the negotiation, performance,

9 Unidroit Principles 2010.

10 [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321.

> and, if applicable, termination of the underlying agreement…
>
> "The common intention of the parties means their subjective intention derived from the objective evidence…"[11]

Following its defeat in England, *Dallah* went to France and asked the French courts to enforce the arbitrators' award instead – and succeeded. An interesting and informative article has been written by Jacob Grierson, an English barrister working in an American law firm in Paris, and by Dr Mireille Taok, a member of the Paris bar also working for an American law firm in Paris. It is published in the Journal of International Arbitration.[12] Let me read you part of their conclusions:

> "the difference between the English and French courts' approaches boils down to this:
>
> i) The English courts were influenced by what happened in the period leading up to the signing of the Agreement: the deliberate replacement of the GoP (signatory of the MoU) by the Trust (signatory of the Agreement): and the fact that Dallah was represented by lawyers who could explain what this change would entail.
>
> ii) The French court, by contrast, was influenced not only by what happened during the negotiations of the Agreement but also by what happened in the period after signing of the Agreement: the GoP's involvement in the performance of the Agreement; the fact that the Trust did nothing to perform the Agreement; and the sending of the termination letter by the Secretary of MORA on MORA's (rather than the Trust's headed notepaper."13

However, they also speculate that, underneath the more formal reasoning

[11] [2010] UKSC 46 (Transcript) at paras 119.

[12] J. Grierson and M. Taok, '*Dallah*: Conflicting Judgments from the UK Supreme Court and the Paris Cour d'Appel' (2011) 28(4) J Int Arb 407.

[13] J. Grierson and M. Taok '*Dallah*' (2011) 28(4) J Int Arb 407 at 416.

of the separate courts, different legal cultures are at work. They write as follows:

> "There may be another explanation for the difference between the decisions of the English and French courts: they applied the principle of good faith in fundamentally different ways. The Supreme court upheld the finding of Aikens J that:
> "If, on whatever principles are applicable, it is found that the GoP was a party to the arbitration clause and the agreement, good faith adds nothing. If, on the other hand, it is found that the GoP is not a party, then I hold, on the French law evidence before me, that the invocation of general principles of good faith in commercial relations and international arbitration is insufficient to make it a party."
>
> The Cour d'appel, by contrast, did not refer to the principle of good faith in its decision, but one cannot exclude that it was in practice influenced by the perceived unfairness of the GoP bringing the Trust to an end some three months after it had caused the Trust to enter into the Agreement.
>
> From this perspective, the Dallah saga speaks volumes about the difference between the legal cultures of England and France. What matters above all to English courts is the bargain struck by the parties, which must then be respected. French courts, by contrast, will often take a more holistic approach to ensure that justice is done."[14]

So, if that is right, and Jacob Grierson has told me that the co-authors had great difficulty in agreeing on the text of their article, it suggests the possibility that in international arbitration much may depend upon whether a common law or civil law applicable law is agreed or, in the absence of agreement, found by the arbitrators; and also on the balance to be found in the arbitral tribunal. Is it made up of common lawyers or civilian lawyers? Where the common law tradition prevails, more attention will be paid to the bargain struck by the parties. Where, however,

[14] J. Grierson and M. Taok '*Dallah*' (2011) 28(4) J Int Arb 407 at 416.

the civil law tradition prevails, there will be a more holistic approach to search out the just result.

I would comment in the word of the Grand Inquisitor as he leaves the presence of King Philip at the conclusion of the great scene in Verdi's *Don Carlos* in which the King and the Inquisitor have been debating the life or death of Don Rodrigo. The King is conscious that he has lost the argument with the Inquisitor. The Inquisitor turns to go. In a last despairing attempt to keep the negotiation alive, the King says to the departing Inquisitor that they must, so to speak, have lunch sometime to continue their interesting debate about world affairs. The Inquisitor says, and now, do you want the earlier French version, or the later Italian version? In French, the Inquisitor says "Peut-être"; in Italian, "Forse". In English, of course, "Perhaps".

Perhaps. Perhaps the common law tradition will give you more of the bargain and the civil law will give you more of justice. But the business man and business lawyer would say: More of the bargain *is* more of justice. The bargain is the parties' own allocation of risk. It is not for judges or arbitrators to impose their own ideas on the parties' treaty. Or to put the matter another way: there may be a more objective and on the other hand a more subjective view of justice. The more objective view is inclined to adhere to the parties' bargain. The more subjective view draws on a wider field of relevance. Which is more interventionist?

The truth I suspect is: that it will be the rare case in which the common law judge or arbitrator will differ from the civil law judge or arbitrator. That is so, even though they may approach problems from different angles and perspectives. But differences will sometimes occur, and there could be many reasons for them, ranging from different traditions, and more, or less, successful legal presentations, to common and garden error!

This is an inexhaustible subject, but I will leave it there.

Thank you very much.

The concept of shipper in sea carriage law – with some deviations to other modes of transport

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Content

1 Introduction – the theme of the article

The term *shipper* is ambiguous: it may denote the person entering into a contract of carriage with the carrier, or it may denote the person actually delivering the cargo to the carrier. The two may be identical, but not always. The purpose of the article is to discuss some of the problems that may arise under Norwegian maritime law when there is no such identity – with some deviations to other modes of transport.

Sea carriage is regulated by the Maritime Code of 24th June 1994 no. 39 (the "MC") Chapter 14,[1] which sets out rules on general cargo carriage as well as on charter parties. In the context of this article, it is the rules on general cargo carriage – based upon the Hague-Visby Rules of 1924/1968 – that are of particular interest. Preparatory work for the implementation of the Rotterdam Rules of 2008 – the intended successor to the Hague-Visby Rules – has already been done, see NOU 2012: 10. At the time of writing (January 2015) the implementation prospects are uncertain, but the rules deserve comment as they are based upon an alternative approach to the problems surrounding the definition of the shipper in governing law. The Rotterdam Rules, in the form recommended in the implementation proposal, will be discussed below, following an examination of current applicable law.

2 The starting point: the definitions in the MC Section 251

The MC Sect. 251 defines the participants in the maritime transport venture. The *carrier* (Norwegian: "transportør") is defined as "the person who enters into a contract with a sender for the carriage of general cargo

[1] A reliable but not authorised translation into the English language is published in MarIus no. 435 (2014), and this translation is used in the article. The other translations in the article are mine.

by sea". His contractual counterparty – in English the *shipper* – is named the *sender* (Norwegian: "sender"), and the definition is: "the person who enters into a contract with a carrier for the carriage of general cargo by sea". The carrier may, depending upon the circumstances, perform the carriage himself or he may leave the actual performance to another. In order to distinguish between the two, the latter is defined as a "sub-carrier", with the carrier usually remaining responsible for the carriage.[2]

When the cargo is delivered to the carrier by someone who is not the sender, we meet the term *shipper* (Norwegian: "avlaster"). He is defined as "the person who delivers the goods for carriage", and appears in several sections of the MC, with rights and obligations. At the port of destination the cargo may be delivered to the sender, but frequently to a third party, i.e., the *receiver* (Norwegian: "mottager"). He is, obviously, an important actor, but he is not defined in Sect. 251.

Our question is: who is the shipper?

The answer depends, obviously, upon the way in which the legal rules relate to the shipper. There may well be one definition applicable to all rules where he is mentioned, but we have to have an open mind for a more sophisticated approach: The definition of shipper may depend upon which rule is being applied. This implies that we have to review the rules of the MC concerning the shipper. But before doing that, it is useful to outline some typical situations where the cargo is not physically delivered to the carrier by the sender (or by someone with whom the sender is undoubtedly identified (typically: one of his employees).

3 The actual delivery of cargo to the carrier

As regards the physical handling of the cargo one can identify some typical situations, as set out in (a) to (d) below:

[2] The terminology usually applied in order to avoid confusion is *contractual* carrier and (for the sub-carrier) *performing* carrier. t

(a) The cargo belongs to the sender (whether he is the owner or has some other interest in the cargo, e.g. as a lessee, is of no importance here). He transfers goods from his warehouse in the port of loading to his warehouse in the port of destination, or an engine spare part which he has bought has to be carried to the place where his vessel with the broken down engine is located.

Here, the cargo may be delivered to the carrier (or his representative) by:

(i) the sender himself, or his employees (his truck driver delivers the cargo to the carrier's shed);
(ii) an independent contractor (a truck company), engaged by the sender; or
(iii) the producer/seller of the engine spare part – either by the producer/seller himself or by a truck company engaged by the producer/seller or the sender.

(b) The cargo is subject to a sale – with the sender as the seller – typically the sale is on CIF or franco terms, obliging the seller to procure transportation to buyer's place. The transportation to the carrier's shed may be performed by the sender or by an independent contractor (see (a) (i) and (ii) above).

(c) The cargo is subject to a sale – with the buyer as sender – typically the sale is on ex works or FOB terms. In these instances the cargo will be delivered to the carrier by the seller himself or by an independent contractor engaged by him (see (a) (i) and (ii)).

(d) When the carrier uses a sub-carrier, delivery is to the sub-carrier, who receives the cargo on behalf of the (contractual) carrier. Thus this situation requires no further consideration in the present context.

(e) Finally, we should mention the possibility of successive or combined transports. However, this will not be examined in this article.

4 A discussion of the rules in the MC regarding the concept of "shipper"

Introduction

Taking the factual outline given in 3 above, on who is actually delivering the cargo to the carrier, as our background, we shall now discuss some sections of the MC concerning the rights and obligations of "the shipper". Should the definition in Section 251 be taken literally? Is the shipper the person/company who physically delivers the cargo to the carrier (including, of course, the carrier's representative)? Or are there some additional requirements?

There are five sections of the MC which require our attention in the first instance. Before discussing these, it makes sense to lead off with some general remarks on how the concept of shipper has been dealt with in the *travaux preparatoires* and in legal commentaries.

The concept of the shipper in preparatory works to current legislation and in legal commentaries

The main/central/key rules relating tothe shipper (where understood as defined in the MC Section 251) – on his rights and potential liability – has caused little in the way of illuminating remarks in the *travaux preparatoires* to the pertinent sections, when promulgated or amended. To show this, we may conveniently start with the 1938-revision of the MC 1893, when the Hague Rules were implemented. Sections 95, 97 and 153 dealt with demanding a bill of lading, the liability for dangerous goods, liability for information in the bill of lading, and they were in line with current regulations, except that the liability for dangerous goods was shifted from the shipper to the sender in 1973.[3] In the *travaux preparatoires* there is a short comment on the concept of shipper; this says that

[3] It was considered that this was "in best conformity with the Convention" (Ot.prp. [Royal Proposal to Parliament] no. 28 (1972–73) s. 9."

the term charterer [the sender] also includes someone who as shipper or receiver "has taken the charterer's [the sender's] place".[4]

When the rules were adjusted under the Visby Protocol of 1973, the shipper was not given included in the definitions section (Section 71). Writing about Section 95 – corresponding to today's Section 294 – the *travaux preparatoires* said:

> "The right to demang is in conformity with the Convention given to the shipper ('chargeur'/'shipper'), as it is also according to today's Section 95 … Often the shipper is also the charterer [the sender], but where they are different persons, it should be the shipper, not the charterer [the sender] who is entitled to demand a bill of lading" (NOU 1972: 11 p. 12).

When the rules were amended in 1994 – as far as possible in line with the Hamburg Rules, without necessitating denunciation of the Haag-Visby Rules – the definitions, now in Section 251, were extended and now included the shipper definition quoted above. On this definition, the *travaux preparatoires* say:

> "In the same manner as in the chapter on chartering [Chap. 14] the term shipper is used for the person actually delivering the cargo for transport. Also in the Maritime Code Sections 95 and 97, there is a distinction between the contractual party and the person/company performing the actual shipper function, see Ot prp no 28 (197273) p. 910. On the other hand, art 1 no 3 of the Hamburg rules defines the English concept 'shipper' so extensively, that it include both the sender and the shipper, but according to the view of the Commission such a terminology may lead to confusion" (NOU 1993: 36 p. 19).

The reference to Ot.prp. no. 28 (1972–73) p. 910 relates to responsibility for dangerous cargo (see above in Section 3). However that does little to contribute to clarification of the concept of shipper. Neither do the legal commentariess, see e.g., Sejersted, *Haagreglene* (3rd ed. 1976 by Kleiven

[4] Innstilling fra Sjølovkommisjonen [Report from the Maritime Law Commission] (1936) p. 34.

and Vogth-Eriksen) pp. 31–32, writing on the concept of the shipper:[5]

"The code is aimed – without, however, giving a definition of the concept – at the person delivering the cargo to the carrier for transport. The shipper may be identical to the charterer and receiver (e.g. where a company sends its own goods to its own consignment warehouse) or identical only to the charterer (e.g. usually where a company charters a ship for cif-sale of its goods) or, finally, separate from the charterer (e.g., where the company sells fob and is thus the shipper, while the buyer is the charterer and also the receiver, unless the goods are resold *in transitu*)."

MC Sect. 255

Sect. 255 concerns the delivery of the goods. It is sufficient to quote the first sentence:

> "The goods shall be delivered at the place and within the period of time indicated by the carrier."

This is obviously a regulation addressing the terms of the contract of carriage, dealing with the obligations of the sender. The truck company taking the goods to the carrier's warehouse is not bound by those terms; the company may have a contract with the sender and is instead bound by that contract. Even when the terms of this separate transport contract are very open, it would be rather far-fetched to state that the company – implicitly – has accepted the terms of the transport contract as being binding on itself with obligations towards a third party – here the carrier.

The heading of this section: "The shipper's delivery of the goods", must, therefore, be deemed somewhat inappropriate; a better and more adequate wording would have been: "Delivery of the goods".

It should be added, however, that when delivering the goods, those actually doing so are subject to more general rules on reasonable and

[5] No more is said in Jantzen, *Godsbefordring til sjøs* [Carraige of goods at sea] (2nd ed. 1952) p. 61 or Falkanger & Bull, *Sjørett* [Maritime Law] (7th ed. 2010) p. 233.

prudent behaviour and may incur liability towards the carrier (and possibly others) if such principles are not complied with – but then we are clearly outside the rules of the MC.

MC Section 259

Section 259 has rules on the carrier's obligation to give – the heading says – a "receipt for goods delivered":

> "The shipper is entitled to demand receipts for the reception of goods as and when they are delivered.
>
> Provisions relating to the issuing of bills of lading and other transport documents are contained in Sections 292 to 308."

It follows from general law that anyone delivering something of any value is entitled to demand a receipt from the receiver. This equally applies to a truck driver or to a truck company carrying the cargo to the quay side. Section 259 subsection 1 may be read as a codification of this general rule of law. It applies to the person actually delivering, regardless of whether he is the sender or not. If he is not the sender, he is still entitled to such receipts, as envisaged in subsection 1. A transport document is a much more complicated matter,[6] and subsection 2 refers to Sections 292 to 308 on the question of who is entitled to demand such a document.

Section 308 concerns the sea waybill, to which we shall revert below (4.8). First we should consider the rules on the bill of lading in Sections 292 to 307 – in short, rules regarding the issuance and contents of the bill of lading and its effects. In these rules there are, from our point of view, three important elements requiring our attention, see 4.5, 4.6 and 4.7 below regarding Sections 294, 296 and 301.

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[6] Cf. NOU 1993: 36 p. 26: "The receipt is only evidence of the actual receipt, and has thus an another character than the bill of lading or other document of carriage issued at a later stage."

MC Section 294

This Section gives "the shipper" the right to demand a bill of lading: "a received for shipment bill of lading" when the goods have been delivered to the carrier, and eventually "a shipped bill of lading" when the goods are duly on board.

There is no definition or indication in this section of who the shipper is. It is, however, quite clear that the rule also applies to a shipper where not identical to the sender. One possible way of explaining this is that according to the contract of carriage, the sender is entitled to demand a bill of lading, and that he – directly or presumably – has transferred this right to the shipper. The better view, however, is that the shipper's position is not a right derived from the sender, but is given him by law, and that this obligation on the part of the carrier arises on receiving the goods for transportation.

Who then is entitled to demand a bill of lading?

At one end of the scale we find the sender; when he delivers the cargo to the carrier he has, clearly, a right to demand a bill of lading. At the other end we have the truck driver, entitled to a receipt of the nature envisaged in Section 259 subsection 1, but obviously not entitled to a bill of lading (unless he is acting as the representative of the shipper). When drawing the line between these two extremes, the nature of the bill of lading has to be taken into account: an essential feature of the bill of lading is its function in facilitating the sale of goods where the sale involves a sea carriage. By holding the bill of lading which "represents" the goods (is "a key to the goods"), the seller can prevent the buyer from getting possession of the goods, and on the other hand, the buyer is entitled to withhold payment until he gets possession of the bill of lading. This means that when the seller delivers the goods to the carrier[7] he is the shipper, in the sense that he can demand a bill of lading. As discussed in 3 above, the physical delivery to the carrier may be left to an independent contractor, but this does not give the contractor (e.g. a truck

[7] The typical example is that he is a FOB seller; if he is a CIT seller he has also the position as sender.

company) the status of "shipper" in relation to Section 294 (as in the example with the truck driver: unless authorized by the seller). Very often, the carriage is arranged by a freight forwarder. If the forwarder is an intermediary with a mandate from the FOB seller, the mandate may include obtaining a bill of lading from the carrier; this may be particularly practical where the freight forwarder undertakes the pre-carriage transport. When the freight forwarder has given a promise of transportation – he is the carrier – the seller is entitled to a bill of lading, and the mandate may have further rules relating to that.

MC Section 296

Section 296 has a long list of information which the bill of lading must contain. Obviously, the carrier does not possess all the required information; the contract of carriage may set the framework and even if the contract is very detailed, there will be additional facts at the time of loading that should be included. Therefore, the carrier has to rely, to a great extent, upon information given by the cargo side at the time when the bill of lading is issued. Suffice it to mention that according to Sect. 296 no. 1, the bill of lading must contain statements on "the nature of the goods, including their dangerous properties, the necessary identification marks, the number of packages or pieces and the weight or otherwise expressed quantity of the goods".[8] Such information may in fact be supplied by the sender, but Sect. 296 no. 1 says that this is information "as stated by the shipper".

Also in this context, physical delivery is insufficient for achieving the status of shipper. Determining who the shipper is has to be decided along the lines indicated above in 4.5. Accordingly, there is a certain balance: the person entitled to demand a bill of lading is the person obliged to supply the information that the law requires be contained in that bill of lading.

[8] In addition, see no. 4 and 5 on the name of the shipper and receiver.

Section 301

The bill of lading simplifies some aspects of the carrier's undertaking: the main rule is that he is entitled to deliver the cargo to the person presenting the bill of lading, see Section 302. But in other respects, the bill of lading may impose severe obligations upon him, because as against the person who has acquired the bill of lading, the carrier is bound by the wording of the bill of lading – provided that the holder has, in good faith, relied upon the text of the bill of lading, see Sections 299 and 300. For example, the cargo received at the destination may not conform with its description in the bill of lading (nature, quality, quantity). If this difference is not due to loss or damage during the time that the carrier was in possession of the goods (which is regulated by special rules), the carrier may be held liable for the loss suffered by the person who in good faith has bought the cargo, relying upon the bill of lading information – and this may be information supplied by the shipper (see 4.6). The carrier has a duty to check the information given, see Section 298, but when he has done that and nevertheless is held liable, the question arises as to whether there is a claim for recourse against the shipper. This is answered positively in Section 301 which imposes a guarantee liability, as stated in Section 259 subsection 1:

> "The shipper is responsible to the carrier for the accuracy of the statements relating to the goods entered in the bill of lading at the request of the shipper."

Here it is obvious that "the shipper" corresponds to the shipper defined in 4.6 and 4.7.

Some additional remarks on the sea waybill, cf. MC Section 308

Section 308 on sea waybills does not mention the shipper, nor does Section 309 on the contents and evidentiary effect of the bill. But the use of a sea waybill does not exclude the right of the shipper to demand a bill

of lading (Section 308 subsection 3). Further, it should be noted that there is no statement in the MC as to who should submit the cargo information to be included in the sea waybill, and there is no specific stipulation on liability if incorrect information results in liability for the carrier.

5 A short deviation to other modes of transport

Introduction

In other modes of transport we find similar factual positions to those described in 4: there is a contract of carriage between a carrier (one giving a promise of transportation) and a sender, but the cargo may be delivered physically to the carrier by a person who is not the sender (not party to the contract of carriage). The relevant enactments do not expressly distinguish between the sender and the person delivering the cargo (the shipper), and this leads to the question of whether an enacted rule using the word sender (Norwegian: "avsender") always means the contractual party.

Grönfors, *Allmän transporträtt* (1977) pp. 45–46 distinguishes between land and air transport on the one hand, and on the other hand maritime transport:

> "In maritime law one adheres, in conformity with old traditions, to the material contractual relationship. As sender … is considered 'the real contractual party' … The freight forwarder or the person otherwise delivering the cargo at the loading place, on the instructions of the contractual party [the sender] is called *shipper* in the MC [Swedish: "avlastare"], and his rights and obligations are separately regulated by law [MC]."

We shall briefly look at some of the relevant stipulations in Norwegian transport law in order to form an opinion on this proposition.

Carriage by air

The rules on carriage of goods by air in the Aviation Act of 11th June 1993 no. 101 (AA) Chapter 10 are based upon the Montreal Convention of 1999. As already indicated, AA has no definitions and distinctions similar to those found in the MC Section 251. However, the carrier's counterparty – *consignor* in the conventions – has been named *sender* in the AA (Norwegian: "avsender", corresponding to the German term "Absender").

In some sections it is evident that the *sender* is the contractual party, see e.g. Section 10–12 on "the sender fulfilling his contractual obligations". In other sections there may be doubt: Section 10–6 says that the air waybill is issued by the sender. If we have, for example, an FCA[9] sale, it would appear sensible for the seller, being in possession of the relevant data, to be the one who issues the air waybill and is responsible for the consequences if the information is incorrect, see Section 10–10. But the general view appears to be that the sender is responsible, even if he (or his "servants") is not physically delivering the cargo.[10]

Carriage by road

The Road Transport Act of 20th December 1974 no. 68 is based upon the CMR Convention of 1956. There is no indication here that one should distinguish between sender and shipper, and it appears to be taken for granted in all the rules that the *sender* is the carrier's contractual counterparty, with rights and obligations flowing from the contract of carriage.[11]

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9 FCA = Free Carrier according to Incoterms 2010.

10 See .e.g. Koller, *Transportrecht* (8th ed. 2013) p. 1230 in commentary to the Montreal Convention Art. 5: «Wie sich aus Art. 7 I MÜ ergibt, ist der Absender (Auftraggebers des Luftfrachtführers) verpflichtet, den Frachtbrief mit den Mindestangaben (Art. 5 MÜ) in drei Ausfertigungen anzustellen sowie die ersten beiden Ausfertigungen zu unterzeichnen/Art. 7 II MÜ)."

11 A minor modification is mentioned in H.J. Bull, *Innføring i veifraktrett* (2nd ed. 2000) p. 19: "The formal description of the sender in the waybill is, however, not more than a presumption for who has he position as sender, and it will, accordingly, be possible to present counter evidence in the individual case." On the general view, see also here Koller op. cit. p. 965: "Absender ist immer der Vertragspartner des Frachtführers."

Carriage by rail

National transport by rail is regulated by private contract. International transport is subject to the COTIF-enactment of 20th December 2004 no. 82, giving i.a. CIM 1980/1999 the status of Norwegian law. The contractual parties to a CIM covered transport are the *carrier* and the *consignor* (Art. 3); there are no rules relating to a shipper, i.e. a person actually delivering the goods to the carrier but without being the consignor.

6 The Rotterdam Rules

Whether the Rotterdam Rules – the commonly used name for the UN Convention of 11th December 2008 on Contracts for the International Carriage of Goods Wholly or Partly by Sea – will be implemented is, as mentioned above, for the time being under political consideration. The technical preparatory work has been completed by a maritime law commission, see NOU 2012: 10 Gjennomføring av Rotterdamreglene i sjøloven [Implementation of the Rotterdam Rules in the Maritime Code].

The approach taken by the Rotterdam Rules to the questions discussed above differs from the MC.[12] A short survey of the proposal (below with the abbreviation C for the Rules and Draft for the proposed amendments to the MC) may be is of general interest, regardless of the political conclusions on implementation of the Rules.

In the Draft, the parties to the contract of carriage are first, the *carrier* (Norwegian: "transportør"); he is the person that "enters into a contract of carriage". The counterparty is the *sender* (Norwegian: "avsender"), i.e., the person entering into a contract with the carrier (C Art. 1 nos. 5 and 8, Draft Section 251 nos. 5 and 8). The term *sender* is the translation of *shipper* in the Convention. In addition to the shipper, the Convention has introduced the *documentary shipper* (Art. 1 no. 9); the term used in Draft Section 251 no. 9 is – somewhat puzzlingly – *sender according to*

[12] This is duly noted in NOU 2012: 10 pp. 51, 84 and 87.

contract (Norwegian: "kontraktsbestemt avsender"). This is a person that accepts being named as sender in the transport document (which may be a negotiable or non-negotiable document). Furthermore, there is a new and important concept of *controlling party* (Norwegian: "rådighetshaver"); the sender comes within this definition, and he may transfer rights attributed to this position to another (Draft Section 319).The person actually delivering the cargo to the carrier (Norwegian: "avlaster") is not mentioned in the Convention; the same goes for the Draft, except that in Draft Section 299a this person is entitled to demand a receipt[13] of similar nature to that mentioned in 4.4 and, as there, related to general principles of law.

Leaving aside the *sender according to contract* as well as the *controlling party* (we shall revert to the first one), we can consider the implications of this contractual structure through two examples where the contract of carriage follows on from an underlying sales contract – either on CIF or FOB terms.

In a CIF sale, the seller has to arrange the transport, usually to the buyer's place of business. Thus, the seller is party to the contract of carriage: he is the sender. He is entitled not only to have a receipt (Draft Section 299a) but also a transport document from the carrier (Draft Section 300). The transport document may be a negotiable document (a bill of lading) or a non-negotiable document (a sea waybill) – with information regarding the cargo (quality, quantity etc.) supplied by the sender (Draft Section 301).

At this point it is worth mentioning that the negotiable document gives the seller reasonable security for payment of the purchase price, as does the non-negotiable document, when it contains a clause making delivery of the cargo contingent upon return of the transport document (see Draft Sections 310 and 311 on delivery of cargo at the place of destination). The seller, in his capacity as sender, has possession of the transport document and can withhold it until the purchase price has been paid (or security provided).

[13] Cf. NOU 2012: 10 pp. 86–87 that this rule is not found in the Rules and that this person has "otherwise no role in the Rotterdam Rules".,

How is such payment protection for payment achieved in an FOB sale?

The FOB buyer has provided transport under his contract with the carrier: the buyer is the sender, and as such he is entitled to the transport document. In other words, as against the carrier he has the right to demand delivery of the cargo at the place of destination. Does this mean that the FOB contract should not be used where the seller is uncertain about the buyer's intention and capacity regarding correct payment? Or are there ways to avoid this apparent difficulty?

The sales contract may state that the transport document should be delivered to the seller or his representative, which would require an assurance from the carrier that he will act accordingly.

Here we should add some remarks on the *sender according to contract* (the documentary shipper). The FOB seller may accept being named as sender in the transport document, whereby, according to Draft Section 293, he assumes a number of the obligations and liabilities of the sender – obviously, this is an acceptance addressed to both the carrier and the sender. It is unnecessary to go into the details; for our purpose it is sufficient to note that the sender according to contract is subject to the rules on delivery of the goods and on giving information on the goods. In NOU 2012: 10 p. 51 it says that the acceptance has to be "real"; just receiving a document where one is named *the sender according to contract* without protest is not sufficient. From our point of view it is remarkable that Draft Section 293 does not refer to Draft Section 300, which states:

> "When the cargo is delivered for transport to the carrier, or to a performing carrier, the sender, or with his acceptance the sender according to contract, has the right to have issued transport documents by the carrier at the sender's option … ."

The consequences of this regulation are barely discussed in NOU 2012: 10; in any case there are no statements relating to our problem of securing the seller's payment of the purchase price. My comment is that the text does not seem to offer an easy way of protecting the interests of the seller.

7 Some concluding remarks

The present MC distinguishes between: (i) the carrier and his contractual counterparty, (ii) the sender, and (iii) the person actually delivering the cargo for carriage. The latter is by law given both rights and obligations – notably the right to have, say, a bill of lading issued and delivered to him. On the other hand, responsibilities are imposed on him, both to provide information on the cargo and towards the carrier for the correctness thereof.

These rules may raise difficult questions on who – in the eyes of the law – is the person falling into category (iii). It is surprising that legal writings have left this sector of law, practically speaking, unattended.

The law on carriage by air, truck or railway lacks a similar distinction between categories (ii) and (iii). With the Rotterdam Rules, carriage by sea will basically have the same structure. And it is also somewhat surprising that the consequences of this shift have not been elaborated in NOU 2012:10.

Implementation of the Rotterdam Rules in Norway

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Content

1 The Maritime Law Commission and its work[1]

The work of the Commission

In the spring of 2012, the Norwegian Maritime Law Commission published its report[2] on the Convention, commonly known as the "Rotterdam Rules".[3] The report recommended the ratification of the Rotterdam Rules if and when ratified by the United States or leading European maritime States.[4] I chaired the Commission and would like to comment on what we did, if possible, from a certain academic distance.

Our recommendation was not very controversial. Before the Commission received its mandate, the Convention had already been subject to a round of consultations, and both the carrier and the cargo sides of the shipping industry, as well as the other interested parties, were positive following these consultations.[5] On the basis of this round of consultations, the Convention was signed by Norway, subject to its ratification.[6]

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1 The article has previously been published in Johan Schelin, Talks on the Rotterdam Rules (Poseidon 2014). The author is the Chairman of the Norwegian Naritime Law Commission.

2 Norwegian Maritime Law Commission, Gjennomføring av Rotterdamreglene i sjøloven: utredning XX fra utvalget til revisjon av sjøfartslovgivningen (Sjølovkomiteen), NOU 2012:10 (Departementenes servicesenter 2012). The Report is available electronically at https://www.regjeringen.no/nb/dokumenter/nou-2012-10/id678031/. There is an English summary of the Report on p. 14 et seq. (http://folk.uio.no/erikro/WWW/sjolov/English.pdf). The URLs in this article were last accessed 26 June 2013.

3 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009. The official text was slightly amended by Circular letters from the Secretary-General of the UN 11 October 2012 and 25 January 2013. The original text, the amended text, ratifications and background information can be found at my web site http://folk. uio.no/erikro/WWW/cog/cog.html

4 Norwegian Maritime Law Commission p. 45 et seq. The term "ratification" here and in the following includes ratification, acceptance, approval and accession, cf. Rotterdam Rules, Article 88.

5 See http://tinyurl.com/86rcw76.

6 See http://tinyurl.com/kdqrod5.

The Commission[7] was appointed by the Ministry of Justice, the ministry responsible for the Maritime Code[8], which requires that both genders and all parts of the country are well represented on such commissions. Of course, it is also important that all aspects of the industry are represented and that the Commission has the necessary level of expertise. We were lucky to have as our secretary Dr. (now Professor) Trond Solvang, who is both an experienced shipping lawyer and a well-established academic (and who was later appointed to a position as a professor at the Scandinavian Institute of Maritime Law). The Commission was also advised by an expert on freight forwarding law, Mr. Tom Rune Nilsen, who was not a formal member of the Commission. In particular, after the inclusion of these two experts, despite the fact that they were males from the capital and thus did not fit well within the policies or committees outlined above, the Commission was well-equipped to perform its task.

Over the course of the Commission, we held extensive informal consultations with interested parties. A website was created so that all interested parties could follow the work and comment on it.[9] To answer some of the questions, we even established an international correspondence group in English to invite comments from the draftsmen and all the other governments considering implementation.[10] In this way, the Commission received valuable input. These resources are still available on the Internet.

The Commission was instructed to cooperate with the other Scandinavian (Nordic) States.[11] This tradition has been in practice for more than one hundred years and has resulted in similar Maritime Codes across the five countries. In this case, we were told that Denmark had already chosen to ratify and they felt, perhaps, that it was important to take the lead in the ratification and implementation processes; after all,

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7 The members were Mr. Viggo Bondi, Mr. Kyrre Joakim Bronder, Ms. Mia Ebeltoft. Ms. Ingeborg Holtskog Olebakken, Mr. Harald Thomsen and Ms. Adrianne Ubeda.

8 Sjøloven No. 39/1994, available in English translation at http://folk.uio.no/erikro/WWW/NMC.pdf.

9 See http://folk.uio.no/erikro/WWW/sjolov/index.html.

10 See http://folk.uio.no/erikro/WWW/RRcorr/.

11 Norwegian Maritime Law Commission p. 17.

Denmark is the home of one of the largest container lines in the world. Sweden and Finland, on the other hand, were not ready to participate, as they had not deemed the Rotterdam Rules to be a priority. Iceland, for its part, as a small country in the midst of a financial crisis, did not have the capacity to participate in the Scandinavian cooperation. The result was a very close cooperation between the Danish and Norwegian Maritime Law Commissions. However, there were a number of meetings to which all the Scandinavian countries were invited and in which representatives of the relevant Swedish and Finnish Ministries participated as observers, together with the Danish and Norwegian Commissions.

The Danish and Norwegian Maritime Law Commissions proposed a revision of Chapter 13 of the Maritime Codes regarding the carriage of goods by sea, incorporating the Rotterdam Rules.[12] The draft revisions are almost identical.

The individual articles of the Rotterdam Rules are easily recognisable in the individual sections of Chapter 13. In addition, in the proposed revisions to Chapter 14, the draft includes some other provisions for those matters not addressed in the Rotterdam Rules, such as the negotiability of bills of lading[13] and withdrawal from a contract of carriage.[14] The optional chapters of the Rotterdam Rules regarding jurisdiction and arbitration[15] are not incorporated, but there are provisions proposed for these matters as well.[16]

Since its submission, the Norwegian Maritime Law Commission's report has been subject to another round of consultation. The recommendation to ratify when the time is right has received widespread

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12 Norwegian Maritime Law Commission p. 128 et seq. Danish Maritime Law Commission, 4. betænkning afgivet af Sølovsudvalget: aftaler om transport af gods helt eller delvist til søs (Rotterdam-reglerne), vol nr (Statens Trykningskontor) p. 9 *et seq*. The Danish proposal has been forwarded to the Parliament without significant amendments, see Danish Parliamentary Bill No. L 154 (2012-13), Forslag til Lov om ændring af søloven og forskellige andre love.

13 See Section IV below.

14 See Section V below.

15 Rotterdam Rules, chapters 14 and 15.

16 See Section XI below.

support and no opposition.[17] As might be expected, there were a few comments regarding the details of the proposal.[18]

It is not possible to elaborate on all the details of the proposal here. I have selected for discussion only those topics that are of greatest relevance in the consideration of the proposal and possible implementation of the Rotterdam Rules.

II Some general issues

En bloc incorporation or rewriting the Rules?

The main discussion centered on whether to incorporate the Rotterdam Rules *en bloc* or to rewrite them into the Maritime Code (as has previously been the tradition in Scandinavia). Our Swedish colleagues indicated that they would definitely prefer the *en bloc* method. However, this method was short-circuited, as the Danish Commission had already begun revising Chapter 13 on the basis of a rewrite of the Rotterdam Rules by the time the Norwegian Maritime Law Commission had received its mandate. Nonetheless, the rewrite is much closer to the original text than is the current Chapter 13 in relation to the Hague-Visby Rules.[19] To a large extent, the only really noticeable adaptations of the Rotterdam Rules in the new draft are in the order of the provisions, the length of their terms, and, of course, the language.

In some states, there is a strong tradition of implementing conventions word by word, which seems to be a prudent practice, as transferring the Convention into a new context—namely a specific national system of law—could inadvertently alter the way it is read. However, the Rotterdam Rules do not require the implementing states to adopt the text in this manner. The

[17] See http://tinyurl.com/mzqyg76.

[18] The most significant comment was perhaps that the Norwegian Bar Association called for further clarification of the multimodal issues discussed in Section VII below.

[19] See to this Erik Røsæg, 'Implementing conventions - Scandinavian style' MarIus 167.

obligation is not precisely defined; the text simply states that the States Parties "have agreed as follows" before a mixture of private law rules and international law obligations.[20] It seems clear that the intent was to achieve an agreement regarding content rather than an agreement on form and format. As such, a word by word implementation not really be required.

Construing the text

In considering the implementation of a Convention, such as the Rotterdam Rules, it is of paramount importance to use the appropriate method.

Clearly, the *travaux préparatoires* of the Convention are an important source of knowledge;[21] the report of the Maritime Law Commission refers to them with great frequency. However, the draftsmen cannot alter, modify, or authoritatively interpret the text, and their intentions for the negotiations, if they can be ascertained, are in principle irrelevant. As the draftsmen are experts, their views should be respected, but they are in principle in no better position than other experts to state the intended meaning of the text. While it has often proved wise, when in doubt, to seek the view of any persons who played a central role in the negotiations, it is essential that the final text stand independently of the context in which it was created.[22]

This is important for negotiators to keep in mind, as it may be difficult for the original draftsmen to avoid taking an authoritative stance as defenders of the faith. At this stage, it is of paramount importance that governments around the world make the text their own and interpret it in accordance with ordinary principles of the interpretation of treaty law. States should consider themselves to be committing to a treaty, not to the opinions of the draftsmen.

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[20] Rotterdam Rules, Preamble i.f. An example of a rule or private law is Article 17, and an example of a rule of public international law is Article 74.

[21] The travaux préparatoires are accessible, but not easily searchable, at http://www.uncitral. org/uncitral/en/commission/working_groups/3Transport.html and http://www.uncitral.org/uncitral/en/commission/sessions/41st.html.

[22] Vienna Convention on the Law of Treaties, 1969, article 31.

The core of the project: Unification

There are many arguments in favour of rules such as the Rotterdam Rules. I think it is a fair inference from the report of the Norwegian Maritime Law Commission that we considered this to be a matter of uniform concepts and uniform laws.[23] The purpose of recommending ratification is to adhere to the forthcoming dominant, new system. Likewise, the reason why we did not recommend ratification until the United States or the major European maritime States had ratified it, is that there is no pressing need to ratify the Rules if they are not adopted uniformly on an international basis.

The project would have looked quite different had it been about protecting a weaker party or industry interests, particularly with respect to multimodal transports.[24] The Commission accepted that the Rules are, to some extent, mandatory, but it expressly stated that this is not a central issue and is not the basis for its recommendation of ratification.[25]

The unification or harmonization of laws has now been on the agenda of the CMI and others for well over a century. It is the general consensus that this is a good idea, which does not require further justification. Perhaps because of this, the Maritime Law Commission did not spend much time justifying this point of view.[26]

A close scrutiny reveals, however, that the matter is not that simple. First, as the attempts to establish conventions on the unification of maritime law have not succeeded after a century, it seems unlikely that it would ever succeed. Second, the savings and rationalisation of unification may not be so remarkable after all, since the remaining differences and language barriers still make it necessary to engage local counsel. Finally, the elements of unification that are in place make it easier rather than more difficult to shop for a favorable jurisdiction, as the differences between the legal systems can be more easily ascertained.

However, there is no doubt that the Rotterdam Rules will take unifi-

[23] Norwegian Maritime Law Commission p. 45 *et seq*.

[24] See Section III below.

[25] Norwegian Maritime Law Commission p. 29.

[26] See on this Norwegian Maritime Law Commission p. 31 *et seq*.

cation a long step forward. Even if the Rotterdam Rules may not dominate the international scene, at least not for many years, they harmonise a wider range of rules better than any previous set of conventions of this kind, and the Rules, as well as the discussions leading up to them, have certainly unified the conceptualisation of legal issues concerning the carriage of goods by sea. The Commission was certainly correct in its appreciation of the effects of the Rules on unification.

III Limitation and protection of the weaker party

Overview

As the focus of the Commission was on unification, the ratification issue was, in its view, unrelated to the economical consequences. In the following, issues of economy will be discussed in order to determine whether this perspective makes sense. First, it will be argued that the limits of liability in the Rotterdam Rules cannot be assumed to strike a fair balance, since they are completely arbitrary and have little effect with respect to the redistribution of risk between carriers and shippers. Furthermore, it will be proposed that there is little need for protection of the weaker party in carriage of goods legislation and that a limitation of liability is costly to both the parties and to society.

Limitation amounts

The Commission's under-emphasis on limitation amounts is reasonable, because the limits do not really strike a fair balance. The issue is not that it is unfair, but that it is arbitrary. In any event, to a large extent the container clause makes the cargo description - rather than the limitation amounts themselves - the decisive factor in the effect of the limitation rules. The number of boxes specified becomes more important than the

limitation amount per box. To some extent, then, any limit is as good as any other, and the limits are not significant when evaluating the Rules. This renders the establishment of limitation amounts correspondingly unimportant.

Perhaps there is no such thing as a fair balance in the context of limitation amounts,[27] particularly when the carriers and the cargo regularly insure against this exposure.[28] But in any event, an arbitrary limitation amount is neither fair nor unfair. The arbitrariness of the limitation amounts of the Rotterdam Rules is evident in that there is no adjustment for inflation—and a limitation amount, the real value of which varies arbitrarily with inflation, cannot strike a fair balance all the time.

While the kilo limitation of the Hague–Visby Rules (1968) of 2 SDR[29] was increased by 50% to reach the limitation amount of 3 SDR per kg in the Rotterdam Rules (2011), general inflation in this period far exceeded this. In Norway, the Consumer Price Index (CPI) inflation in this period was about 730%,[30] so one would have expected that the new limitation amount would be 14–15 SDRs per kg. Compared to the rules in the U.S.,

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27 Michael F. Sturley, 'The Mandatory Character of the Convention and its Exceptions: Volume Contracts' in Rafael Illescas Ortiz and Manuel Alba Fernández (eds), Las Reglas de Rotterdam: Una Nueva Era en el Derecho Uniforme del Transporte - Actas del Congreso Internacional (Carlos III University 2010) at p. 288, fn. 121.

28 In relation to this last point on insurance, see Michael F. Sturley, 'Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence' 24 (1993) JMLC 119.

29 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924, as amended by Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968, and Protocol Amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1979, Article IV(5). I use the abbreviation SDR, as in the Conventions, although the more common code for Special Drawing Rights today is XDR.

30 Norwegian Maritime Law Commission p. 19. CPI = Consumer Price Index, which is calculated on the basis of prices of baskets of consumer goods. Today they form part of the official statistics in most countries.

the original Hague Rules of 1924,[31] or the Gold Clause Agreement,[32] the discrepancy is even greater. The result is that the limitation amounts were arbitrary both in 1968, at present, and at all relevant points of time in between.

One might argue that it is wrong to use general inflation here. It may also be argued that inflation with respect to imported and exported industrialised goods has been lower than the general inflation and that this lower inflation should be the guideline. Indeed, electronic equipment and clothing have become increasingly less expensive rather than progressively more expensive.

Such an argument must be based on the assumption that the effects of the limitation amount, on say, a consumer shipping his furniture for the purpose of relocation, are not that significant. Presumably, there might also exist the underlying notion that the limits should be determined based on the number of claims that will actually be limited, rather than on the basis of what the carriers (or cargo) are able to cover by insurance.

This kind of reasoning is not self-evident, though it would be interesting to see whether it is really true that the prices of imported and exported merchandise are inflated at a lower rate than the CPI inflation rate.

I tested whether the CPI inflation rates would be a good benchmark

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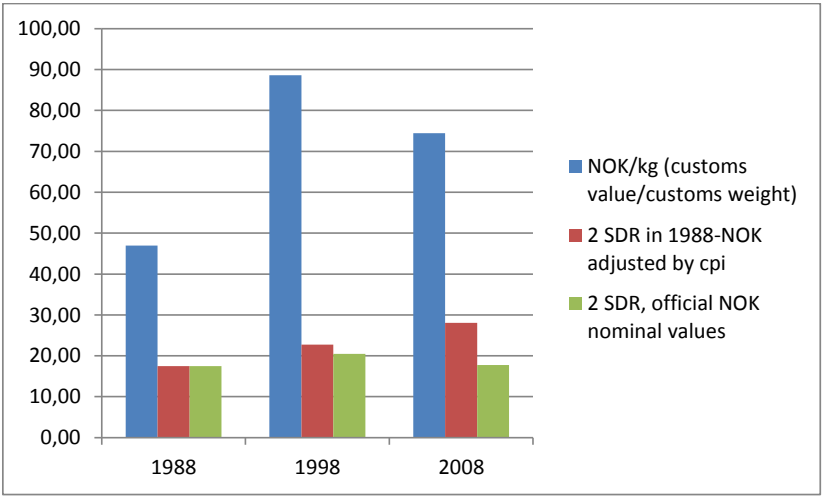
31 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924, Article 4(5) and 9 provides for a limitation amount of 100 gold pounds per package. Adjusted for inflation, this would be GBP 4,391.74 in 2013 (according to http://www.whatsthecost.com/cpi.aspx) or SDR 4,484.92 (according to http://tinyurl.com/loof3ub). This is to be compared to the Rotterdam Rules unit limitation amount of SDR 875, but as the Rotterdam Rules are supplemented by a kilo limitation amount, it is fair to add that the Rotterdam Rules would yield more than the Hague Rules adjusted for inflation if the unit weighs more than 1,495 kg (4,484.92/3) and the container clause does not kick in.

32 In this agreement, the Hague Rules limitation amount was agreed to be GBP 200 in 1950, see Sjur Brækhus and Alex Rein, Handbook of P & I insurance (Assurance foreningen Gard - Gjensidig 1979) p. 170. Adjusted for inflation, this would equal GBP 4,946.33 or SDR 5,053.02 in 2013. The converters and the basis for comparison are the same as in the previous footnote.

for imports by ship in the SITC[33] category 7, which includes computers, etc.,[34] using data taken from official Norwegian customs statistics,[35] official Norwegian SDR exchange rates,[36] and official Norwegian CPI figures. The results are as follows:[37]



Even for this group of goods, there is no indication that using a special, low inflation rate would be meaningful. Rather, the results indicate that even making an adjustment for inflation based on CPI has at times been insufficient. The limitation amount in percent of the average value has thus varied as follows:

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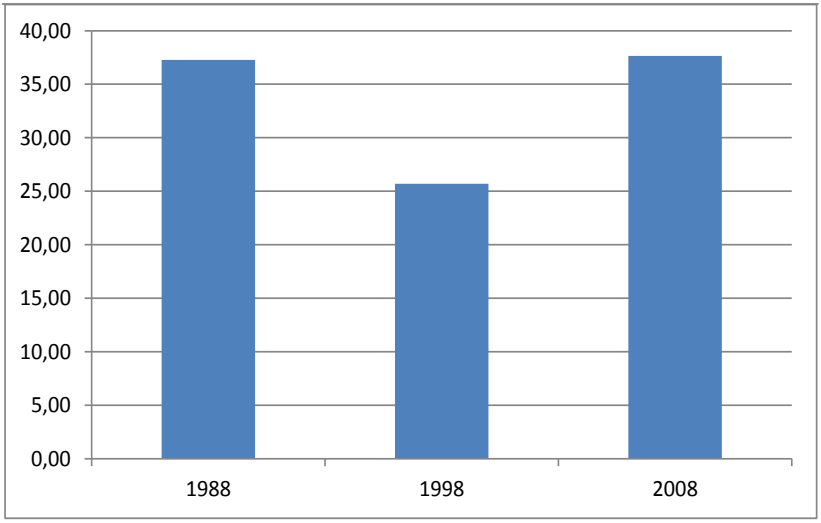
33 Standard International Trade Classification, see http://unstats.un.org/unsd/trade/sitcrev4.htm

34 Computers are found in category 75.

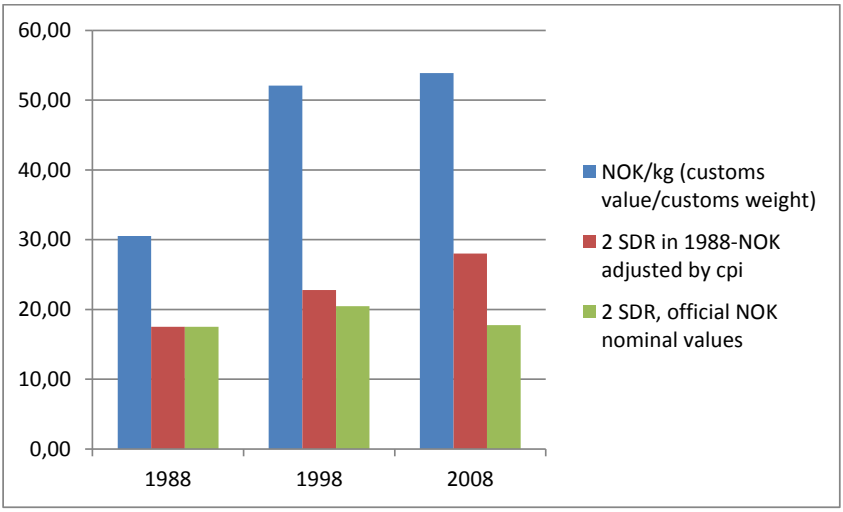
35 These data are generated for me by the Central Bureau of Statistics and are available at http://folk.uio.no/erikro/WWW/SSB.zip, cf. http://www.ssb.no/english/subjects/09/05/ uhaar_en/. I asked for figures for every 10th year starting with 1968, the year of the Hague-Visby Rules. For 1978 and 1968, it was not possible to separate data relating to carriage by sea from data relating to carriage by other modes of transport.

36 See http://tinyurl.com/qyoe8ky. The rates are only available from 1981.

37 See http://www.ssb.no/en/priser-og-prisindekser/statistikker/kpi.



While some of the goods may have been less expensive to produce, they retained their value per kilo because of their increased sophistication. This may be the case with computers. From a maritime limitation perspective, however, it is irrelevant whether or not one will now get more value for one's money than before. As seen in the following graph, the data for exports yield the same picture as for the imports:



The same general picture is also true for other kinds of goods. We made a comparison between the values of NOK per kg of different SITC groups of goods by ship for 1988, 1998 and 2008 and determined the difference after adjusting the 1988[38] figures for inflation (about 60% in Norway). The differences in NOK were indeed small:

SITC Group	*Imports*	*Exports*
0 – Food and live animals	-1.33	3.17
1 – Beverages and tobacco	4.42	4.99
2 – Crude materials, inedible, except fuels	-1.33	0.38
3 – Minerals fuels, lubricants, and related materials	-2.27	-2.75
4 – Animal and vegetable oils, fats, and waxes	4.70	-3.95
5 – Chemicals and related products, not elsewhere specified	-1.35	0.34
6 – Manufactured goods classified chiefly by material	-0.20	-1.51
7 – Machinery and transport equipment	-5.05	-0.72
8 – Miscellaneous manufactured articles	51.83	**-90.96**
9 – Commodities and transactions not classified elsewhere in the SITC	19.16	**-9.08**

This indicates that adjusting the limitation amounts by the general inflation rate over this period of time would have maintained the balance between the carrier and the cargo sides quite well, better than without adjustment for inflation.

There are a couple of exceptions to this general impression, however; these are emphasised in bold in the table. For these groups, adjustment of the limitation amounts by the inflation rate would shift the balance in favour of the cargo. The most important import group is SITC Group 8, which includes clothing.

This does not require mathematics. One could break these figures down into smaller groups, analyse their different states and time intervals, and distinguish between goods carried in bulk and those carried as

[38] The figures are somewhat old, but were easily available and serve to illustrate the points made.

packaged goods, goods for which the unit limitation rule does or does not apply, goods ordinarily carried in liner trade or in tramp, etc., and then weigh the figures for the amount carried in each group. One could also consider that the Hague-Visby Rules do not exclude all consequential losses in some jurisdictions,[39] so that the kilo limitation may also be significant for goods that have a lower value than the limit. Nonetheless, the indication is clearly that this exercise is not worthwhile: the limitation figures are arbitrary, and there is no indication that adjusting them for general inflation, as opposed to special inflation rates for imports and/or exports, would cause a general shift in the balance.

The Commission was correct in assuming that the limitation amount is arbitrary when it is measured for its real value, so great emphasis should not be put on its nominal value.

I have also had the opportunity to study trade statistics collected by the U.S. delegation in the course of the negotiations of the Rotterdam Rules.[40] The data collected relates to the 2002 U.S. imports and exports. A unique feature of these figures[41] is that they represent the weights and values of containerised goods collected per unit as described in the cargo manifesto, bill of lading, or customs declaration. Under the Hague-Visby Rules Article 4(5)(c), the units that are described determine the application of the unit limitation rule, as opposed to the kilo limitation rule. In the U.S., there is jurisprudence in the same vein.[42] With some analysis, the data provides an opportunity to illustrate the impact of the unit limitation rule. Does that warrant a focus on the limitation amounts? The units used in these statistics are as follows:

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39 There are several possible mechanisms here, but one is to allow consequential loss es despite the Hague-Visby rules Article 4(5)(b), see, e.g., the Norwegian Case Rt. 1987.1369.

40 The dataset is available at http://folk.uio.no/erikro/WWW/US.zip.

41 Much of the materials reflect the fact that values per kg sometimes exceed the limitation amounts, and sometimes not. Although this could be important when considering a national negotiation strategy, the only point of principle in this respect is that it confirms that the limitation amounts are neither so high that liability would never be limited nor so low that limitation is the main rule.

42 Robert Force, A. N. Yiannopoulos and Martin Davies, Admiralty and maritime law, vol I (Beard Books 2008) p. 74–80.

Coils	Sacks	Packs/package
Bins	Drums/fibre drums/polymix drums	Gallons
Totis	Blocks	Big bags
Tank	Cartons/fibreboard containers	Super sack
Unit	Sets	Bags
Barrels	Crate	Rolls
Kegs	Cases	Reels
Boxes	Pieces	Bundles
Bales	Dozen	Cylinders
Pails & piles		

I have not investigated whether a differentiation has been made between physical units and units of measurement in all these cases, or its legal significance if a differentiation has not been made,[43] as it does not seem all that important in the overall picture.

According to these figures, it is extremely common in the container trade to specify the units within containers. Well over 90% of the weight is specified in this way.

The units to which the cargo documentation refers—or the observed units if the container clause does not apply—may trigger the application of unit limitation rules, as opposed to kilo limitation, if it yields higher compensation. This depends on the weight of the units. In the Hague-Visby Rules, unit limitation would apply if the unit weighed less than 334 kg (the unit limit of 667 SDR divided by the per kilo limit) and if the loss per kg exceeded 2 SDR. In the Rotterdam Rules, the similar values are 292 kg and 3 SDR. In the table below, calculations on this basis have been carried out on the 2002 U.S. figures for containerised transports. The weight percentages of goods for which unit limitation would apply for total loss without consequential losses are as follows:[44]

[43] See Admiralty and maritime law p. 80.

[44] 1 SDR = USD 1.29 (average of IMF exchange rates on the first day of each month 2002).

	Imports	*Exports*
Hague-Visby Rules	89%	43%
Rotterdam Rules	76%	29%

As always, there are some clarifications to be made with respect to such figures:

- The differences between exports and imports are most likely to be due to the differences in unit weights, which, again, may reflect the fact that the kinds of goods being exported are not the same as those imported.
- The figures include carriage by all modes of transport. It is likely that average weights are higher for goods carried by sea than for goods in total. This would indicate that figures for carriage by sea would, perhaps, have yielded lower percentages, which indicates that unit limitation would have applied in fewer cases.
- The calculations are based on the average weights of the different limitation units. Of course, these figures may also include some units that are too heavy for unit limitation. The percentages are, therefore, probably slightly on the high side; however, many of the average unit weights are well below the maximum for unit limitation, so that this error is most probably small.

Outside maritime transport, there is not necessarily a unit limitation and container clause, so the parties can specify the units within the container without having it any effect on the liability, and, therefore, have no disincentive to doing so.

The figures indicate that the unit limitation rule would play a significant role in States Parties to the Hague-Visby Rules due to the container clause (which, as mentioned, makes the number of boxes specified more important than the limitation amount per box). The exemptions are when units like tanks and barrels are used, as they have an average weight that is close to being too high for unit limitation. If the maritime unit limi-

tation were applicable, the U.S. figures (not reproduced here) indicate that these limits would create ample room for full liability, or at least a higher liability than the kilo rule, based on average unit sizes. The relative importance of the unit rule would, however, be somewhat *reduced* by the Rotterdam Rules, as the kilo rule applies there at a lower weight. It follows that the way the cargo documentation describes the cargo is significantly more important than the limitation rules. The Norwegian Commission was correct in not focusing on the limits, as liability is more dependent on the cargo description.

Cost distribution

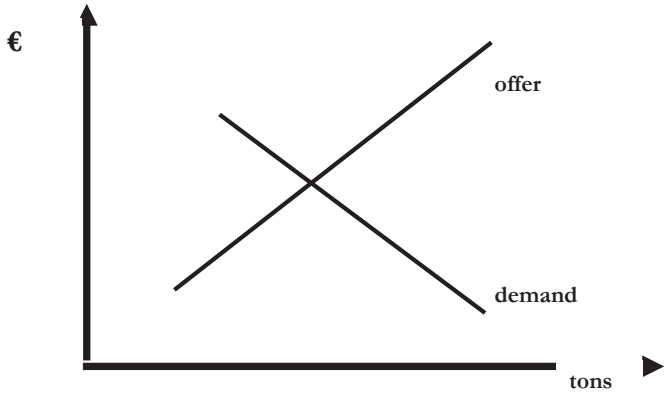
In the same way that one could (erroneously) assume that the Commission underestimated the general significance of the limitation amounts, one could also question the Commission's view of the distributive effects of the rules: namely, that the limitation rules are inefficient tools for the distribution of wealth between the carriers and cargo owners. The question is whether the rules for the protection of the cargo would really benefit the cargo and vice versa.

A simple offer and demand model may be used for the clarification of this issue. It is quite common to believe that the price or the freight rate is the result of the calculation of all the costs and profits and that increased costs for the carrier would affect the price, which would be recoverable from the cargo side. However, if all the costs were recoverable, arbitrarily increased profits would also be recoverable, and the carrier would increase the freight rates even without an increase in costs. In other words, there is an obvious limit to the increase. This limit is the market price, and it applies even if the increase of the freight rates demanded by the carrier is well justified by an increase in the costs. Therefore, an offer and demand model is necessary for an appropriate analysis.

The relevance of costs in this situation is that increased liabilities may easily be seen to imply increased costs and vice versa. If the carrier's liability is increased, the carrier's liability insurance premiums, or his

average liability payments, are likely to increase; and if the carrier is exempted from liability, he is likely to be able to dispense with all or part of his insurance coverage. There is either a direct or indirect relationship between liability and costs.

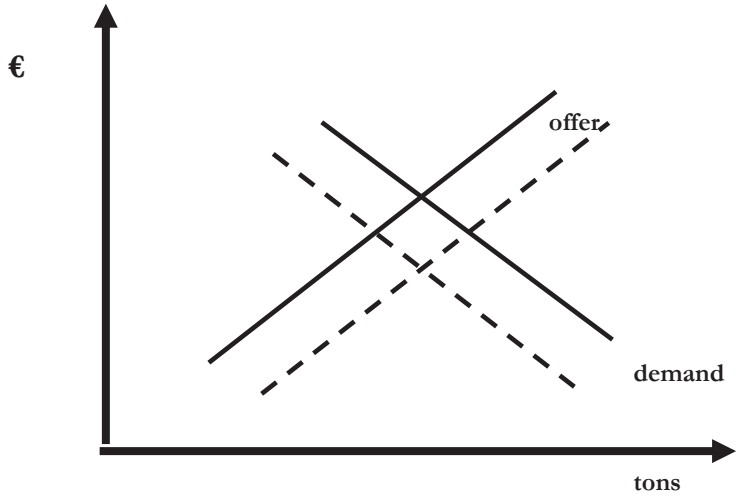
Let us first evaluate how the market price (freight) is determined in the simple offer and demand model. In this scenario, one will have an offer and demand curve for the carriage of goods services. If there were a high price, the demand (in tons) would be low; furthermore, if there were a high price, many would offer shipping services, and the offer would be high (in tons). The price (freight) would be where the two curves cross, as can be seen in the following figure.[45]



If the carrier's liability were limited, his liability costs would decrease. Therefore, carriers would be willing to offer transport at a lower price. The cargo owners, on the other hand, would not be willing to pay as much as before, as cargo costs are increased due to increased cargo insurance premiums. Both the cargo owner's demand curve and the carriers' offer curve would shift downward, as indicated by

[45] This and the following graph are simplified versions of Erling Eide's graphs in Annex 2 to the Norwegian Maritime Law Commission; Rettsøkonomiske analyser av forslaget til ny sjøtrans¬portkonvensjon (p. 301 et seq.).

the dotted lines in the following figure.



The point where the dotted lines intersect indicates where the new market price would be set. In this example, the carrier's savings equals the increased expenses of the cargo owner, and there are no transaction (negotiation) costs. The decrease in the market price is equal to the savings. Neither the carrier nor the cargo owner would have benefited from the limitation of the carrier's liability, and the volume carried would be unaltered.Perhaps surprising for many is the fact that the end result is not affected under these circumstances by placing the liability on the carrier or on the cargo or by sharing it by means of limitation. The freight rate would adjust to compensate for the increased or decreased costs, all other factors being equal. The struggles of the legislator are in vain.

Introducing transaction costs would perhaps alter the picture somewhat, though it would still not enable legislators to place the liability costs on one party or the other. Thus, the Norwegian Commission was correct not to emphasizing this aspect of the Rules.

Henrik Lando has observed that one has to take into consideration the fact that parties may exit the market.[46]

[46] Henrik Lando, 'On the Pareto-optimality of Contract Rules' in Erik Røsæg,

In connection with Lando's observation, it is argued that in a consumer setting, producers will exit the market if consumer legislation leads to their businesses becoming unprofitable. That would again lead to an imbalance in which the demand exceeds the offer, and then the prices would increase, and the market imbalance would be reestablished at a higher level. [47]The argument is that the ultimate effect would be that consumers would always carry the cost of mandatory legislation. Transferred to our context, this would mean that in the long run, the cargo would carry the costs of mandatory legislation. If this were correct, the intended cost distributive effects of the Rotterdam Rules would not only fail, but would work contrary to the intentions.

However, there are problems with this reasoning on two levels. On one level, the reasoning apparently overlooks the fact that a business may not be unprofitable (or unattractive), even though it carries a great deal of risk for mandatory legislation, and furthermore, that both sides of the contract may find the situation so difficult that they may wish to exit the market because of the mandatory legislation. Even consumers can exit the market in the sense that they can choose to buy other products for whatever money they have. Therefore, the observation is simply that the market is continuously changing, although it does not say very much about risk distribution.

The problems at the other level concern the reasons why legislators should take such subsequent market changes into account at all. If they did, they would take into account the carriers and the cargo as abstract groups, even though the assumptions of the group members have changed. Such an approach may make sense for a trade organisation, but the legislator should perhaps focus on the actual conflict to be resolved by the courts. From the short-term perspective, it is firmly established that the elasticity of the market determines how much of the costs of mandatory legislation are shouldered by each party.

However, even if the costs were distributed between the parties, le-

Hans-Bernd Schäfer and Endre Stavang (eds.), Law and economics: essays in honour of Erling Eide (Cappelen Akademisk Forlag 2010).

47 See On the Pareto-optimality of Contract Rules p. 128.

gislation is not a useful tool to determine how these should be distributed. The Commission therefore acted correctly in not emphasising the distributive effects of limitation in the Rotterdam Rules.

Is there a general need for protection?

The inference from the observations above should be that legislation which aims to distribute costs between carriers and cargo owners may not be very effective. In the following, the discussion will centre on whether it would be meaningful if it were effective. Given the existence of protective legislation, does it really work to the benefit of the cargo interests today?

It is fairly certain that no ship owner or cargo owner would go bankrupt on the basis of how the carriage of goods rules are made with respect to all liabilities for cargo loss or cargo damage. Relatively speaking, the liability costs are marginal in any part of the shipping business. Therefore, the Commission acted correctly in not focusing on the protective aspects of the Rotterdam Rules.

As regards the ship owner, the Commission did not manage to obtain statistics of P&I premiums to compare with the overall costs of shipowers, but there is an OECD report[48] written by an insurance expert[49] that gives a good indication. This report states that insurance costs may be about 10% of the total costs of the ship owner;[50] half of that would be P&I premiums,[51] and only a quarter of remainder, so 1.25% of total costs, would relate to significant cargo claims.[52] In other words, the carriage of significant goods liability would affect the margins of 1.25% of the ship owners' costs. Obviously, these margins cannot be ignored, but the figures can vary considerably without cause for serious concern.

Additionally, the insurance costs on the cargo side are quite margi-

48 OECD Maritime Transport Committee Report on the Removal of Insurance from Sub-standard Shipping (June 2004).

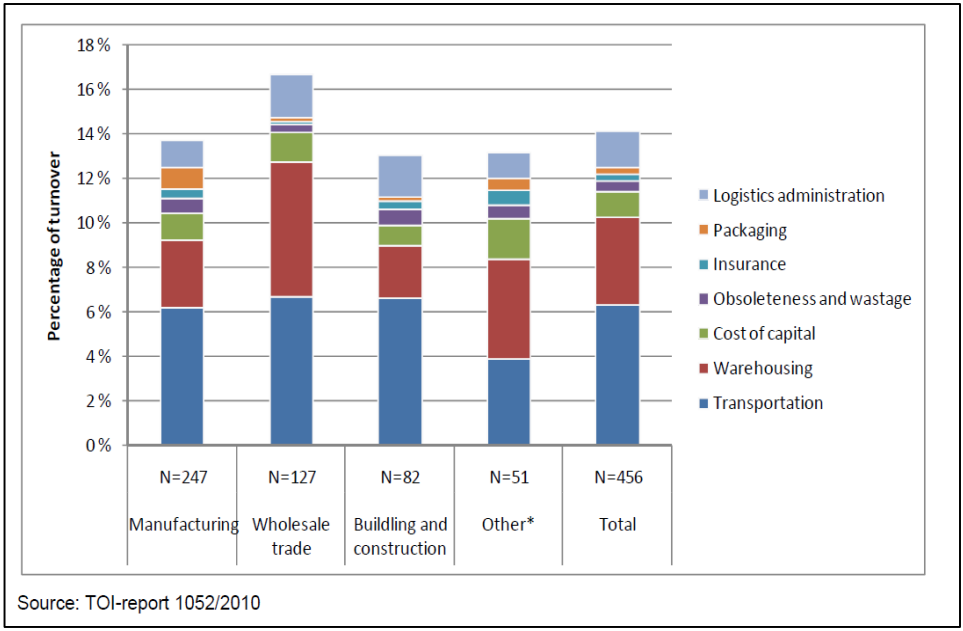
49 Terence Coghlin, a former Chairman of the International Group of P&I Clubs.

50 OECD Maritime Transport Committee Report para 15.26.

51 Ibid.

52 Ibid. para 4.25.

nal.[53] The data available is from Norway, but there is no reason to believe that Norway is a special case in this context. Furthermore, the data clearly shows that there are many other kinds of expenses that play a more dominant role than insurance, and cargo-related liability insurance is only a part of that, as seen in the following graph.



Source: TOI-report 1052/2010

The economic effects of the Rules should thus not remove the attention from the uniformity issue.

The discussion above fits well into this view. Even if the description of the cargo may have a significant impact on the limitation of the carriers' liability due to the container clause (as the number of boxes specified in the documents easily becomes more important than the limitation amount per box), there does not seem to be a great push to have the cargo

[53] Inger Beate Hovi and Wiljar Hansen, Logistikkostnader i norske vareleverende bedrifter: nøkkeltall og internasjonale sammenlikninger, vol 1052/2009 (TØI 2010).

described in large units (if the units in the cargo documentation and the customs declaration are similar). It is probably not worthwhile for the parties to minimise liability in this way.

It may very well be that the shippers were the market underdogs in 1893, when the U.S. Harter Act[54], the forerunner of the Hague-Visby Rules, was adopted. If so, it may have made sense then to attempt to correct that by legislation, in the way it had been. Regardless, what was right in 1893 is not necessarily correct today. Much has changed since the Harter Act.

First, the market has clearly changed. There is a free internation market for shipping services, and monopolies are rare.[55] On the shippers' side, small individual exporters have in part been replaced by large international groups of companies or freight forwarders organising the transport for a number of small shippers. There is a shift and a diversification regarding which countries are mainly exporters and which are mainly importers of different products, and world trade has increased so much that it is likely that there is often an alternative market available, if the terms in one market of transport for export are too harsh. Cargo interests are not necessarily the underdogs any longer.

Second, if there were a group of underdogs in a market, competition law is likely to protect them. In many states, including those most likely to ratify the Rotterdam Rules, abuse of a dominant market position is illegal.[56] The need for legislation to protect groups, such as shippers of goods by sea, is correspondingly diminished.

Third, contract law has also changed. Generally, courts are less willing to enforce unfair contract terms, as they are more inclined to construe contracts in a reasonable manner.[57] For the Norwegian Maritime Law Commission, it was important that the Scandinavian Contract Acts make

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54 Now 46 U.S.C.A. §§ 30702-30707.

55 See the description in Martin Stopford, Maritime Economics (Routledge 2009) p. 180 et seq.

56 E.g., Treaty on the Functioning of the European Union, Articles 101 and 102.

57 Alf Petter Høgberg, Kontraktstolkning: særlig om tolkningsstiler ved fortolkning av skriftlige kontrakter (Universitetsforlaget 2006) p. 30-31.

unreasonable contract terms unenforceable.[58] There may not, then, be a need for mandatory contract legislation on top of this. Indeed, it is unlikely that the terms of the Hague-Visby Rules would have been enforceable if they were introduced in a contract in Scandinavia today, due to the extensive exemptions from, and limitation of, liability.

There are also other changes that question whether the legislative technique of the Harter Act and the Hague-Visby Rules is appropriate today. Altogether, it is rather unlikely that both the problems regarding contracts for the carriage of goods by sea, as well as the responses to them, should remain the same for more than a century.

Additionally, simple observations of real life seem to confirm the impression that protecting the shipper as the weaker party is no longer the best rationale for the mandatory carriage of goods legislation. Offer and demand vary in shipping, and the attribution of the underdog varies accordingly. As already mentioned, the level of organisation on the shippers' and the carriers' side also varies, and it would be difficult to point out groups similar to the allegedly strong European carriers and the allegedly weak U.S. exporters from a hundred years ago, which triggered the Harter Act and the Hague-Visby Rules. Strong shippers and weak carriers could be as likely a scenario as the other way around.

If strong carriers were only prevented from imposing unreasonable contract terms because of mandatory legislation, one would expect that contract terms to which no such legislation applied would be unfair.[59] However, there are no reports indicating this, even if this situation is not uncommon.

First, for domestic transport there is no mandatory legislation under international conventions. Although some states have separate legislation for domestic transport or have made the international conventions applicable, there are also examples of countries with little or no mandatory legislation for domestic transports. One example is the domestic carriage

[58] See, e.g., the Norwegian Act relating to Conclusion of Agreements, etc., 1918, s. 36.

[59] One would also expect that carriers strongly opposed mandatory legislation such as the Rotterdam Rules, whereas in fact it was the carriers that pressed for the new regime.

of goods by road in Denmark.[60] Despite the lack of legislation, the contract terms are not more unfair than under, for example, the Hague-Visby Rules.

Second, in large parts of the world there are no applicable international conventions for carriage by road.[61] Nonetheless, unfair contract terms do not necessarily flourish.

Third, some courts have stated that the international unimodal carriage of goods conventions do not apply to contracts of carriage that are not linked to at least one mode of transport, because the carrier is free to choose his mode of transport (e.g., non-modal transports).[62] The effect of this seems to be that the mandatory provisions of the conventions do not apply. Still, the terms of the carriers do not vary much from the (valid) terms of modal contracts subject to mandatory legislation.

Fourth, one should not forget that a great number of transport services are contracted as part of a contract of sale—e.g., at delivered terms. In these cases, no mandatory legislation for the carriage section of the contract applies as between the buyer and the seller. Still, the market mechanisms seem to secure balanced contracts in any case.

Finally, it is likely that mandatory legislation on the carriage of goods does not apply to logistics contracts—that is, contracts in which the carrier undertakes substantial services with respect to storage, finishing, etc., in addition to transport services.[63] Still, there is no suggestion that these contracts are particularly unbalanced.

Altogether, it does not seem that the contract terms in operative use are very much influenced by whether or not one is inside the mandatory scope of carriage of goods legislation. Add to this the fact that evasion

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60 Per Vestergaard Pedersen, Transportret: Introduktion til reglerne om transport af gods (Thomson 2008) p. 381 fg. The General Conditions of the Nordic Association of Freight For warders (NSAB 2000) even make the Freight Forwarder to some extent liable as carrier.

61 See http://tinyurl.com/mdzr8pf for the limited geographical scope of the Convention on the Contract for the International Carriage of Goods by Road (CMR), 1956.

62 German Bundesgerichtshof 1. July 2008, Case ZR 181/05, Cour de cassation de Belgique 8 Nov 2004, case C.03.0510.N.

63 Norwegian Maritime Law Commission p. 54.

attempts are fairly rare[64]—indeed contractual incorporation of mandatory legislation by paramount clauses is more common—it can certainly be assumed that there is no great need today for mandatory carriage of goods provisions.

Mandatory regime at a cost

Even if the limitation rules are arbitrary, unnecessary, and inefficient, they do not necessarily do much harm. Unfortunately, the mandatory regimes of the carriage of goods conventions come at a cost, and in this respect, they are directly harmful.

First, the regimes create unnecessary legal expense. Considerable energy has been wasted on determining the exact borderlines between the different regimes, an exercise that seems inevitable, because courts cannot easily let parties use contracts to supplant mandatory rules. The problem is exacerbated by the fact that non-application of the conventions would constitute a violation of a treaty obligation of the State Party in question.

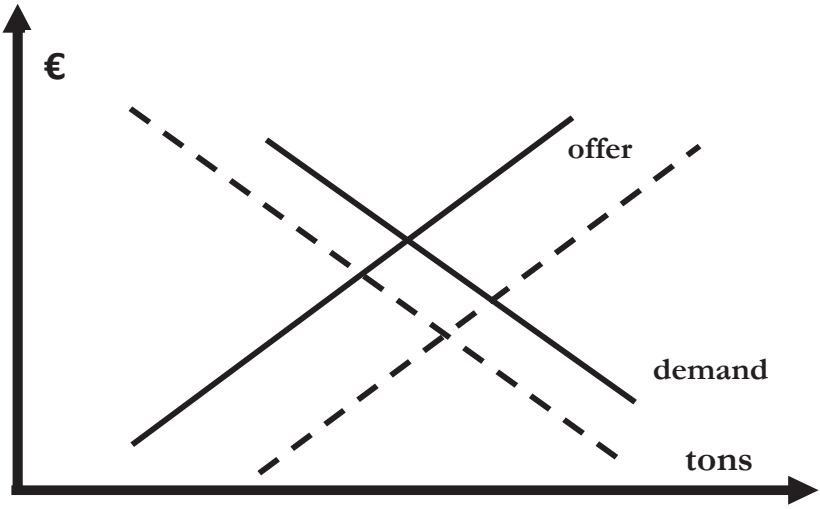
This cost is not limited to actual litigation costs. The fact that parties cannot foresee their legal position may also be costly for them, and their struggles to clarify their position may be equally expensive.

Second, a mandatory regime that tends to involve two insurers is likely to double the costs for setting up the insurance systems, and in addition, generate expenses incurred in defining the borderline between these systems. Both the Hague-Visby Rules and the Rotterdam Rules are likely to generate such unnecessary expenses, as P&I insurers as well as cargo insurers must generally be involved in every twransport. It may be, however, that the Rotterdam Rules have defined the borderline between the two insurers more clearly by abolishing the nautical error exception, albeit that in this respect, new issues may be triggered by the intricacies of Article 17 of the Rules.

Third, and not least important, is the cost of mandatory rules because of their mandatory risk distribution for cargo damage. As already mentio-

64 Sturley (2010) at p. 279.

ned, if the insurance cost is the same for the cargo owner and the carrier, it would not matter how rules, even mandatory rules, distribute the risk between the parties, because the freight will adjust accordingly. But it may very well happen that one of the carrier or the cargo owner can insure the cargo less expensively than the other. In this case, it would make commercial sense for them to levy the risk on the party that can bear it with the least expense. However, mandatory rules may prevent this levy. That would increase the total costs of the parties, as they would be forced to choose the more expensive alternative for insurance. In these cases, the offer and demand curves could be represented by the following graph.[65]



In the graph, the insurance costs associated with the carrier and the offer line are higher than the insurance costs associated with the cargo and the demand line; in both cases, the insurance costs equal the vertical distance between the solid and dotted lines. In such cases, both parties would prefer that the cargo owners insure the risk of cargo

[65] This graph is a simplified version of Erling Eide's graph 2.6 in his Annex 2 to the Norwegian Maritime Law Commission (p. 301 et seq.) Rettsøkonomiske analyser av forslaget til ny sjøtransportkonvensjon.

damage (no carrier liability), so that the freight would be fixed where the dotted lines intersect. In total, this would be less expensive for the parties than the carriers' liability, in which case the freight would be fixed at the level where the solid lines intersect.

Of course, the carrier would save a considerable amount if there were no carrier's liability—namely the value corresponding with the vertical distance between the solid offer line and the dotted offer line. Additionally, the cargo owners would recover more than their increased insurance costs by the reduction of the freight rate (which equals the vertical distances between the intersections of the solid and the vertical lines, respectively).

In such a situation, it would not make sense to impose a mandatory leglislative requirement on the parties to choose carriers' liability. Such mandatory legislation would not help either party, but it would force the parties to choose the more expensive alternative for insurance costs.

Furthermore, the mandatory legislation does not give the legislator control over who would pay these unnecessary costs. This is determined by the inclination of the offer and demand curves, that is to say, the elasticity of the offer and demand. The more sensitive the market is to changes in freights, the steeper the curves and the lower the elasticity, and the shorter the vertical distance between the crossing of the dotted and solid lines. The legislator has no control over this and may inadvertently make a party other than the intended pay a great deal of the unnecessary costs imposed on the parties.

It is highly unlikely that the legislator would actually have sufficient grasp of the market to understand the effect of the rules. Additionally, it is highly unlikely that the market would have remained the same over a period of one hundred years, and in all submarkets, so enabling the same mandatory legislation to continue to be suitable. Mandatory legislation is simply an unnecessary and irrational cost.

Conclusion drawn by the Commission

In the above discussion, it is argued that there is little need for protection of the weaker party in carriage of goods legislation and, furthermore,

that such legislation is costly for society and the parties and has little effect. Additionally, it was concluded that the liability rules are not fair in the sense that they are completely arbitrary. The Norwegian Commission acted correctly, then, to accept the Rotterdam Rules despite their mandatory character, rather than because of it. Thus, the uniformity of laws remains the core of the project.

IV Cargo documentation

The negotiable transport document

The Hague-Visby Rules do not address bill of lading issues, but only apply on the basis of the cargo documentation when a bill of lading is issued.[66] The Rotterdam Rules apply regardless of cargo documentation, but include detailed rules on a variety of transport documents and their electronic equivalents.[67] I will first address the implementation issues regarding the negotiable transport document of the Rotterdam Rules, and then the implementation issues regarding other cargo documentation.

The Rotterdam Rules abolish the term bill of lading, and use the term negotiable transport document for its equivalent. The new terminology has one advantage in that the documents may easily be disassociated from existing bill of lading rules and that the same document may be accepted more easily as cargo documentation under other unimodal conventions.

In Norway, we did not see the point of abolishing the bill of lading terminology ("konnossement"), as Scandinavian law is reluctant to let names of documents trigger or prevent any unintended legal effects.[68] On the other hand, it would be wise to link commercial practices, which

66 Hague-Visby Rules Article 10.

67 Rotterdam Rules, Article 46 *et seq.*

68 Norwegian Maritime Law Commission p. 37.

would certainly continue to use the bill of lading terminology, to the new rules. Therefore, a document called a bill of lading will be regarded as a negotiable transport document if the draft implementing legislation is adopted.

Currently, a transport document called a bill of lading (or an equivalent which must be surrendered to allow the cargo to be delivered) will be considered negotiable in Norwegian law even without an order clause.[69] If one wants to issue a non-negotiable bill of lading, a recta clause ("not to order") has to be added. In the Rotterdam Rules, the reverse applies if the implementing legislation does not provide otherwise.[70] Regardless, the Commission still proposed that an express order clause should now be required in accordance with the default rule of the Rotterdam Rules.[71] This would bring the Norwegian law in line with common international practice,[72] and also in line with the general Norwegian law on negotiable instruments.[73] International unity is particularly important here, as the character of the document may be governed by choice of law rules (e.g., *locus regit actum*) that are different from the choice of law governing the carriage of goods contract, and thus, particularities in local law may easily surprise the parties.

Even when a bill of lading or transport document is called "negotiable," it is not clear what that means. In the current Norwegian law, the bill of lading is a fully negotiable instrument, like a bill of exchange. A buyer of a bill of lading acting in diligent good faith may thus acquire a better right than his seller. In Norwegian law, this feature of the document is called "negotiabilitet," which is a term easily confusable with the term "negotiability" used in the Rotterdam Rules.

However, in the Rotterdam Rules, the term negotiable only means transferable,[74] in line with commercial usage and the usage in some

69 Norwegian Maritime Code § 292.

70 Rotterdam Rules, Article 1(15).

71 Norwegian Maritime Law Commission, draft § 251 No. 15.

72 E.g., for English law Stephen Girvin, Carriage of goods by sea (Oxford University Press 2011) p. 47.

73 Promissory Notes Act, 1939, § 11.

74 UNCITRAL Document A/CN.9/WG.III/WP.21 para 13.

countries. Whether the document should be negotiable, like a bill of exchange, is left to national law, usually the law where the bill is issued.

The Norwegian Maritime Law Commission proposed to discard national rules on the transfer of bills of lading in good faith,[75] so that a bill of lading after the implementation of the Rotterdam Rules would be transferable, but not fully negotiable. However, the term "negotiable" was maintained in the proposal, in line with the Rotterdam Rules, commercial practice, and the current Norwegian Maritime Code, but with a meaning different from that of the current Norwegian maritime law and in the current and future general Norwegian law of obligations. This is very much in line with the Rotterdam Rules, but is potentially very confusing.

It did make sense to abolish the old rules regarding the purchase of bills of lading in good faith (as stated in the previous paragraph). We found neither banks nor traders who relied strongly on this feature, and abolishing it would simplify the law. Internationally, such good faith rules are not at all of a uniform standard.

It does not really make sense to call a bill of lading negotiable (as stated in the paragraph before the previous), meaning transferable, (as the Commission proposed), since in Norwegian law, a creditor may generally assign his claim freely. Even a non-negotiable bill of lading is transferable. The best that can be said for the terminology is that it is international.

In Norwegian law, it is not important to address whether the old bill of lading, the Rotterdam Rules negotiable transport document, or any other document, is a "document of title" in the sense the expression is used at common law (document that can be used to transfer ownership). Thus, the implementation of the Rotterdam Rules did not create much of a problem in this respect.

It has already been mentioned that the claim on the carrier for delivery

[75] Norwegian Maritime Law Commission p. 37 et seq. The rules regarding reliance on the cargo description in good faith do not concern competing interests in the goods or the document, and are preserved, and so are the rules protecting a purchaser in good faith which are not directly related to the documentation.

of the cargo is freely assignable under Norwegian law. This means that a document of title, or indeed any document at all, is not needed for this purpose.

The transport documents, or the transfer or possession of them, are also irrelevant for the passing of property. In Norwegian law, the passing of property will be considered separately in different contexts—property passes gradually—and insofar that the passing of property is of importance for the position of third parties, the documentation, or other matters in the hands of the parties(such as their agreement), tend not to be the decisive factors. Thus, stoppage *in transitu* can be relied on in relation to a buyer's bankruptcy estate even after a bill of lading has been handed over with the express agreement that property has passed.[76] Likewise, a buyer can, under the circumstances, claim his goods in the seller's bankruptcy estate before the agreed time of the passing of property and the delivery of transport documents.[77] The transfer of a bill of lading does not play an important role in the passing of property, and it is, therefore, not correct to consider it a document of title in this respect either.

Even though the bill of lading or negotiable transport document cannot meaningfully be called a document of title, the document can be said to represent the goods as well as to being a key to the cargo. As a surrender document, the person who has control over it also has contractual control over the cargo. However, in cases of wrongful delivery, the claim on the carrier may not be worth much. The document may be issued by an insolvent or inaccessible carrier; furthermore, there is typically no maritime lien for misdelivery claims;[78] and under the Rotterdam Rules, the full cargo value is not recoverable anyway, as even a misdelivery claim is subject to limitation.[79] Although the document would in practice give fairly good control over the goods, the worst scenario is

[76] Mads Henry Andenæs, *Konkurs* (M.H. Andenæs 2009) p. 191–193.

[77] Andenæs *l.c.* p. 260 *et seq.*

[78] International Convention on Maritime Liens and Mortgages, 1993, Article 4, International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, 1967, Article 4 and International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926, Article 2.

[79] Rotterdam Rules, Article 59.

that the document only represents a dubious claim on the carrier for the kilo or unit limitation amount. It would therefore be quite an exaggeration to say that the document grants a title to the goods.

This control over the claim on delivery would suffice to regularly establish a constructive possession in good faith of the goods, which will extinguish some competing claims for the goods if Norwegian law is applicable. If the Commission's proposals are accepted, this would apply even to the purchaser of the document, as the purchaser in good faith would not obtain a better right than his seller.[80] However, the title to the goods acquired in this way may also be lost to others later obtaining actual or constructive possession in good faith,[81] or by someone claiming a greater right to the document. Thus, it is not only by means of special documents that such constructive possession can be established. The document as such is, therefore, rather insignificant with regard to constructive possession and hardly worthy of being called a document of title.

On this basis, there is not much to the document. Still, the claim under a bill of lading can be pledged under Norwegian law, e.g., to a bank that has received it under a letter of credit,[82] unlike a claim on a carrier not linked to a surrender document or a bill of lading under the current law. In this context, the document plays a significant role.

It is a general principle in Norwegian law that the obtaining by the pledgee of control over the pledge is insufficient to perfect the pledge. The pledgor must also be stripped of any possibility to enforce the pledged claim on delivery, and there must be a notarization made at the time of the pledge to ensure that it precedes any bankruptcy proceedings of the pledgee. Therefore, the Commission clarifies that all bill of lading originals must be surrendered to the pledgee, and the carrier must be notified about the pledge.[83]

Under current Norwegian law, an agreement on the pledging of a bill

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80 Norwegian Maritime Law Commission p. 37 *et seq.*

81 Norwegian Act No. 37/1978 on Acquiring of Chattels in Good Faith.

82 The Norwegian Mortgage Act, No. 2/1980, § 4-2.

83 Norwegian Maritime Law Commission p. 43.

of lading can be perfected simply by a transfer of possession.[84] After consultations, the banks do not seem concerned about the proposed amendments in this respect, which require notification of the carrier. Indeed, the banks have indicated that they can adapt to whichever documents the customer wishes to have presented under the letter of credit. Apparently, the value of the cargo does not play a significant role as collateral in most cases.

Other paper documentation

The Rotterdam Rules include provisions for several different types of transport documents, which can easily be reproduced and implemented in national law (or at least in Norwegian law). These are, in addition to the negotiable transport document already discussed:

- Non-negotiable transport documents (Article 45)
- Non-negotiable transport documents that require surrender (Article 46)
- Negotiable transport documents with a clause permitting delivery without surrender of the document (Article 47(2))

In all of these cases, the cargo can be lawfully delivered without surrender of the document, and to a person not entitled to it according to the document, if the goods are not claimed at destination. Thus, there is no constructive possession under the documents. One effect of this is that the documents cannot be pledged under a letter of credit to a bank or to anyone else.

As stated above, both the non-negotiable and the negotiable transport documents are transferable, and under none of these does the purchaser in good faith acquire a better right than his seller. Under the Norwegian implementation, therefore, the documents are but slight variations of the same theme. The greater difference is found in Article 41 of the Rotterdam Rules on the evidentiary effects of the bill of lading particulars, but even those differences are rather limited.

[84] The Norwegian Mortgage Act, No. 2/1980, § 4-1.

Electronic documentation

The rather simplistic approach to cargo documentation in Norwegian law (above) makes for quite painless electronic cargo documentation. Developing electronic equivalents to paper documentation in all aspects of life has been a government priority for years.

The Commission has recommended that electronic cargo documentation be referred to as "documents." In this way, one avoids the cumbersome references to "a transport document or an electronic transport record," but can instead simply refer to "a transport document." The fact that there is no such thing as an electronic document in the literal or physical sense was not cause for concern for the Commission.

In the Rotterdam Rules, one type of document has no electronic equivalent: the non-negotiable transport documents that require surrender. The Commission has not proposed to make an exception in this case from the rule that the term "documents" include electronic documents, so that a type of cargo documentation, in addition to those of the Rotterdam Rules, was provided for.[85] There is nothing in the Rotterdam Rules that obliges States Parties to only recognise or legislate the types of cargo documentation provided for in the Rotterdam Rules themselves; and the reason that this type of cargo documentation was not included in the Rotterdam Rules was probably that they are not common. The Commission was on safe ground by including this kind of cargo documentation.

As there are not many features of the paper documents left in the proposal of the Commission, the problem of finding electronic equivalents does not arise. It would have been possible to enact that an acquirer in good faith of a right under electronic cargo documentation should obtain a better right than his seller, but abolishing this kind of rule saved the trouble.

While a bill of lading (or a negotiable transport document) can be pledged by surrender and notification to the carrier under § 4-2 of the Mortgage Act, this does not apply to the rights under the electronic cargo

[85] Norwegian Maritime Law Commission p. 100.

documentation, as the Act only refers to (paper) documents. However, the cargo itself can be pledged under § 3-2 of the same act. This requires that a third party, such as the carrier, possesses the cargo on behalf of the pledgee, so that the pledger cannot make use of it. If the bank has control over the negotiable transport record, the requirements are fulfilled. Paradoxically then, cargo under electronic transport documentation can be pledged without special notification to the carrier, while cargo under a negotiable transport (paper) document can only be pledged with such notification. The difference is most likely unintentional, as the provisions on paper documentation were primarily drafted with a view toward monetary claims.

Electronic cargo documentation requires some sort of electronic signature and a service provider with a rulebook for such signatures.[86] The issues regulated in the rulebook will not be a unified body of law, but there is not much to be done about that at the implementation stage. However, a concern for the Norwegian legislators, should, in the eyes of the Commission, be to prevent the monopolisation of the systems for electronic signatures to the extent that this is not dealt with by competition law. In particular, monopolies that do not favour the safest systems and procedures may be undesirable, in particular if the risks are not apparent to all users. There is nothing in the Rotterdam Rules to prevent the States Parties from intervening in these respects. The Commission, therefore, proposed to empower the government to issue regulations on service providers of electronic signatures if deemed necessary.[87]

One example of a situation in which legislative intervention could be necessary would be if a system for electronic cargo documentation were used to promote one particular brand of electronic signatures, so that the system would not allow participants to use the electronic signatures they already use for other purposes, which may be safer or more convenient for them. It is likely that different brands of electronic signatures would expend a large amount of effort to position themselves in the market in the years to come, such as by establishing exclusivity agreements with carriers.

[86] Rotterdam Rules, Article 9.

[87] Norwegian Maritime Law Commission p. 86.

Subject to these small niggles, electronic cargo documentation and the implementation of the Rotterdam Rules should thereafter create few problems in Norwegian law.

Cargo description

The Rotterdam Rules introduce estoppel-based liability for wrongful description of the cargo in every kind of cargo documentation, and, except for non-negotiable documentation that does not need to be surrendered for delivery, the estoppel-based liability is not limited to reliance interest or specified kinds of information.[88] This is different from the current Norwegian law, which attached such estoppel-based liability only to the reliance interest in paying against bills of lading.[89]

In addition, there are special provisions in the current Scandinavian Maritime Codes relating to torts-based liability for wrongful information in a bill of lading,[90] which (at least in Norway) may even reflect a general rule on liability for wrongful information.[91] This liability, not being a transport liability, is not subject to unit or kilo limitation.

There is nothing in the Rotterdam Rules to prevent the retention of this torts law provision, or even to extend it to wrongful information in all kinds of cargo documentation. The Rotterdam Rules simply do not address this kind of liability aside from the evidence rule in Article 41. Article 4 on the applicability of the defences and the limits of liability of the Rules, therefore does not come into play. But even if the sanctions for the wrongful description of cargo fall outside the scope of the Convention, the limitation rules apply.[92] They apply to "breaches of . . . obligations under this Convention," and the duty for the carrier to provide information that is as accurate as possible is certainly an obligation under the Convention.

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88 Rotterdam Rules, Article 41.

89 Norwegian Maritime Code § 299, cp. § 209 on sea waybills.

90 Norwegian Maritime Code § 300.

91 Se to this Trond Solvang, 'Sections 299 and 300 of the Maritime Code – Carrier's Liability for misleading statements in bills of lading' MarIus 430 p. 29 et seq.

92 Rotterdam Rules, Article 59.

It is rather distasteful that the Rotterdam Rules allow the carrier to escape full liability for wrongful cargo description unless the conditions for losing the right to limit liability are fulfilled—perhaps so distasteful that it could endanger the acceptance of the entire Convention. The Norwegian (and Danish) Commissions, therefore, made sure to add another duty in addition to the duty to ensure that the statements in the bill of lading are correct, namely a duty to warn persons who could be misled by the information.[93] This duty would prevent loss in many cases and provide the carrier with unlimited liability in other cases (as the breach of this duty, not being a duty set out in the Convention, is not subject to the limitation rules of the Convention). But some cases remain in which the carrier would only have limited liability, typically when he had good reason to believe that the transport document would not be relied on by a third party.

IV Contract terms

Gap-filling law

Besides the function of the transport documentation as a cargo representative and receipt for the goods, the transport document also reproduces the contract terms—this is nothing new. However, on a few points, certain aspects, more or less linked to the transport document, had to be considered in the implementation process. A number of gap-filling provisions in the Maritime Code have been perpetuated, including the rules on freight on a *quantum meruit* basis if the transport cannot be completed.[94]

[93] Draft § 307 of the Norwegian Maritime Law Commission, the Danish Maritime Law Commission and the Danish Parliamentary Bill, respectively.

[94] Norwegian Maritime Law Commission, draft § 286.

The receiver as a contractual party

The Rotterdam Rules include a provision that a holder exercising any right under the transport document is bound by the terms ascertainable from it.[95] In the implementing legislation, a provision of the Maritime Code is perpetuated, which provides that a person who claims delivery, whether or not he is a holder, becomes a party to the contract as expressed in the transport document.[96] However, if the goods are not delivered against a transport document, the receiver is only liable for claims for freight, etc., that the receiver knew about or ought to have known about.

Article 42 of the Rotterdam Rules on freight prepaid clauses applies here, and is reproduced in this context in the draft implementing legislation.[97] This is the provision that freight cannot be claimed under a transport document with a freight prepaid clause. The placing of it in the Rotterdam Rules next to Article 41 on the evidentiary effects of the cargo description indicates that the draftsmen have viewed it as some sort of estoppel. Its placement in the draft of the Maritime Code indicates that this is a statement on the terms of delivery of the cargo.

As a rule of estoppel, Article 42 does not itself provide a basis for a claim for freight on the receiver. The proposed draft § 320g may then come to the aid of the carrier by establishing a basis for the claim on freight.

The *travaux préparatoires* of the Rotterdam Rules indicate that the clause cannot be relied on by a receiver who knew (or ought to have known?) that the freight were not in fact prepaid.[98] This fits quite well with the above-mentioned rule in draft § 320g that freight claims can be enforced against the receiver even if he has not yet got the transport document in these cases. The transport document may indicate that the receiver is liable to pay freight, etc., even if it states that the freight has

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95 Rotterdam Rules, Article. 58(2) and Norwegian Maritime Law Commission, draft § 320f.

96 See Norwegian Maritime Law Commission, draft § 320g. Such claims against the receiver are also secured by a maritime lien in the cargo, see Norwegian Maritime Code § 61.

97 See Norwegian Maritime Law Commission, draft § 320h.

98 UNCITRAL document A/CN.9/621 para 303.

been paid, where the payment obligation follows from the standard text of a document that has been stamped "freight prepaid".

The contractual shipper as a contract party

The Rotterdam Rules introduce the concept of a contractual shipper. While the Rules from the outset assign all rights and duties on the cargo side to the shipper as the contractual counterpart of the carrier, other interested parties can assume the rights and duties of the shipper by agreeing to be named as the contractual shipper.[99] An FOB seller would perhaps agree to be involved in this way in order to be consulted under the procedure for delivering the cargo without presentation of the transport documents.[100]

The current Scandinavian Maritime Codes distinguish clearly between the contractual counterpart of the carrier ("sender") and the person who delivers the goods for carriage ("avlaster"), and some rights and liabilities are assigned directly to the person who delivers the goods for carriage.[101] This includes the right to receive transport documentation and the liability for wrongful or insufficient information about the cargo.[102] In the implementing legislation, these rights and obligations are now assigned to the shipper or contractual shipper.

The concept of a contractual shipper caused uncertainty in two respects, and the Commission would have very much liked to be able to clarify this without waiting for international practice to develop. First, it is not clear how detailed and specific the agreement needs to be for a party to be considered as the contractual shipper.. Would it be sufficient not to have protested after having seen the transport document with one's name on it? The Commission suggests that a more expressly stated agreement is necessary, but that may, of course, lead to the circu-

99 Rotterdam Rules, Article 1(9). It is apparently not possible to sign up as documentary carrier, see UNCITRAL document A/CN.9/621 para 276.

100 See, *e.g.,* Rotterdam Rules, Article 47(2).

101 Norwegian Maritime Code § 251.

102 Norwegian Maritime Code § 294.

lation of misleading transport documents.[103]

Second, it was not entirely clear to the Commission whether one could agree to parts of the contractual position of the shipper without agreeing to all of it. Can one accept the position, with the reservation that one is not liable for wrongful or insufficient information about the cargo? There are no express rules that limit freedom of contract acceptance in this respect. Nevertheless, the Commission suggests that system considerations indicate that one must either accept all aspects of the position of a contractual shipper or none of them.[104]

Relationship to charter parties

Regardless of whether or not a transport document has been issued, the Rotterdam Rules also apply to cargo under a charter party, but do not apply to the relationship between the charterer and the owner.[105] In the Scandinavian Maritime Codes, Chapter 13 governs the carriage of goods by sea, and Chapter 14 governs charter parties. Chapter 14 has included some provisions from Chapter 13 pertaining to:

- tramp bills of lading (§ 325);
- safeguarding of the position of a receiver who is not the charterer (§ 347(2));
- liability of the voyage carrier (§ 347(1)); and
- liability of the time charterer (§ 383(1)).

Such provisions are mandatory in voyage chartering; in Scandinavian trade this extends to some degree to the charterer-carrier relationship as well.[106]

In the draft implementing legislation, Chapter 14 exclusively addresses the relationship between the charterer and the owner. All other relationships are referred to Chapter 13, which is made applicable by express provisions.[107] The mandatory provisions for voyage chartering in Scan-

[103] Norwegian Maritime Law Commission p. 51.
[104] See Norwegian Maritime Law Commission p. 84.
[105] Rotterdam Rules, Articles 5 *et seq.*
[106] Norwegian Maritime Code § 322.
[107] Norwegian Maritime Law Commission, draft § 253 and Rotterdam Rules, Article 7.

dinavia are upheld,[108] meaning that it does not matter for the liability in this type of trade whether the transport is carried out under a transport document, a voyage charter, or without any documentation at all.

Clauses incorporating charter party terms into the transport document are, of course, still valid at the outset.[109] Detailed rules on exceptions and rules for setting aside unusual or unreasonable terms are not set out in the draft implementing legislation. Such provisions are not found in either the current Maritime Code or in the Rotterdam Rules.

VI Delay

The Rotterdam Rules do not include a default rule to establish when the goods are considered to be delayed, but only a reference to the contract.[110] The commentaries to the Norwegian provision implementing this Article clarify that when there is no agreement, the goods must be delivered within a reasonable period of time.[111] Even a clause that expressly reserves the right of unreasonable delay to the carrier would not be upheld under Norwegian contract law, as it only recognises reasonable contracts as being valid.[112]

On this point, the *travaux préparatoires* of the Rotterdam Rules expressly leave the establishment of gap-filling laws in the hands of the national legislators.[113] It would be most unlikely in any event that the Rotterdam Rules would require States Parties to enforce a manifestly unreasonable contract to the detriment of the party otherwise protected by the Rules, or overrule foundational principles for the formation of

108 Norwegian Maritime Law Commission, draft § 322.

109 Norwegian Maritime Law Commission, draft § 325.

110 Rotterdam Rules, Article 21.

111 Norwegian Maritime Law Commission p. 71 on draft § 278.

112 Norwegian Act relating to Conclusion of Agreements, *etc*., 1918, s. 36.

113 UNCITRAL document A/CN.9/621 para 184. It also follows from Article 24 that national law determines whether doctrines of "deviation by delay" should supplement the Rules, and thus whether delay due to slow steaming should constitute (a deviation by) delay.

contracts in the States Parties.

The Norwegian Maritime Law Commission also added another gap-filling rule, this one as an addition within the text of the act: slow steaming for environmental purposes will not be considered a delay unless otherwise mutually agreed. Thus, the least environmentally friendly alternative requires express agreement. It is likely that Norwegian courts would reach the same result by interpretation, but a provision in the act creates clarity, e.g. when the agreement is "due dispatch."

Although this is an option for carriers that have no corresponding duties, this proposal has not been welcomed by all shipowners. I have difficulty seeing why the Rotterdam Rules could not or ought not to be supplemented in this way.

Another important rule that relates to delay is only stated in the *travaux préparatoires* of the Rules: damage to goods that has been caused by a delay shall be considered under the rules for cargo damage rather than under the rules for delay.[114] This has practical relevance in relation to the limitation amounts for damages. This understanding has also been referred to in the report issued by the Maritime Law Commission.[115] Had the Norwegian courts not been so attentive to such remarks in the *travaux préparatoires*, this rule would probably need to have been reflected in the text of the implementing legislation.

VII Multimodal transports

Articles 26 and 82

Multimodal transports are the Gordian knot in the legislation for the modern carriage of goods. While the transports are often door to door, the conventions and legislation tend to be unimodal and they vary considerably in their tenor. The way in which these conventions work

[114] UNCITRAL documents A/CN.9/616 para 184 og A/63/17 para 201.

[115] Norwegian Maritime Law Commission p. 74.

together is not well thought out at all, and occasional attempts to regulate the relationship between conventions often complicates matters more than it simplifies them. Different conventions are governed by different international organisations, which are under the influence of different groups of carriers, thereby complicating the conventions' coordination. In addition, it is probably the case that different groups of carriers see multimodal transports from their own perspectives, so that a combined road and sea transport will be regarded as a sea transport by a shipowner, but as a road transport by a land carrier.

When there is one set of rules to govern the entire transport, it is called a uniform approach. The Rotterdam Rules have a modified uniform approach, as the rules apply to the entire voyage when they are applicable, but they also have modifications, which state that other unimodal conventions shall apply when they explicitly provide for a voyage with a sea leg (Article 82), and that certain substantive rules of other unimodal conventions may be applicable by virtue of the Rotterdam Rules themselves Article 26).

From an implementation point of view, these rules to govern through a modified uniform approach under the Rotterdam Rules do not create many problems, except that they are somewhat complicated. However, some clarifications are needed. For example, the Norwegian Maritime Law Commission understood the rules to mean that if Article 82 were to be applied, the Rotterdam Rules would not apply to the contract at all, well knowing that this does not perhaps appear to be obvious from the wording.[116] However, the Norwegian Commission advised the courts to consider international interpretations when such interpretations develop – in priority to considering the interpretations of the Norwegian Commission.[117] Formerly, when implementing other Conventions, the Commission (then consisting of other persons) has favoured specific interpretations of the Conventions without such deference to international developments of the law.

It is to be hoped and expected that the views of the Norwegian—and

[116] Norwegian Maritime Law Commission p. 34.

[117] See Norwegian Maritime Law Commission p. 59.

Danish—Commissions are also taken into account when the Rules are construed in or by other States Parties. This applies to the above issue as well as to other interpretations considered by the Commissions. There is, in principle, no reason to discard the views of an independent commission any more than one would discard the views of a national court.

The void

The main multimodal problem from an implementation point of view is, however, which rules to apply in situations where the Rotterdam Rules do not obviously apply. The Rules leave a certain void: If the sea leg is not explicitly mentioned, the Rotterdam Rules do not apply pursuant to their wording.[118] But the implementing legislation could extend its scope, for example, in cases where a sea leg would most likely be involved, so as to clarify matters and apply the protection of the mandatory legislation to similar situations to those explicitly dealt with in the rules.

There are at least two reasons why the Commission did not recommend such an extension. First of all, the Commission did not feel that it was very important to use mandatory legislation to protect the cargo interests.[119] Second, such an extension would create quite a problem if similar extensions of the other unimodal Conventions were also to be considered. What should be the criteria for preferring the extension of one Convention over that of another?[120]

Without such an extension of the scope of the Conventions, the Commission recommended that it should be the responsibility of the parties to clarify which regime should apply to a contract of carriage that does not expressly fall under the scope of any of the unimodal Conventions.[121] If the parties do not clarify this, the courts should choose one of the conventions as a gap-filling law, depending on the nature of the form of

118 Rotterdam Rules, Article 5.

119 See discussion above in Section III.

120 See in this direction Norwegian Maritime Law Commission p. 59.

121 See to this and the following Norwegian Maritime Law Commission p. 33–34.

carriage. The Commission listed different criteria. Notably, the choice of transport document is not among these criteria, as this choice may be made as a unilateral act by the carrier if the parties have not agreed on which specific regime to apply. That being said, the use of a bill of lading could indicate a common intention of the parties to apply the maritime rules.

In this way, different carriers could offer different terms based on different regimes, even if they intend to use the same combination of, say, road and sea transport. Such differences are natural, as the carriers may have backgrounds as either sea carriers or land carriers. If the differences in the regimes—e.g., the limitation amounts—are important to the cargo owners, the difference of terms could be used as a competitive element by the carriers. It is likely such differences are not of great importance to the cargo owners.[122]

In the implementing legislation, there are no specific provisions to reflect this view. The *travaux préparatoires* recommend that the scope of the Conventions should not be expanded by interpretation (but the scope as stated in the Conventions should, of course, be fully respected).[123] Norwegian courts regularly pay attention to such remarks. At a later stage, this could be further clarified and reflected by legislation.

VIII Scope of the Convention

The scope of the provisions of the Rotterdam Rules is reproduced in the draft.[124] The comments suggest that should Norwegian law be applicable outside this scope, the Rotterdam Rules should be treated as gap-filling law.[125]

It would not make much sense to provide for mandatory legislation

[122] See Section III above.

[123] Norwegian Maritime Law Commission p. 33.

[124] Norwegian Maritime Law Commission, draft § 252.

[125] Norwegian Maritime Law Commission p. 54.

within this scope and then allow parties to agree on a choice of law that did not recognize the Rules, but the Commission observes that this is the way the Rules are most likely to be interpreted.[126] Should the Rules be construed as restricting choice of law, their ratification would be a matter for the European Community,[127] and it is unlikely that the European Community would accept the Rules. The Member States are therefore likely to insist that the Rules should be construed as not restricting choice of law. The Norwegian Commission therefore, quite pragmatically, assumes that the Rules will not prevent the parties from opting out of them. As the Commission emphasises, the uniformity aspect rather than the mandatory aspects of the Rules, this was not considered to be a significant problem.[128]

In the implementing legislation, the scope of the Rules extends to domestic transports.[129] This is very much in line with the tradition in Norway. However, some modifications have been made in order to preserve an existing semi-uniform domestic system. The domestic limitation amount is 19 SDR per kilo. The proposed high limit for delay claims (twice the freight) under the Rotterdam Rules has been made applicable to domestic transports by rail, road, and air.

The Rules are proposed to be mandatory for domestic transport.[130] Although the Commission is not a great proponent of mandatory legislation,[131] the Commission felt that a liberalisation of the domestic rules in this respect should wait until the domestic rules for all modes of transport could be liberalised simultaneously. The Commission did not have a mandate to consider this.

It is occasionally unclear whether a particular type of domestic transport forms part of an international transport. For example, a road

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126 See to this and the following Norwegian Maritime Law Commission p. 54.

127 Treaty on the Functioning of the European Union, Article 3 and, *i.a.* Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations.

128 See Section II above.

129 See to this and the following Norwegian Maritime Law Commission p. 54.

130 Norwegian Maritime Law Commission p. 56.

131 See Section III above.

carrier moves goods to a terminal on the coast, not knowing whether the goods are to be shipped further. If damage occurs on this leg, the cargo owner (who has direct action under Norwegian law) would sue the inland carrier at a limitation amount of 19 SDR per kilo, rather than sue the other carrier who has organised the international transport, which would be governed by the Rotterdam Rules limitation amounts. Such channeling has been thought undesirable, and the Commission recommends that the inland transport should be considered part of the international transport and thus would be subject to the Rotterdam Rules limitation amounts, regardless of the knowledge of the inland carrier.[132] This protection does not follow from the Rotterdam Rules or the draft implementing legislation, but (as has already been mentioned) it is common practice for the Norwegian courts to pay attention to such remarks in the *travaux préparatoires*.

IX Scope of performance

The starting point

The Rotterdam Rules apply to transports actually undertaken, which may be less than the need of the cargo owners. If a carrier agrees to undertake the carriage from A to B and later arranges for the further carriage to C, it would not be possible, even considering the protective purpose of the legislation, to conclude that the carrier really undertook to carry the goods from A to C.[133]

Even within the agreed scope of performance there are exceptions to the liability of the carrier. One important exception is the recognition of exemption clauses concerning loading and discharging operations not

[132] Norwegian Maritime Law Commission p. 55.

[133] At one stage, one discussed whether or not to «leave the description of the obligations of the carrier entirely to contractual freedom» (UNCITRAL Document A/CN.9/510 para 115), but a general text in this respect was never adopted.

performed by the carrier (FIO clauses).[134] In the following section, two similar issues that have caused doubt in the Norwegian implementation process will be discussed. They both concern options available to the implementing States. The section will focus on problems of the implementation itself, rather than the use of the options.

It would, of course, be simplest if there were no liability exceptions in the scope of the carrier's performance.[135] However, some exceptions are allowed.

The scope of performance is defined at the outset, as per Article 12(1) of the Rotterdam Rules:

> "The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered."

For cargo damage and delay within this period of responsibility, the Convention and its rules for liability apply. Outside this period, liability issues are subject to national law. The liability can at that point be strict and unlimited, or national law could potentially permit the carrier to exempt himself from liability altogether.

Some special cases of delivery of cargo are dealt with in Article 12(2) of the Rotterdam Rules. Delivery from the carriers at the destination is also dealt with in Articles 45-47 on delivery of goods under transport documentation, e.g., against presentation of the document. Delivery in these rules is likely to have the same definition as in Article 12, so that the period of responsibility does not end before these procedures are followed. In the same vein, the rule in Article 48 on goods that remain undelivered has been built on the assumption that the period of responsibility continues, but in such a way that the carrier's risk and liability is diminished. This

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[134] Rotterdam Rules, Articles 13 and 17(3)(i); Norwegian Maritime Law Commission draft §§ 262 and 274(3)(i)).

[135] It is for the shipper to prove that the damage occurred within the scope of the responsibility of the carrier; see Rotterdam Rules, Article 17(1); Norwegian Maritime Law Commission draft § 274(1).

provision also applies when no cargo documentation has been issued.

Despite these clarifications, there are plenty of situations where the exact point of delivery is unclear, perhaps especially at the end of the transport and when there is no formalised cargo documentation. Is a container left on the dock considered as being delivered when it is placed there, or later, when the receiver could or should have picked it up? And if goods are left with the carrier's independent terminal operator (who is also supposed to store the goods on behalf of the receiver), are they considered as being delivered at arrival, when they leave the terminal operator, or at some time in between?[136]

The starting point, as outlined above, may need both clarification and adjustments. This will be discussed in the following section.

First and last terminal periods

Article 12(3) of the Rotterdam Rules grants the freedom to limit the scope of the carrier's responsibility, namely to exclude the first and last terminal periods from the carrier's responsibility:

> "For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:
> (a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or
> (b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage."

Apparently this exclusion applies even if the carrier or an agent appointed by the carrier is the actual caretaker of the goods in these periods.[137] If

[136] *E.g.*, NSAB 2000 § 27 determines, for the purposes of that contract, that the transport terminal period ends and the storage period commences 15 days after the transport.

[137] Danish Maritime Law Commission p. 84, Danish Parliamentary Bill p. 67. Alexander von Ziegler, Johan Schelin and Stefano Zunarelli, *The Rotterdam Rules 2008:* Commentary to the United Nations Convention on Contracts for the International Carriage of *Goods Wholly or Partly by Sea* (Wolters Kluwer 2010) p. 81–82 discusses the issue with out a clear conclusion.

so, this is not only a provision of scope or an opportunity for clarification, but an opportunity to provide for a more far-reaching exemption than an FIO clause.

It is not clear whether the parties under this clause can define the period of responsibility so that it ends before the goods are delivered under the procedures set out in Articles 45 *et seq.* (e.g. delivery with the presentation of a negotiable transport document). It is unlikely that the intention has been to short-circuit the delivery procedures set out in these articles.

It is, however, clear from the *travaux préparatoires* of the Rotterdam Rules that States Parties are free to extend the mandatory scope of the Rules so that the Rules apply even in the first and last terminal periods.[138] This is somewhat confusing, as mandatory legislation in these periods would mean that the parties—contrary to Article 12(3)[139]—are not allowed to agree on the time and location of receipt and delivery of the goods unless they actually are delivered; and if the goods actually are delivered, the contractual clarifications would not be important for the period of responsibility. Despite this awkward relationship in the wording of the Rules, it is, nonetheless, an option for the implementing States to make the Rules mandatory in the first and last terminal periods.

In any event, the parties can (and should) clarify when the goods should be offered for delivery and when the receiver should have a duty to receive them. However, such clarifications do not affect the period of responsibility that relates to actual delivery, and the States Parties can extend the mandatory scope of the period of responsibility.

In addition, the Norwegian Maritime Law Commission (unlike the Danish Commission[140]) wished to take advantage of this option to make

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138 UNCITRAL document A/63/17 para 40.

139 There are indications in the travaux préparatoires that the period after delivery as defined in Article 12(3) was considered not only outside the scope of the period of responsibility, but also outside the scope of the Convention. Article 12(3) would then not give a right for the contractual parties to decide that the rules of the Convention should not apply. See on this point, the Yearbook of the United Nations Commission on International Trade Law, 2008, vol. XXXIX, p. 926, para 55 (Sturley).

140 Danish Maritime Law Commission p. 84–85; Danish Parliamentary Bill p. 67.

the liability provisions of the Rules mandatorily applicable to the first and last terminal periods.[141] In Scandinavia, the current implementation of the Hague-Visby Rules has also been extended to the terminal periods.[142] This has worked fairly well. There may be a need for further clarifications (e.g., regarding the exact point of delivery to the receiver), but that cannot really be resolved by an exemption clause, which does not necessarily relate to anything that can be deemed an actual delivery.

Given that the Rules should be extended to mandatorily apply to the first and last terminal periods, the wording of Article 12(3) is problematic (as already mentioned). The clause states that exclusion of liability by defining delivery is permitted in these periods. The wording of the clause, therefore, runs contrary to the liberty of the States Parties, clearly expressed in the *travaux préparatoires*, to mandatorily implement the Rules in the first and last terminal periods.

The Commission resolved the problematic wording by not reproducing Article 12(3) in the draft implementing legislation. The mandatory scope of the Rules will then be determined by Article 12(1) and (2).

It would, of course, have been good to have been able to reproduce this provision of the Rules in the implementing legislation. However, because of the way Article 12(3) is drafted, this is simply not possible for States Parties wishing to take advantage of the agreed-upon option to also make the Rules mandatorily applicable in both the first and last terminal periods.

Exceptions for certain legs

When parts of the transport are performed by others, the carrier would usually agree to be liable for these parts as a (maritime) performing party.[143] If the carrier should not wish to be responsible for these parts, there is always the possibility that the services could be defined so as to exclude the services provided by others. If this is made clear, then the carrier will not be liable for them, even if the performing parties are

[141] Norwegian Maritime Law Commission p. 67.

[142] See, *e.g.*, the Norwegian Maritime Code § 274.

[143] Rotterdam Rules, Article 18.

engaged by the carrier (on behalf of the shipper).

There are occasions, however, when a letter of credit requires transport documentation for the entire transport. In the transport documentation, the carrier undertakes the responsibility to carry the goods all the way to the intended destination. Would it still be possible to exempt liability for certain legs of the transport? This has been discussed for particular situations where the final leg of the transport is performed by the receiver or shipper ("merchant haulage").

To some extent, there will be no basis for liability against the carrier under Article 17 if the agents of the shipper or receiver have caused damage or delays, and these agents are not considered as being borrowed servants for which the carrier is responsible. However, a total exemption would be preferable for the carrier over the possibility of escaping liability by litigating the intricacies of Article 17.

Even if not addressed in the text of the Rotterdam Rules, the *travaux préparatoires* of the Rules allow for total exemptions in such cases.[144] The extent of this rule is, however, not entirely clear:

- Can the exemption apply to parts of the transport performed by any performing carrier that is not the contracting carrier, or only to parts of the transport performed by the shipper, the receiver, or anyone who can reasonably fall under the definition of "merchant"?
- Can such exemptions apply to any part of the transport and any task related to the transport, or only, for example, to the first and last leg of the transport?
- Must the exemption apply even when it is difficult or impossible for the cargo owner to make a claim against the performing party, for example, because he must be sued in a remote jurisdiction?
- Must the exemption be reflected in the transport documents, or can a receiver suing the carrier on the basis of a bill of lading be surprised by the defence that he has sued the wrong person?

[144] UNCITRAL document A/63/17 paras 45–51.

The *travaux préparatoires* of the Rules refer to current commercial practice, but it is not clear what that is.

The State Parties cannot be held liable if they abide by the wording of the Rules without recognizing merchant haulage exceptions, nor if they recognize such exceptions to be in line with the *travaux préparatoires*. Indeed, by abiding by the wording of the Rules, the implementing States can choose to do either. Even implementing States that abide by the wording and refuse to recognise merchant haulage exceptions at all should clarify their view on the exception.

For lack of better guidance, the Norwegian Commission decided to propose the retention of a similar provision in the current Scandinavian Maritime Codes § 168(2)-(3):

> "If it has been expressly agreed that a certain part of the carriage shall be performed by a named performing party, the carrier may make a reservation exempting him- or herself from liability for any loss caused by an event occurring while the goods are in the custody of the performing party. The burden of proving that the loss was caused by such an event rests on the carrier.
>
> A reservation according to paragraph two can nevertheless not be invoked if an action against the performing party cannot be brought before a Court competent according to the rules on jurisdiction in the Chapter."

It also follows from draft § 325 that such exemptions cannot be invoked unless they are reflected in the transport documentation.

The Danish proposal does not include the quoted provision from the existing Scandinavian Maritime Codes and finds it irreconcilable with the Rotterdam Rules.[145] An exception for merchant haulage is, however, accepted, but on the basis that the carriers' obligation to carry the goods despite draft § 325 is not defined at the outset by the transport document.[146]

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[145] Danish Maritime Law Commission p. 84–85 and 92; Danish Parliamentary Bill p. 67 and 72.

[146] Ibid.

X Limitation for shippers

While the limitation under the Hague-Visby Rules relates to damage of the goods, the carrier's limitation under the Rotterdam Rules is extended to all liability under the Rules, including, for example, the mutual duty to cooperate and provide information and instructions in Article 28. This is a broadening of the scope of the carriers' limitation of liability, compared to the Hague-Visby Rules. All persons on the ship's side have similar rights. Still, the shipper or persons on the cargo side have no right of limitation, even if the liability may be significant if a cargo causes damage to the ship and other cargo.

The issue of shippers' limitations is, perhaps, implicitly left to national law. One reason why limitation of the shipper's liabilities could not be agreed upon in the international negotiations was that there was no meaningful way to determine the limitation amount, so that it corresponds with the possible liabilities[147]—as if that had ever been considered necessary in the maritime limitation of liabilities. Therefore, it is reasonable to expect that the issue would be raised when considering the implementation of the Rules.

In Norway, there was no apparent industry interest in establishing a right of limitation for the shipper. It may be that the insurance arrangements were found to be adequate and also, perhaps, that the limitation was not deemed to be an arena in which a benefit could be obtained from the contractual counterparts. Furthermore, the Commission found that this right of limitation would not fit very well with the "intention" of the Rules.[148] No one considered the shippers' limitation to be a matter of principle, at least not one of such importance that it could justify non-international and more complicated rules. Consequently, no addition to the Rotterdam Rules was proposed by the Commission in this respect.

147 UNCITRAL documents A/CN.9/WG.III/WP.74 and A/CN.9/616 paras 94–99.

148 Norwegian Maritime Law Commission p. 81.

XI Jurisdiction and arbitration

The chapter on jurisdiction in the Rotterdam Rules is made optional for the States Parties,[149] presumably in order to accommodate EU member states. Jurisdictional provisions are a matter for the community and not for the member states,[150] which provides the opportunity for member states to ratify without acting jointly with the community. The chapter on arbitration is made optional in the same way,[151] presumably due to the close relationship between jurisdiction and arbitration.

Norway, not being a member of the EU, has retained the competence to determine whether or not to adopt the jurisdiction and arbitration chapters of the Rotterdam Rules. If it were to adopt these, it would have to make a special exception to the Lugano Convention to implement rules similar to the Brussels Regulations in the EU.[152] However, the preference of the Norwegian Commission was to do as Norway's EU trade partners did—that is, opting out of the jurisdiction and arbitration chapters.[153]

However, the substantive rules of the two chapters of the Rotterdam Rules were to a large extent included in the draft implementing legislation,[154] albeit not the clause on recognition of other Rotterdam Rules judgments,[155] and with a provision giving the Brussels regime precedence.[156] Even in an alternative draft that assumes adoption of the Rotterdam Rules' jurisdiction chapters, the Commission recommends

149 Rotterdam Rules, Article 74.

150 Treaty on the Functioning of the European Union, Article 3 and, *i.a.* Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation, 2012).

151 Rotterdam Rules, Article 78.

152 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2008, Article 67.

153 Norwegian Maritime Law Commission p. 46–47.

154 Norwegian Maritime Law Commission draft §§ 320i *et seq*, Alternative A.

155 Rotterdam Rules, Article 73.

156 Norwegian Maritime Law Commission, draft § 320i(1), Alternative A.

that judgments of other Rotterdam Rules States should only be recognized on the basis of the individual evaluation of each Rotterdam Rules State,[157] which assumes that the duty to recognise, as set out in the Rotterdam Rules, is subject to rules in national law.

In the current Maritime Code, there are jurisdiction provisions to ensure that cargo interests can bring actions in Norway (or another Scandinavian State) despite forum clauses.[158] The idea is to prevent the circumvention of mandatory rules by choosing a forum in a non-Hague-Visby Rules State, and perhaps also to prevent the selection of a forum in the remote domicile of the carrier due to standard forum clauses that the parties have not really considered. Such rules are perpetuated.[159]

However, the Lugano Convention requires recognition of forum clauses that point to other Lugano States.[160] Such rules, as mentioned in the previous paragraph, are, therefore, of little help, at least to avoid circumvention of the mandatory rules. One cannot expect all Lugano States to become Rotterdam Rules states.

The Danish Commission proposed similar rules on jurisdiction (and these have later been put before the Parliament).[161] Although Denmark is a member of the EU, it does not cooperate in the justice sector,[162] and has, therefore, retained competence in this area of law. However, if Sweden or Finland later decide to ratify the Rotterdam Rules, their implementing legislation would have to avoid most or all jurisdictional provisions. Should this take place, the Norwegian and Danish jurisdictional provisions would, perhaps, also have to be reconsidered.

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157 Norwegian Maritime Law Commission, draft § 320r, Alternative B.

158 Norwegian Maritime Code § 310.

159 Norwegian Maritime Law Commission, draft §§ 320i, Alternative A, and 255.

160 Lugano Convention, Article 23.

161 Danish Maritime Law Commission p. 156; Danish Parliamentary Bill p. 109.

162 Protocol (No 22) on the Position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

XII Conclusion

The Norwegian Maritime Law Commission proposed legislation on the basis of the Rotterdam Rules and, further, recommended ratification as soon as the U.S. or major European maritime states ratify them. The Rotterdam Rules and the proposal for implementation have received widespread support in Norway. It is, therefore, likely that the Ministry will dispatch a bill to Parliament with a proposal for ratification and implementation as soon as the States we are waiting upon do so.

The Danish Parliament has already adopted implementing legislation.[163] The entry into force may be delayed until the international success of the Rotterdam Rules has been ascertained.

[163] See http://tinyurl.com/o4h3gy5.

National Employment Conditions and Foreign Ships – International Law Considerations

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Content

1 Introduction[1]

A common means for states to secure the applicability of their national employment conditions over their domestic trade has been to reserve this trade to ships flying that state's own flag.[2] In states where this type of trade restriction has traditionally not been favoured, including in Europe, states have usually refrained from regulating employment conditions of foreign ships. It is accordingly unusual for states to require that crews working on board foreign ships comply with that state's national employment standards, irrespective of whether the ship in question is within the state's jurisdiction temporarily or on a more permanent basis.

Recently, however, legal developments in certain countries such as Australia and Brazil have provided renewed relevance for the ascertaining the limits of states' jurisdiction to require foreign ships to comply with national employment conditions.[3] In Norway, too, maritime labour associations have expressed an interest in a legal review being undertaken of the possibility of imposing national employment conditions on foreign-flagged ships, in particular with regard to off-shore service vessels serving installations on the Norwegian continental shelf.[4]

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1 The article is a shortened and slightly modified version of the international law chapter in an unpublished study commissioned by the Norwegian Seafarers' Union and the Norwegian Maritime Officers' Association, undertaken by Professor Erik Røsæg and the present author in late 2014.

2 See e.g. the table in T. Kvinge & A.M. Ødegård, *Protectionism or Legitimate Protection? On Public Regulation of Pay and Working Conditions in Norwegian Maritime Cabotage*, Fafo, 2010, pp. 30-31, where such requirements for 12 non-European countries are summarized based on ITF information. In summary, the report identifies "at least thirty seafaring nations in the world … that apply regulatory frameworks of various kinds to cabotage" (p. 28).

3 See notably the 2009 Australian Fair Work Act, as discussed extensively in B. Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping*, Springer, Dordrecht, 2014, p. 161-221 and the Brazilian Shipping Act (Law No. 9432/97) and S. Skinnarland and M. Mühlbradt: *Det gode liv til sjøs: lønns- og arbeidsvilkår på utenlandske skip: norsk handlingsrom*, Fafo Report 2014:19, pp. 51-55.

4 "Vurdering av NIS fartsområdebegrensning og innretning av nettolønnsordningen. Innstilling 1. september 2014 til Nærings- og fiskeridepartementet fra Utvalget

The relative shortage of state practice in this field does not, of course, mean in itself that states are legally prevented from regulating employment conditions on board foreign ships, but in the absence of a practice-induced need to assess this question, the matter has received relatively little attention in recent legal literature.

This article seeks to address this question from a public international law point of view, with a particular focus on the law of the sea. It will not come as a surprise to anyone familiar with this branch of international law that the extent to which states can regulate employment conditions on board foreign ships is not entirely clear. The law of the sea includes a series of limitations with respect to a (coastal) state's jurisdiction over foreign ships that merely pass through its coastal waters, which effectively rule out placing national employment conditions on such ships. As regards ships that voluntarily enter foreign ports or off-shore terminals, which fall under the territorial sovereignty and jurisdiction of the (port) state, the law of the sea is notably less explicit and, hence, less precise. The jurisdictional uncertainty is increased further by the fact that the question at hand partly relates to the law of the sea and partly to trade issues that are not subject to a comprehensive international regulatory framework. It appears that the link between the ship in question and the port state is of key relevance for establishing the port state's regulatory jurisdiction over the ship, but there are few obvious criteria to use for establishing whether such a link exists.

The presence of international customary law in this area is also uncertain. While states generally refrain in practice from imposing their own employment conditions on visiting ships, it is not easy to establish whether this originates from a sense of legal obligation, *opinio juris, which is a requirement for the formation of customary international law,*[5] or

oppnevnt 3. mars 2014 for vurdering av fartsområdebegrensningene i Norsk Internasjonalt Skipsregister (NIS) og innretningen av nettolønnsordningen (NIS-utvalget)" Oslo, 2014. www.regjeringen.no/contentassets/845aec95d7884956bb0b8c1a42c4a797/rapport_nisutvalget.pdf, p. 30 and 39.

[5] See notably the *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands); Judgment by the International Court of Justice of 20 February 1969, ICJ Reports 1969, para.74. For a

whether national requirements are not imposed for practical or political reasons. There are no judgments by international courts or tribunals dealing with employment conditions on foreign ships. National case law in the field is inconclusive and mostly dates from a time when the division of responsibilities between flag and port states was very different from today's situation.

This article first discusses the general jurisdictional framework under the 1982 UN Convention on the Law of the Sea (UNCLOS) (section 2), before addressing the more specific limits on port state jurisdiction under general international law (section 3). Some specific issues relating to off-shore service vessels are finally discussed, such as whether off-shore installations on the continental shelf can exercise 'port state jurisdiction' (section 4), and whether traffic between such installations and the mainland of the shelf state is to be considered 'cabotage', and the implications of that (section 5). Following a brief review of international trade law considerations (section 6), some conclusions about the Norwegian situation are made in section 7.

2 General

2.1 UNCLOS

The starting point for addressing any question relating to the distribution of rights and obligations between states with respect to regulation of shipping is the 1982 UN Convention on the Law of the Sea (UNCLOS). This convention, which is commonly labelled 'the Constitution of the Oceans', regulates states' jurisdiction over ships in significant detail, for prescriptive as well as enforcement jurisdiction, separately for each

full review of the subjective element in the formation of customary law, see the report of the International Law Association's Committee on the Formation of Customary (General) International Law, 2000, at pp. 29-42. The report is available at www.ila-hq.org/en/committees/index.cfm/cid/30.

maritime zone. The Convention is widely ratified world-wide, by 166 contracting parties, including Norway and the European Union, and is widely considered to represent customary international law.[6]

To the extent that questions relating to jurisdictional matters are not addressed in UNCLOS, reference will need to be made to general international law, which is also recognised in the last paragraph of the convention's preamble.[7] Many matters of relevance for the present topic belong to this category, implying that general international law, mostly uncodified, will play an important role in deciding the jurisdictional limits.

2.2 Flag states

The fundamental principle underlying regulation of ships is that it is for the state which has granted a ship the right to sail under its flag, i.e. the flag state, to assume the rights and obligations relating to the operation of ships, including employment matters. While the theoretical foundation of flag state jurisdiction is somewhat unclear,[8] it is a practical arrangement which ensures that ships, which are self-contained mobile units, have a comprehensive legal system applicable to them irrespective of their location and at the same time prevents them from being subjected to a multiplicity of different legal regimes along their route.

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6 See www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm

7 The paragraph affirms that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

8 Basing flag state jurisdiction on the territorial principle, on the fiction that ships are assimilated to territory, has not had much support in international law since the dictum of the PCIJ in the *Lotus* Case in 1927 (ser. A No 10). On the contrary, this idea has been categorically criticised and resisted and specifically changed in a variety of conventions, including UNCLOS (Article 91(1)) and its predecessor Article 5 of the 1958 Convention on the High Seas, which refer to the 'nationality' of ships. See also Research Report: 'Study on the Labour Market and Employment Conditions in Intra-Community Regular Maritime Transport Services Carried out by Ships under Member States' or Third Countries' Flags Aspects of International Law', by Netherlands Institute for the Law of the Sea (NILOS), University of Utrecht (Authors: Dr. E.J. Molenaar; Dr. A.G. Oude Elferink; Ms. D. Prevost) (hereinafter the NILOS Report), p. 20 with further references.

As regards the high seas, UNCLOS Article 92 is clear in stating that ships shall sail under one flag alone and "shall be subject to its exclusive jurisdiction on the high seas", "save in exceptional cases expressly provided for in this convention". The Convention includes no such express exceptions in the field of employment matters, which suggests that port and coastal states are prevented from regulating such matters, at least as far as ships on the high seas are concerned.

As to the flag state's more specific obligations in the area of employment, Article 94(1) requires every flag state to "effectively exercise its jurisdiction and control in administrative, technical and social matters", while paragraph 2(b) of the same article requires every state to "assume jurisdiction under its internal law over each ship flying its flag and its master, officer and crew in respect of administrative, technical and social matters concerning the ship."[9] While this article is placed in Part VII of the Convention, entitled 'High Seas', it follows from its nature that the duties which are laid down therein apply irrespective of the ship's location.

A similar focus on the rights and duties of flag states holds true for the main technical conventions for shipping. All of the main conventions of the principal regulatory body in shipping, the International Maritime Organization (IMO), are focused on flag state administration, with only an ancillary, supporting role for port and coastal states, normally only in the form of control procedures in ports.

The principal convention in the field of employment, the 2006 Maritime Labour Convention (MLC), similarly focuses on flag states. Even if Article V(1) provides, more broadly, that each member "shall implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction", the bulk of the implementing obligation rests on flag states, leaving mainly control functions to the port state and

[9] Finally, paragraph 3(b) of the same Article requires measures to ensure the safety at sea with regard to "the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments".

no reference at all to coastal states.[10] This is not least the case in Title 2 which deals with conditions of employment, where all obligations relating to employment agreements, wages, leave, manning etc. that have a specific addressee to them, target the flag state of the ship.[11] Title 5, which deals with compliance and enforcement, specifically separates the responsibilities of flag states from those of port states. As to the former, it provides that: "Each Member is responsible for ensuring implementation of its obligations under this Convention on ships that fly its flag",[12] while port state responsibilities are limited to inspections and other mechanisms to ensure that the standards of the convention are complied with.

The principle that the flag state exercises jurisdiction over its ships, irrespective of their location, thus has a solid foundation in treaty and customary law and faces little opposition in state practice. The flag state's jurisdiction to regulate employment conditions is very strong in the key international conventions that exist in the field, and none of the conventions discussed above provides for an explicit right for any other state to implement requirements that go beyond the ocnventions' standards as far as foreign ships are concerned.

Nonetheless, this circumstance does not, as such, exclude other states from potentially having a concurrent jurisdiction over the ship. Indeed, UNCLOS includes a great variety of instances where the flag state's jurisdiction is explicitly shared with that of a port or coastal state. Employment conditions on board ships do not belong to this category, but alternative legal bases could also exist.

2.3 Port state

In contrast to the strict jurisdictional limitations imposed on coastal states,[13] UNCLOS includes very few limitations on the right of port states to impose conditions on foreign ships. Internal waters form part of the

[10] See Articles V(2)-(4)

[11] See e.g. Standards A.2.1(1) and A.2.2(1) and Regulations 2.4(1) and 2.7(1).

[12] Regulation 5.1.1(1)

[13] See e.g. UNCLOS Articles 21 and 211

sovereignty of the state (Article 2) and in the absence of specific limitations, the jurisdiction over foreign ships in this area must therefore be assumed to be complete. In addition, the absence of a right to access foreign ports and the port state's wide discretion to exercise jurisdiction over foreign ships is acknowledged, albeit rather implicitly, in UNCLOS Articles 25(2), 211(3) and 255. None of those articles place particular restrictions on port state prescriptive and enforcement jurisdiction.

As a starting point, therefore, the port state has a strong jurisdictional claim for regulating foreign ships that voluntarily enter their ports. However, the extent of this jurisdiction varies depending, among other things, on the type of requirement which is at issue and on the methods by which the port state enforces the requirement. The more detailed reach and limitations of port states' right to exercise this jurisdiction are largely governed by general international law and potential treaty commitments. These questions are returned to in section 3 below.

2.4 Host state

A final capacity in which states are sometimes claimed to act in when regulating foreign ships is as the 'host state'. This is not a term that is used in the law of the sea, but rather used in international investment law and in relation to headquarters agreements. In EU law, the term is linked to legislation on the freedom to provide services.[14] Apart from that, it has occasionally been used in a jurisdictional sense in EU shipping regulation, when addressing matters where the interests of the port state are particularly strong and the links between the ship and the port state go beyond a temporary visit within the port state's territory. Typically the 'host state' has been used in relation to safety aspects of regular passenger traffic,[15] but it was also the term used in the European Commission's proposal for a directive regulating manning conditions

[14] See e.g. the Cabotage Regulation.

[15] See in particular Council Directive 1999/35/EC on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high speed passenger craft services. See also H. Ringbom, *The EU Maritime Safety Policy and International Law*, Martinus Nijhoff Publishers, Leiden/Boston, 2008 pp. 297-310.

for regular passenger and ferry services operating between Member States.[16] While it is true, as will be discussed in particular in section 3.4 below, that a strong connection between the port state and the subject matter which is being regulated may affect the extent of the prescriptive jurisdiction of the port state, it is clear that a change of terminology alone will have no jurisdictional implications. Merely labelling port state requirements as being imposed by a host state will not affect the jurisdictional rights and obligations in any way. For this reason the remainder of this chapter will refer to the term "port state" only.

3 Port state jurisdiction

3.1 General remarks on port state jurisdiction

It is a truism to say that the lawful implementation of a specific rule requires both a jurisdiction to prescribe the rule in question and a jurisdiction to take the enforcement measures concerned. These two types of jurisdiction (prescriptive and enforcement jurisdiction) are closely connected when it comes to the jurisdiction of port states to take measures against foreign ships. While the presence of the ship in the port serves to ensure a close link to the territorial interests of the port state and a basic right to take enforcement measures against the ship, the presence of the ship is not a sufficient jurisdictional basis for imposing *any* kind of enforcement measure or *any* type of requirement. Before the specific questions related to the application of Norwegian employment conditions on foreign ships to ships calling at Norwegian ports can be addressed, it is therefore necessary to outline the main aspects of port state jurisdiction more generally.

The first distinction to be made relates to how the port state require-

[16] Proposal for a Council Directive on manning conditions for regular passenger and ferry services operating between Member States (COM(98)251 final and COM(2000) 437 final).

ment in question is to be enforced. Enforcement measures which are widely recognised from the point of view of international law, such as the denial of access to the port,[17] which also implies, *a fortiori*, a right for the port state to make access to its ports conditional on compliance with specific requirements,[18] may be justified even if the prescriptive basis for the requirement is weak, while punitive measures, such as sanctions imposed on ships that have entered the port, may require a firmer prescriptive jurisdictional basis.[19] As a starting point, a port State is hence free to impose its national conditions for access by foreign ships to its ports, at least as long as the effect of non-compliance relates to denial of access to the port, or denial of other services associated with the port stay to which ships have no entitlement.

Since it is rarely practical or even desirable to implement national requirements by denying ships the right to enter ports, states would normally need to justify their national requirements on the basis of the territorial jurisdiction they have through the presence of the ship in their territory. It is well-established that internal waters for jurisdictional purposes may be assimilated to the land territory of the state and that ships, through their voluntary presence in the port or internal waters of another state, therefore subject themselves to the complete territorial jurisdiction of that state.[20] This applies even if there are international

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17 *Case concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America), 27 June 1986, ICJ Reports 1986, para 213. See also A.V. Lowe, 'The Right of Entry into Maritime Ports in International Law'. 14 *San Diego Law Review* 1977, pp. 597-622 and L. de la Fayette, 'Access to Ports in International Law' *International Journal of Marine and Coastal Law*, 1996, pp. 1-22.

18 Even with respect to ships in distress who request permission to go to a port or other place of refuge, the prevailing view seems to be that such ships do not have a general right of access under customary law, but that each request needs to be assessed separately on its merits. See e.g. A. Chircop, O. Lindén (eds.), *Places of Refuge for Ships – Emerging Environmental Concerns of a Maritime Custom*, Martinus Nijhoff Publishers, 2006.

19 See in particular E.J. Molenaar, 'Port State Jurisdiction toward Comprehensive, Mandatory and Global Coverage', 38 *Ocean Development and International Law*, 2007, pp. 225—257.

20 See also UNCLOS Article 2, and, e.g., K. Hakapää, *Marine Pollution in International Law, Material Obligations and Jurisdiction with Special Reference to the Third United Nations Conference on the Law of the Sea*, Suomalainen Tiedeakatemia, Helsinki

rules relating to the subject matter in question, as long as those rules do not specifically rule out the exercise of such jurisdiction by port states.[21] The fact that MLC specifically regulates employment conditions does not therefore in itself exclude a port state from applying more demanding conditions for foreign vessels voluntarily present in its ports.[22]

The wide discretion of port states is not, however, without limits. Limitations to this *a priori* unlimited jurisdiction of port states include the restraints that follow from treaty commitments, whether imposed by bilateral or multilateral, maritime, commercial or other treaties or by the set of safeguards which relate to any kind of enforcement action against foreign vessels in UNCLOS Part XII, section 7. While it is not so common for IMO or ILO conventions to explicitly prohibit port states from taking further regulatory action in a given field, there are other types of conventions which may have such effects. For example, bilateral and multilateral treaties on trade and commerce commonly include a requirement of national treatment, limiting the rules that (port) states may apply to ships of other contracting parties to those which are applied for ships flying the port state's own flag.[23] The national treatment principle

1981, p. 169; R. Jennings & A. Watts (eds.), *Oppenheim's International Law*, 9th Edition, Volume I, Longman, Harlow, 1992, p. 622; Molenaar, 1998, pp. 105, 187; and Churchill & Lowe, 1999, p. 65.

21 Independent prescriptive jurisdiction for port states is understandably not usually included in conventions which aim to harmonise regulation, though certain more recent instruments have tended to include provisions preserving the 'residual' jurisdiction of port states to take action, notwithstanding the rules of the convention. See e.g. Regulation XI-2/2(4) of SOLAS (on maritime security); Article 1(3) of the 2001 International Convention on the Control of Harmful Anti-Fouling Systems on Ships (London, 5 October 2001; and Article 2(3) of the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments. The most far-reaching example in this respect is Article 4(1)(b) of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (www.fao.org/Legal/ treaties/037t-e.pdf), according to which nothing in the agreement shall be construed to affect "the exercise by Parties of their sovereignty over ports in their territory in accordance with international law, including their right to deny access thereto as well as to adopt more stringent port State measures than those provided for in this Agreement."

22 See also the NILOS Report, pp. 84-88.

23 For example, Article 2(1) of the 1923 Statute of the International Régime for Maritime Ports, to which, Norway and certain other European states such as Sweden, Denmark,

is also a key principle under the World Trade Organization (WTO) agreements.[24] In order to limit their use of these rights, states have commonly entered into bilateral or multilateral treaties on "friendship, commerce and navigation".[25]

Restraints may also follow from the application of more general principles of general international law, such as the obligation to act in good faith or the prohibition of abuse of rights.[26] Proportionality requirements may also impose limitations, if the consequences of the requirement would be completely out of proportion with the aim it seeks to achieve.[27] These types of limitations, which may be grouped together under the general heading of 'reasonableness criteria', are clearly less specific and more dependent on the circumstances of the individual case than the relatively clear-cut, maximum limits imposed on coastal states for regulating ships transiting their maritime zones.

A second fundamental distinction that needs to be made relates to the content of the port state requirements which are at issue. While this matter has not been addressed in treaties or by international courts, it seems to be widely accepted that the extent of a port state's prescriptive jurisdiction over a foreign ship differs depending on the subject matter of the requirements then at issue. On the one hand, there are rules relating to 'static' features of ships, such as its design, construction or equipment standards, or manning levels. These features 'follow' the ship wherever

and Germany, are still parties, provides that "every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers."

24 National treatment refers to "treatment no less favourable than [the Member] accords to its own like services or service suppliers" (GATS Article XVII). See also Article III of General Agreement on Tariffs and Trade (GATT) and Article 2(1) of the WTO Agreement on Technical Barriers to Trade (TBT Agreement).

25 See e.g. de la Fayette, 1996, p. 4.

26 See also UNCLOS Article 300.

27 A proportionality requirement exists explicitly in some UNCLOS provisions relating to the enforcement of national rules against foreign ships. See e.g. Articles 221 and 232.

it is; either the ship complies or it does not, irrespective of its geographical location. Since a ship operator cannot easily change these features during a voyage, these types of requirements are often considered to be most intrusive ones with respect to ships' navigational rights. Paradoxically, however, static port state requirements are comparatively easy to justify in jurisdictional terms. If a ship fails to comply with a port state's requirement on static features, it will be in violation even while present within the port or internal waters of the state, where the prescriptive jurisdiction of states is uncontested.[28]

Port state requirements of a 'non-static' nature, which relate to specific conduct or other operational requirements on foreign ships, raise somewhat different questions. Compliance with such obligations may change during the voyage of a ship which calls for a determination of the scope of the obligation in geographical terms. If the port state regulates conduct that takes place beyond the areas over which it has explicit prescriptive jurisdiction, the requirement entails clear extra-territorial elements, in which case different jurisdictional considerations apply.

As discussed below, however, most employment conditions do not easily fit into either of these broad categories. On the one hand, a ship which fails to comply with the required employment standards is clearly also in breach of these during its stay in the port. Yet, to limit, for example, wage requirements to the time during which the ship is in the port, or even in the territorial waters of the port state, would defeat the object and the purpose of the requirement. In reality, the payment of wages is not a requirement which can be easily defined in geographical (or jurisdictional zones) terms at all.

A final distinction which could be of relevance with respect to employment conditions relates to the longstanding discussion in international law as to whether port states have any jurisdiction at all over foreign ships in matters which are purely 'internal' to the ship and therefore do

[28] See also Swedish Case No. M 8471-03, Svea Court of Appeal, Environmental Court of Appeal (Miljööverdomstolen), Judgment of 24 May 2006, where the Court confirmed that the requirement of the port of Helsingborg for ships to be equipped with selective catalytic converters to reduce nitrogen emissions, was consistent with international law, even if no such requirements had been established by IMO.

not affect the port state itself. This matter is reviewed in section 3.2 below.

It can therefore be concluded that, while states have a broad jurisdiction to regulate foreign ships in their ports in general, a number of elements of the prospective employment requirements affect the assessment of the extent to which Norway can actually rely on port state jurisdiction for this particular purpose. Those elements are in particular: the way in which the requirements will be enforced; their focus on a matter which could be argued to be 'internal' to the ship; the extension of the requirement to matters that take place beyond Norwegian territory; the substantive connection between the requirement and Norwegian interests; other relevant treaty law and 'reasonableness' considerations.

These matters will be discussed further in the remainder of the article. However, it should be pointed out that, due to the shortage of codified law in this area, all these considerations are based on relatively non-specific criteria and that there is considerable discretion for both states and courts to interpret them in their own way. Moreover, the increased use in practice of this jurisdiction by port states in the past few decades, combined with very limited protests by other states, may even by itself have had the effect of altering the legal boundaries in the past years. It should accordingly be borne in mind that the international law relating to port state jurisdiction is in a state of flux.

3.2 Internal matters

A commonly cited potential exception to this broad jurisdiction of port states relates to matters which are entirely 'internal' to the ship. Matters which do not have any bearing on the interests of the port state should accordingly be left for the flag state alone to enforce. In this way a compromise is achieved between the interests of a port state over activities within its jurisdiction and the flag state's interests in keeping its regulatory authority intact. However, the applicability of this potential limitation for the application of employment standards is uncertain.

While it seems reasonably clear that employment standards, such as

wages, would form part of such 'internal matters',[29] and that these matters are usually not regulated in practice by port states, there is disagreement among lawyers as to whether this practice is based on a legal obligation or only on considerations of comity. Two schools are usually identified: on the one hand, the French approach under which the port state is considered to be legally prevented from regulating or enforcing matters belonging exclusively to the 'internal economy' of the ship; on the other hand, the Anglo-American approach under which the restraint exercised by port states in this respect is based on considerations of comity and discretion. Many authors have noted that in practical terms the difference between the two schools is not particularly large, as countries who favour a broad jurisdiction under the Anglo-American school tend to be reluctant to make use of this jurisdiction in practice, while those adopting the French position tend to adopt an expansive understanding of what disturbs the peace of the port.[30]

This issue, which has not been regulated in multilateral treaties,[31] has long traditions in case law. It has not been addressed by international courts, but at national level the French approach dates back to two opinions given by the Conseil d'Etat in 1806,[32] whereas the US Supreme

[29] This is not the case with requirements on working hours and other standards which have a direct bearing to the safe operations of the ship. See also M.S. McDougal & W.T. Burke, *The Public Order of the Oceans*, Yale University Press, New Haven/ London, 1962, p 165, noting that states have sometimes been asserting jurisdiction on the basis of quite [is "quite" intended to mean "fairly", "relatively" or "very"?] unclear effects on the port state's public order, such as 'moral disturbance'.

[30] P.C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, G.A.Jennincas &Co, New York, 1927, p. 192; Churchill & Lowe, 1999, p. 66; M. Hayashi, 'Jurisdiction over Foreign Commercial Ships in Ports: A Gap in the Law of the Sea Codification', 18 *Ocean Yearbook*, 2004, pp. 504-505: B. Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping,* Springer, Dordrecht, 2014, p. 30.

[31] See, however, the codification projects of the Institut de Droit International in 1898, where it was recommended in a Resolution that port states only exercise their jurisdiction if conduct endangered the "peace of the port" and the 1930 Harvard Research Draft Convention on Territorial Waters which recognised the full authority over the coastal state under customary international law over all events in port, but acknowledging that "it would be desirable that states should refrain from an exercise of jurisdiction in matters which relate to the internal economy of the vessel." (Quoted in McDougal & Burke, 1962, p. 168). See also Hayashi, 2004, pp. 506-508.

[32] The *Sally* and The *Newton* 1806, Conseil d'Etat, reprinted in the article by A.N.

Court has addressed this balance in numerous cases going back to the late 19th century. While many of the cases have involved criminal or disciplinary proceedings against crewmembers,[33] some have specifically concerned employment conditions on board foreign ships.

In particular, in a series of cases related to the US National Labor Relations Act, the US Supreme Court has confirmed the power of Congress to legislate for foreign seafarers, but has concluded that Congress has not expressly exercised that power.[34] The judgments suggest, firstly, that the Supreme Court accepted that the United States had a jurisdictional right under international law to apply such statutes if that was deemed to be desirable and, secondly, that it prefers not to use that option unless the intention to have such effects has been made perfectly clear by Congress.[35]

The absence of examples in state practice of national standards affecting the internal matters of ships while in ports, in combination with protests against such plans when they have been contemplated, has led some authors to conclude that a rule of customary international law has emerged to the effect that port states are prevented from applying local laws on employment conditions.[36] The more widespread view appears to be, however, that the Anglo-American approach more accurately reflects the current state of customary law in this area, i.e. that the relative absence

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Charteris 'The Legal Position of Merchantmen in Foreign Ports and National Waters', *British Yearbook of International Law*, 1920/21, at pp. 45,51.

33 See for example *Mali v. Keeper of the Common Jail* (Wildenhus's Case), 120 US 1, p. 12 (1887)

34 *Lauritzen v. Larsen* 345 US 571(1953); *McCulloch v. Sociedad Nacional de Marineros de Honduras* 372 US 10 (1963); *Lopes v. Ocean Daphne*(1964); *Incres Steamship Co. Ltd. v. International Maritime Workers' Union* 372 US 24(1963)

35 See also cases referred to in 3.3 below, NILOS Report, p. 103, Churchill & Lowe, 1999, p. 369, A. E. Boyle, 'Proposed EU Directive on Manning Conditions for Regular Ferry Services Between EU Member States', Unpublished Opinion, 1998, p. 3.

36 See, for example, the opinion by Professor Boyle referred to in the previous note, at p. 4: "It seems clear from this history that there is both a widespread and general practice of abstaining from applying local law to the employment conditions of seafarers on foreign ships and a pattern of protests from European maritime nations when attempts are made to apply local law. Although no international court has held that such regulation is contrary to international law, the evidence considered here prima facie meets the standard for the existence of a rule of customary law."

of state practice in this field originates in practical and policy considerations, rather than in a sense of legal obligation.[37] The absence of *opinio juris*[38] would accordingly suggest that a rule of customary law has not developed in this field.[39] In other words, the absence of examples in state practice of port states imposing employment conditions on foreign ships is better explained by the fact that there may be many good policy and practical reasons to refrain from applying such standards, than by the existence of a rule prohibiting such standards as a matter of international law.

To this it may be added that, just as with the absence of examples in state practice, so likewise the protests by other states against plans for legislation involving 'internal matters' may be motivated by reasons other than purely legal.[40] It may also be noted that one of the few recent enactment of such jurisdiction, the extension in 2009 of the Australian Fair Work Act to ships that visit Australian ports, which does include obligations relating to wages on foreign flagged ships, has not generated very much diplomatic protest,[41] which in itself suggests that a more permissive stance towards port states' jurisdiction in this regard may have developed.

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37 See in particular the NILOS Report, p. 104. See also for example McDougal & Burke, 1962, pp. 164-165; Hakapää, 1981 pp. 169—170; D. P. O'Connell: *The International Law of the Sea*, Volume II, edited by I. A. Shearer, Clarendon Press, Oxford, 1984, pp. 625—626; Jennings & Watts, 1992, pp. 622—623; Churchill & Lowe, 1999, pp. 65—69; Molenaar, 1998, p. 102; BMT Murray Fenton Edon Liddiard Vince Limited, 'Study *on the economic, legal, environmental and practical implications of a European Union System to reduce ship emissions of SO2 and NOx*', No. 3623, Final Report, August 2000, Appendix 4, pp. 36—37, D.R. Rothwell & T. Stevens, *The International Law of the Sea*, Hart Publishing, Oxford/Portland, 2010, p. 56; and Marten, 2014, pp. 28-31. But see J.M. Schupp, 'The Clay Bill: Testing the Limits of Port State Sovereignty, 18 *Maryland Journal of International Law*, 1994 and P. Boisson, *Safety at Sea, Pthe olicies, Regulations & International Law*, Edition Bureau Veritas, Paris, 1999, p. 170.

38 See the North Sea Continental Shelf Case, ICJ Reports 1969, para. 74.

39 The NILOS Report, pp. 103-106. Marten, 2014, p. 31 considers that the choice of approach with respect to the 'internal matters' is a matter of domestic law only.

40 Thus Philip Jessup, 1927, p. 192 already noted that "it is noteworthy that the protests of foreign states against the application of American prohibition laws to their ships in American ports are based almost entirely upon appeals to comity rather than to law."

41 Marten, 2014, p. 195

Moreover, since the debate on this is a longstanding one and since the role of port states and, in particular, flag states has changed considerably in the past half century, it is quite conceivable that the case for leaving all 'internal' matters for the flag state to regulate has weakened through the separation of the link between the flag and the operation of the ship. While a traditional flag state with strong links to the ship and its crew may be held to be better placed to regulate the on-board employment conditions, it is less certain if that argument applies to a ship flying the flag of an open register, where there are limited if any links to the ship's beneficial owner or crewing agency.

While, therefore, the application of national wage requirements to foreign ships in Norwegian ports is unlikely to violate a rule of customary international law relating to 'internal matters' on ships, it would nevertheless be an unusual step to take in general in Europe and in particular for a country which has traditionally been among the ones protesting against such moves by other states. It is proposed below that the legal acceptability of the requirement in the end does not depend - at least not exclusively - on the legal status of the 'internal' matter requirement, but rather on the reasonableness of the requirement and its proportionality and justifiability more generally.

3.3 Extra-territorial application of port state jurisdiction

A different, though related, question concerns the effect of the port state requirements beyond the port state's own territory. It has already been noted above that in order to be effective, the employment conditions need to apply more broadly than merely during the time that the ship is in the port. This raises questions regarding "the limits of jurisdiction which can properly be claimed on the basis of the temporary presence of foreign ships in ports."[42]

Generally speaking, enforcement of a rule is only legitimate if the rule is lawfully adopted in the first place. Therefore the circumstance

[42] Churchill & Lowe, 1999, p. 69.

that the *enforcement* takes place in the port or internal waters, where the jurisdiction of States is very broad, does not do away with the need to find a justification of the rule in terms of *prescriptive* jurisdiction. The mere presence of the ship in the port is not therefore a sufficient jurisdictional basis for requirements that extend beyond the port state's territorial jurisdiction.[43] Since the prospective Norwegian employment conditions, in order to be effective, need to be applied beyond the time in which the ship is present in area where Norway has a clear and explicit territorial jurisdiction, it seems safe to assume that it needs to have another prescriptive legal basis to rely on, apart from the presence of the ship in the port.[44]

Yet, as was already noted above, UNCLOS offers no such prescriptive jurisdiction for states over social matters on board foreign ships. On the contrary, UNCLOS Article 92 specifically provides that as far as the high seas are concerned, the flag state jurisdiction is of an exclusive nature, subject only to specific limitations in that convention.

It is conceivable that the required (prescriptive) jurisdictional basis for port state requirements could be found outside the realm of UNCLOS, notably in the principles of extra-territorial jurisdiction under general international law. However, while the existence of certain principles to this effect is widely acknowledged, their respective status, scope of applicability and mutual relationship remains uncertain, due to a notable

[43] A recent judgment by the European Court of Justice goes unusually far in assuming a regulatory jurisdiction against foreign aircraft on the basis of the temporary presence of the craft at an EU Airport. The Court concluded that the implementation of an emission trading scheme that covered emissions by foreign aircraft, wherever they operated, could be justified on the basis that they voluntarily subjected themselves to the jurisdiction of EU member states by landing at their airports. According to the Court, the application of the emissions trading scheme to foreign aircraft operators "does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union." Case ECJ C-366/10, *Air Transport Association of America and Others,* para. 125.

[44] Similarly the NILOS Report, p. 101, but see Boyle, 1998, p. 2 who considers that the 'manning directive' would not have represented an exercise of extraterritorial jurisdiction.

lack of authoritative judgments at international level, and a multitude of national judgments which point in diverse directions.[45] Four main principles of extraterritorial jurisdiction are usually identified in international law:[46]

- *The personality principle* awards jurisdictions on the basis of the nationality of the subject. However, since the rules in question here are intended to cover foreign ships and operators, this principle is not relevant for present purposes. In a less established variant, the 'passive personality principle' covers the nationality of those who are affected by the act.
- *The universality principle* is also likely to be irrelevant, as only very serious crimes, such as genocide, crimes against humanity, war crimes and, in the maritime field, piracy, are normally considered to give rise to universal jurisdiction.
- *The protective or security principle* provides a right for a State to enforce against a limited category of offences which threaten the security of the State or the integrity of its government, even if the offence is committed outside its territory. The more detailed scope of this principle – notably with respect to the types of offences which are covered – is subject to debate, but in general the threshold of 'threat' for the State concerned which it seeks to cover is placed quite high.[47]

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45 See for example the Final Report of the ILA's Committee on Extraterritorial Jurisdiction, Helsinki 1996, pp. 521—522. The Committee's Chairman concluded that "it was impossible to draw up a draft convention on extraterritorial jurisdiction given the great differences of opinion which existed in this area of international law." (*Id*. at p. 525).

46 See, for example D.W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources, LIV *British Yearbook of International Law* 1983, pp. 4-14; Restatement (Third) on Foreign Relations Law (1987), §§ 402—403; R. Higgins, *Problems and Process : International Law and How we Use it,* Oxford University Press 1994, p. 89; I. Brownlie, *Principles of Public International Law,* Sixth Edition, Oxford University Press, Oxford, 2003, p. 299-305 and 466-478; A. Aust, *Handbook of International Law*, Cambridge University Press, 2005, pp. 43-48; and V. Lowe, 'Jurisdiction', in M.D. Evans (ed.), *International Law*, Second Edition, Oxford University Press, Oxford, 2006, pp. 337-356.

47 The protective principle is traditionally considered to involve crimes against the security or political stability of the State. Hakapää, 1981, p. 153, for example, refers to

- *The effects principle* which accepts jurisdiction over extraterritorial acts which have effects within the State concerned is more controversial. Under this principle, the effects of the conduct may suffice to provide a basis for jurisdiction, in particular insofar as those effects are significant and foreseeable. The principle is sometimes difficult to distinguish from the less controversial 'objective territorial principle', under which territorial jurisdiction is broadly understood and founded "when any essential constituent element of a crime is consummated on state territory".

In brief, therefore, the international law principles on extra-territorial jurisdiction are unlikely to provide further clarification as to the limits on how far port states may go in regulating the employment matters of1 foreign ships.

The state of flux in this area of international law has led certain legal scholars to settle for a rather more generic single jurisdictional principle of "substantial and genuine connection" between the subject-matter and the state exercising the jurisdiction.[48] Crawford concludes that "if there is one principle emerging, it is one of substantial and genuine connection between the subject matter of jurisdiction, and the territorial base or reasonable interests of state in question."[49] As regards port state jurisdiction, the territorial presence of the ship in the port provides for a territorial link to the state and also jurisdiction to enforce its national requirements, but that presence alone does not establish whether the connection between the port state and the re-

situations where an act "affects the basic attributes of a State as an independent member of the international community."

48 Brownlie, 2003, p. 297. See also ibid. at 305; F. A. Mann, 'The doctrine of jurisdiction in international law', *Recueil des Cours*, Collected Courses of the Hague Academy of International Law, No. 111, 1964, pp. 43–51; A.F. Lowenfeld, *International Litigation and the Quest for Reasonableness, Essays in Private International Law*, Clarendon Press, Oxford, 1996, pp. 228–232; and Jennings & Watts, 1992, pp. 457–458 and 468 and the US Restatement (Third) of Foreign Relations Law (1987), sub 403(2).

49 J. Crawford, *Ian Brownlie's Principles of Public International Law*, Eight Edition, Oxford University Press, Oxford, 2012, p. 457.

gulated matter is 'substantial and Tegenuine'.[50]

Case law understandably provides limited guidance with respect to the standards that apply for testing such a connection in relation to port states' employment conditions. While there are no international cases in this field, a few cases on advance payments, decided by the US Supreme Court in the 1920's illustrate how the link between the requirement and the ship's presence in port might be drawn.[51] The four US Seamen's Wage Acts of 1875 and 1884, which were "apparently enacted to reduce foreign shipowners' competitive advantage by indirectly forcing them to pay higher wages",[52] were held by the Supreme Court in *Strathearn Steamships Co v. Dillon* to apply to foreign crew on board foreign ships, even if the visit was only of a temporary nature. The Supreme Court considered, however, that it had been Congress's intention to limit the scope of a crew's right to advance payments to the ship's presence in US ports.[53] In *Jackson v S.S. Archimedes,* the Supreme Court specifically rejected the idea that advance payments under the US Act could also be claimed in foreign ports, before the ship's departure to the USA.[54] Following the latter case, attempts were made in Congress to extend the scope of the Act to cover payments abroad, but this was resisted, since many states (including Norway) protested.[55] Even here, however, the Supreme Court

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[50] See e.g. L.S. Johnson, *Coastal State Regulation of International Shipping*, Oceana Publications, Inc., Dobbs Ferry, 2004, p. 42: "the greater the nexus between the port state's interests and the necessity of regulating ships' activities to protect that interest, the stronger the grounds are for establishing such conditions". See also Molenaar, 2007, p. 228., H. Ringbom, 'Global Problem – Regional Solution? – International Law Reflections on an EU CO_2 Emissions Trading Schemes for Ships', 28 *International Journal of Marine and Coastal Law*, 2011, and Marten, 2014, pp. 210-220.

[51] See also BMT Report, 2000, Appendix 4, p. 39.

[52] Note: 'The Effect of United States Labor Legislation on the Flag-of Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies against Shoreside Picketing' 69 *Yale Law Journal*, 1959-60, at p. p. 507

[53] 252 U.S. 348 (1920): "taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act.

[54] 275 U.S. 463 (1928)

[55] The "storm of diplomatic protests" is referred to in *Benz v. Compania Naviera*

did not rule out its potential jurisdiction over payments abroad, but merely added that "for us to run interference in such a delicate field of international relations, there must be present the affirmative intention of the Congress clearly expressed."[56]

For a more recent indication of the type of considerations to include in an assessment of the reasonableness of the port state's measures, reference may be made to the US Restatement of Foreign Relations Law of 1987, which identifies eight different factors which need to be assessed, under *any* jurisdictional principle, before jurisdiction can be established:[57]

(a) the link of the activity to the territory of the regulating state;

(b) the connections between the regulating State and the person principally responsible for the activity;

(c) the character of the activity, the importance of regulation to the regulating State, the extent to which other States regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another State may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another State.

These criteria clearly emphasise that the interests of the port state are not

Hidalgo, S.A., 353 U.S. 138 (1957) at p. 146.

56 Id. at p. 147.

57 US Restatement (Third) of Foreign Relations Law (1987), sub 403(2)

independent from those of the flag state and/or the international community, and that the validity of the port state's claim to jurisdiction will depend on balancing these interests.

3.4 Concluding observations

All in all, the position of port states with respect to their jurisdiction to impose requirements on foreign ships is both complex and unclear. On the one hand, port states have a broad right to refuse access of foreign ships which do not meet the specific criteria that they impose. This right is not disputed and is limited only by certain general reasonableness requirements, such as proportionality and the prohibition of abuse of rights and by potential treaty obligations, including the safeguards set out in UNCLOS.

On the other hand, there seems to be no available jurisdictional foundation on which to base such requirements insofar as they create effects beyond the territory of the port state. The international law in this area is imprecise and does not easily accommodate the demands of today's international shipping, where a variety of jurisdictions may be involved in the operation of a single ship and the link between the flag and the ship's operation is often artificial.

The most recent legal studies on employment conditions imposed by port states provide a mixed picture of the legality of such requirements. While two studies prepared for the European and Norwegian Shipowners Associations are critical as to states' powers to impose such requirements, the NILOS study prepared for the European Commission takes a somewhat more positive stance. While acknowledging that such requirements are unusual, it concludes that "it is certainly not evident that the exercise of port State jurisdiction by which third States would be required to apply Community employment conditions as discussed in this Report, would be incompatible with general international law."[58]

In essence, the legality of this type of measure depends on a sufficient jurisdictional basis and the type of enforcement measures taken. To

[58] The NILOS Report, p. 105

summarise the legal situation as outlined above with respect to prospective Norwegian employment conditions, the conclusions set out in the following paragraphs would seem to ensue.

If the employment conditions were to be enforced exclusively by means of denying access to Norwegian ports of ships which fail to meet the required employment standards, its acceptability in jurisdictional terms would be easier. Such a measure could, and probably would need to, be coupled with an accompanying requirement for ships to make a notification with regard to their compliance prior to their entry to the Norwegian port. It is possible to apply this form of enforcement in a prospective way as well, by imposing a prohibition on a non-complying ship in the port entering Norwegian ports in the future, for a certain time or until compliance can be demonstrated. Similarly, requirements which are only enforced by means of denial of other services to which foreign ships have no international law entitlement, can probably be justified even with a weak prescriptive jurisdictional basis.

It should be noted, however, that denial of port access to foreign ships represents a significant intervention in maritime trade, which may be a considerable burden not only on foreign flagged ships but also on the maintainance of the Norwegian services. As a very minimum, the good faith obligation imposes limits on how far this right can be taken, but more concrete obligations will presumably follow from other types of treaty obligations, including international trade law.

With respect to ships that are present in the states' ports or internal waters, enforcement jurisdiction can normally be presumed on the basis of that presence alone. Rules relating to 'internal matters' could be an exception to this, but it may be concluded that their status as an independent legal requirement has always been uncertain and that it has probably lost even more of its relevance in view of general developments in maritime law over the past decades. Rather, for these cases it is the jurisdiction to prescribe the rules which poses the principal legal challenge. The jurisdiction to prescribe, in turn, depends on the nature of the requirement, and more particularly on whether or not it is considered to entail extra-territorial effects. If so, an express legal basis in UNCLOS

or elsewhere is needed as a foundation for the jurisdiction. Yet there is no explicit jurisdiction for states other than the flag state to prescribe employment conditions for ships, and not even an implied jurisdiction to do so beyond their own territorial sea. This suggests that the employment conditions would be limited to the time that the ship spends in the internal waters and territorial sea of the port state or to ships that operate exclusively in such waters.

However, discussing employment conditions in terms of territoriality and jurisdictional zones is largely artificial. Most employment conditions cannot easily be defined in such terms. With the exception of requirements on crew's working hours, for which there is some regulatory precedence of 'unilateralism' in Europe,[59] conditions relating to wages or applicable work agreements, are not linked to the location of the ship. Rather, they are administrative requirements placed on the shipowner or crew manager which are unconnected to the location of the operations by the ship or its crew.[60] Nevertheless, it may be considered that since the effects of the conditions would extend beyond the time which the ship spends in the port state's national waters (with the exception of ships that *exclusively* operate in such waters), the extraterritorial implications of the prospective employment standards need to be acknowledged. The requirements cannot therefore rely solely on the territorial presence of the ship in the port at the time of enforcement, but also need an additional prescriptive basis.

Other bases than UNCLOS for extraterritorial jurisdiction, based on general international law, do not add much clarity to the question. It has been proposed that there is only one principle of jurisdiction in public international law and that it is the one of a substantial and genuine con-

[59] In the case of working hours, the EU has applied requirements that extend well beyond the time that ships spend in the territorial jurisdiction of the port state, through Directive 1999/95 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports. This directive implemented ILO Convention No 181, which at the time was in force, but only ratified be a handful of states. On the other hand, the directive had quite weak enforcement provisions. See Ringbom, 2008, p. 357.

[60] See Marten, 2014, pp. 197-199.

nection between the subject-matter and the reasonable interests of state in question.

Hence, it seems that the legality of such employment conditions ultimately depends on a balancing between the interests of the port state and those of the flag states concerned. Taking into account the considerations listed in the US Restatement on Foreign Relations Law, the following observations may be noted with respect to national Norwegian employment conditions.

On the one hand, the interests of ships, flag states and the maritime community are obviously significant when it comes to the 'unilateral' use of port state jurisdiction more generally. Requirements which extend beyond the explicit prescriptive jurisdiction for different maritime zones, laid down in UNCLOS, may be perceived as undermining efforts to achieve global regulation, in relation to jurisdictional as well as substantive matters. It may be contended that the object and purpose of UNCLOS and international maritime law more generally would be undermined if individual states were entitled to impose port state requirements which challenge key features of shipping operation and set hurdles for international navigation. The absence of tradition and state practice in regulating employment conditions would present a particularly important consideration in this regard.[61]

On the other hand, the interests of the port state should not be underestimated. Equal treatment of seafarers' employment conditions is certainly a genuine and legitimate concern to begin with, seeking to eliminate discrimination between ships and to prevent social dumping. The reasonableness of the port state's claim to jurisdiction depends on the proximity of the shipping service in question and the extent of the requirement. While it is probably difficult to justify that a ship which

[61] Lowenfeld, 1996, pp. 23-24, observes that subparagraph f) of the Third Restatement's § 403(2) quoted above (on 'consistency with the traditions of the international system') was included "primarily with reference to maritime law, which by centuries-old custom limits the jurisdiction to prescribe of port states and commits most jurisdiction, including wages and working conditions of the crew, compensation for injuries and safety requirements, either to the flag state or to international treaty." (Footnote omitted) - it .

only occasionally calls at a Norwegian port should be subject to rules requiring foreign ships to apply national conditions over a longer time-frame, the situation may be quite different if the ship in question regularly operates to the port in question.[62]

Covering ships which operate exclusively, or almost exclusively, in Norwegian waters, would be easier to justify, both in terms of prescriptive jurisdiction under the law of the sea, but also with respect to the concern to improve the workers' social situation, which obviously increases with a stronger connection of the crews concerned to Norway.

A similar picture follows from international private law, in relation to determining the choice of applicable law in maritime employment contracts. In brief, the European rules in this area[63] provide that when there is uncertainty relating to applicable law for the employment contract, the choice could be made on the basis of the law of the country in which or from which the employee "habitually carries out his work",[64] [or] if "it appears from the circumstances as a whole" that the contract is "more closely connected with" another country than the choice of applicable law arrived at under the other criteria.[65] More importantly, Article 9 provides for a more general possibility to apply 'overriding

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62 Similarly, see Marten, 2014, pp. 197-198, who also notes that the Australian Fair Work legislation prescribes for weekly pay rates for foreign ships engaged in coastal trade on a short-term basis.

63 Notably, Regulation 593/2008 on the law applicable to contractual obligations (Rome I) and its predecessor, the 1980 Rome Convention on the law applicable to contractiual obligations.

64 Article 8(2) In the case of international trade, the flag state would usually be the relevant one. See W. Wurmnest, 'Maritime Employment Contracts in the Conflict of Laws', The Hamburg Lectures 2009 & 2010, Springer, 2012, p. 135. For certain examples in German case law, where the coastal state laws, not those of the flag state, have been applied to employment matters, see the NILOS Report, pp. 44 .

65 Article 8(4). The criteria to be taken into account in that assessment include the language of the contract, the use of legal concepts from a specific legal system, the currency used, the duration of the employment contract, the nationality of the contracting parties, the normal place of residence, the place where the employer supervises his staff and the place where the contract is concluded. W. Van Eeckhoutte, 'The Rome Convention on the law applicable to contractual obligations and labour law', in R. Blanpan (ed.) Freedom of services in the European Union – Labour and Social Security Law: The Bolkestein Initiative, The Hague 2006, pp. 171ff.

mandatory provisions' of third countries. The scope of this exception is not established in case law,[66] but its very presence serves to illustrate the limits of the flag state's exclusivity over employment matters.[67] More generally, therefore, international private law in this field, by calling for an evaluation of the circumstances in the individual case, negates the idea that flag states' legislation will always govern issues relating to the employment conditions of ships.

Finally, the flag state's quest for exclusive jurisdiction over employment matters can also be expected to weaken if the link between that state and the seafarers on board is faint. It is far from self-evident that some far away open register is a better state to regulate employment conditions of seafarers, with whom it has no links and who spend all their time in Norway.

In a detailed analysis of one of the few national employment schemes for foreign shipping which is currently in operation, Marten concludes that the substantial connection principle could be applied to justify the Australian Fair Work legislation. He considers the Australian rules which, *inter alia*, cover offshore service vessels,[68] to represent "a careful selection of those vessels that are already connected closely with its jurisdiction, such as ships operating out of the country's ports, or whose operators use Australia as a base."[69]

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66 U. Liukkunen, The Role of Mandatory Rules in International Labour Law *A Comparative Study in the Conflict of Laws*, Talentum, Helsinki, 2004, p. 141.

67 Marten, 2014, pp. 208-209 suggests that the Australian employment laws on wages and working hours qualify as overriding mandatory provisions under the EU rules.

68 33(1)(c) of the 2009 Fair Work Act, extends the Act's provisions to "any ship, in the exclusive economic zone or in the waters above the continental shelf, that: (i) supplies, services or otherwise operates in connection with a fixed platform in the exclusive economic zone or in the waters above the continental shelf; and (ii) operates to and from an Australian port".

69 Marten, 2014, p. 190.

4 Off-shore installations and the exercise of 'port state jurisdiction'

Ships which provide services to Norwegian off-shore installations, without making frequent or even without any calls at Norwegian ports, will obviously have a significantly weaker connection to Norway. This prompts the question as to whether the installation itself may exercise 'port state' jurisdiction, for instance with regard to service vessels that provide regular or semi-permanent services to it. The legal status of offshore installations is regulated in detail in UNCLOS.

While the waters and sea-bed within the limits of the territorial sea form parts of the area for which the coastal state exercises (territorial) sovereignty,[70] this is not the case beyond that area, where most Norwegian off-shore installations are situated. The territorial sovereignty argument, which is central to the justification for port states' extensive jurisdiction over foreign ships, is hence not available for the installations. Nevertheless, the jurisdictional authority over those installations is quite extensive.

UNCLOS Article 56(1)(a) lays down that the coastal state has "sovereign rights" for the purpose of exploring and exploiting living and non-living natural resources in the EEZ, including the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone. Subparagraph (b) grants jurisdiction with regard to the establishment of installation and structures in this zone. With respect to the latter, UNCLOS Article 60(1) establishes that coastal states have the exclusive right to construct, authorise and regulate the construction, operation and use of off-shore installations in their EEZs, and through Article 80, on their continental shelf.[71] In addition, they

[70] UNCLOS Article 2(2).

[71] In view of the parity of the legal regimes for the EEZ and the continental shelf, it seems that the nature of the installation (floating or fixed) is not of immediate importance for this matter. In addition, the broadly based jurisdiction in UNCLOS for installations and any other structures in the EEZ suggests that the considerations below also apply to other installations established in this area, such as wind farms or

have "exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations" (Article 60(2)). Coastal states may further, where necessary, establish "reasonable safety zones" of maximum 500 metres (unless a wider area is authorised by a competent international organisation). In these zones, coastal states "may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations or structures" (Article 60(3)).

On the other hand, Article 78 provides that the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters (EEZ) and that any exercise of those rights "must not infringe or result in any unjustifiable interference with navigation and other rights or freedoms of other States". Moreover, Article 58(2) provides that the high seas articles, including Article 92 providing for the exclusive jurisdiction of the flag state, apply to the EEZ "in so far as they are not incompatible with this Part".

The quoted parts of Article 60 above suggest that the jurisdiction over the installation relates to the activities on the *installation* itself. As a prolongation of those rights, it seems quite possible that unilateral requirements could be imposed by coastal states for ships serving their off-shore installations with respect to the matters listed in Article 60(2) and possibly others, such as the security of the installation.[72] By contrast, the only express jurisdiction over *ships* is the one in Article 60(3) which is limited to safety. It therefore seems that even if some degree of 'quasi port state jurisdiction' could be argued to exist for off-shore installations, this would not extend to matters which do not affect the installation as such.[73]

aquaculture installations. It may also be noted that these rules apply, independently of the nationality of the operator of the installation.

72 Cf Marten, 2014, p. 188: "Artificial structures in the EEZ are not equivalent to ports under international law in terms of jurisdiction and in most scenarios the vessels in this maritime zone enjoy the same rights as they would on the high seas". He concludes that "it would appear that the attempt to apply the [Australian Fair Work] Act to ships in the EEZ or waters above the continental shelf … contravenes UNCLOS." See also id. at p. 22

73 In this case it seems less relevant whether the ship actually moors by the installation

The absence of express or implied jurisdiction in UNCLOS to regulate ships servicing off-shore installations does not rule out that a coastal state could potentially use its sovereign rights to regulate the *access* to such installations or to provide services to them. This could be supported by the extensive and exclusive rights of the coastal states to decide on the operation of such installations combined with the absence of any right of ships to provide such services.[74] Some states have specifically enacted legislation to ensure that foreign vessels visiting such installations expressly consent to the coastal state's jurisdiction.[75] However, even if a right to impose access conditions for serving off-shore installations exists in international law, it was noted above that the corresponding right of port states is subject to a number of general limitations.[76] The same limitations, as a minimum, apply to this scenario. Employment conditions imposed on ships that do not even call at the coastal state's ports (and where the crew on board thus has no relationship to the domestic employment standards) are likely to score very badly in an assessment of the reasonableness of the measure and its connection to the interests of port/coastal state.

In view of such considerations, coastal states probably do not have jurisdiction to impose employment conditions on ships servicing their installations on that basis alone. That does not exclude, of course, that traffic to or from such installations could be included in the assessment of the national connection of the trade from the port state perspective under the principles discussed in section 2.2 above.

In conclusion, the coastal state's jurisdiction to place employment conditions on ships serving installations on its continental shelf or EEZ

or not. Its provision of services in the vicinity of the installation ought to be sufficient for this purpose.

74 Treating such installations as ports in a functional sense is also supported by the inclusion of traffic between them and the coastal state within the definition of 'cabotage', for example in Article 2(1)(b) of EU Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage).

75 See the US Deepwater Port Act 33 USC 1501-1524 (1974) and O'Connell, 1984, pp. 842-846.

76 See section 2.1 above.

is somewhat weaker, but not radically different, from that of a port state. In the end it is the connection between the requirement and the interests of that state which is decisive for the assessment of the legality of the requirement. The closer the link between Norway and the regulated services, the stronger the arguments will be as to the genuine interests of Norway in regulating this matter.

The question of whether jurisdictional limitations in this area could be avoided by the adoption of commercial policies by the operators of the installations to achieve the same result is another issue, which goes beyond the scope of the present analysis, as operators are not, as such, bound by international law. From the point of view of public international law it seems sufficient to note that, to the extent the coastal state specifically requires operators to adopt a certain policy as a condition for authorising operations on its continental shelf, those conditions would need to be consistent with the coastal state's obligations under international law.

5 International trade law and other relevant treaty limitations

It has already been noted that multilateral or bilateral treaties may impose additional limitations to port States' jurisdiction to regulate foreign ships. A potentially important category of multilateral treaties that may have such effects is the international trade law agreements under the umbrella of the World Trade Organization (WTO), in particular the General Agreement on Trade in Services (GATS). While it is not possible to assess this branch of law in detail here,[77] some general remarks may be still be justified, if only to illustrate that the considerations that apply under

[77] For a thorough assessment of trade law aspects of unilateral manning conditions by port states, see the NILOS Report, pp. 52-83. See also B. Parameswaran, *The Liberalization of Maritime Transport Services, With Special Reference to the WTO/GATS Framework*, Hamburg Studies on Maritime Affairs No. 1, Springer, Heidelberg, 2004.

international trade law are not necessarily very different from the other limitations on port States' jurisdiction discussed above.

Generally speaking, the relevant international trade agreements do not rule out the adoption of unilateral measures affecting trade, but seek to avoid their abuse by establishing certain principles to govern such measures. The key principles include 'most-favoured nation' ('MFN') treatment,[78] and 'national treatment'.[79] These principles aim at ensuring that trade from all WTO members is treated equally and that members refrain from abusive or discriminatory practices. The beneficiaries are not only ships flying the flag of another member to the WTO, but also "a person which operates and/or uses the vessel in whole or in part but which is of a non-Member".[80]

Of the obligations above, the MFN principle gives rise to particularly significant implications for shipping, being a sector that traditionally relies on reciprocal concessions. Essentially, the obligation provides that any WTO member providing services to another member has a right to the same treatment as any other country providing such services, hence allowing 'free-riders' to benefit from such concessions. Eventually, this obligation was – and still is - suspended in the maritime sector, pending the conclusion of separate negotiations over this matter.[81] However, for states that have made specific commitments in various subsectors of

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78 See, for example, the General Agreement on Trade in Services, Article II(1): "each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country". The WTO Appellate Body has held that this phrase covers both de jure and de facto discrimination. See EC-Bananas III, WT/DS27/AB/R, 1997, paras. 233-234. There could be exemptions under para.2 of the Annex on Article II Exemptions.

79 GATS Article XVII(1) provides that "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

80 GATS Article XXVIII(f)(i)In view of the broad membership of GATS, it seems clear that either of these conditions will usually be met.

81 See the Annex on Negotiation of Maritime Transport Services.

maritime transport services, the MFN obligations still applies.[82]

The GATS obligations are not absolute. Article XIV includes a set of 'general exemptions' to safeguard the interests of the enacting State.[83] The (exhaustive) exemptions include no reference to employment conditions, but such conditions could possibly fall within any of the subparagraphs quoted in the previous footnote. Apart from fitting in within one of the subparagraphs, the restrictive measures will also need to be proven necessary to achieve the relevant objective. This involves a balancing test, in which the trade restriction of the relevant measure will be weighed against how vital the protected interest is. In this case, too, employment conditions which have a close link to safety, such as rules on on-board working hours, seem easier to exempt.

There is no case in the WTO Dispute Settlement System directly dealing with employment conditions for ships, but the NILOS Study concludes, on the basis of an analysis of other relevant case law, that at least the objective of preventing social dumping could be encompassed within the scope of public order and public morals under subparagraph (a) and that such conditions could also, subject to certain conditions, be justified under the rules of the "chapeau" of Article XIV.[84]

Yet, even if there seems to be some margin for states to justify employment conditions for foreign ships under the WTO rules, there is an additional hurdle with respect to new measures affecting trade in the

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[82] However, Norway has made no commitments which are of relevance to the present topic. See also https://i-tip.wto.org/services/(S(i4r1myegpfmcur53y10bqgca))/GATS_Detail.aspx/?id=Norway&sector_path=11.A%20Maritime%20Transport%20Services

[83] Article XIV provides in the relevant parts that "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, … nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: a) necessary to protect public morals or to maintain public order…b) necessary to protect human, animal or plant life or health"…c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to … (iii) safety"..

[84] The NILOS Report, pp. 69-72, concluding on p. 81 that "the form that the relevant measure takes, and the specific objective it aims to achieve, will be crucial in establishing whether it can be justified under Article XIV".

maritime sector. While the 1994 Ministerial Decision and the accompanying Annex on Negotiation on Maritime Transport Services limited the impact of the MFN obligations on maritime transport, notably by suspending the application of the MFN requirement, the failure to conclude the rules on shipping services created an additional limitation with respect to new measures in the field. A so-called 'standstill clause' was included among the legal obligations that apply to members:[85]

> "Commencing immediately and continuing until the conclusion of the negotiations referred to in paragraph 1, it is understood that Members shall not apply any measures affecting trade in maritime transport services except in response to measures applied by other countries and with a view to maintaining or improving the freedom of provision of maritime transport services, nor in such a manner as would improve their negotiating position and leverage."

This clause, which was intended as a temporary limitation during the negotiations which were expected to be concluded within a few years, has continued remained in place following the (repeated) failure to conclude such negotiations. It prevents members from introducing new trade restricting measures, seemingly irrespectively of the policy exceptions that may otherwise apply under GATS.[86] This could represent a significant hurdle for the introduction of new measures in the field of employment conditions. Alleged violations against this clause cannot be challenged through the WTO dispute settlement, but they could justify countermeasures by other states.

6 Cabotage

The legal regime governing port state jurisdiction which has been discussed above applies to international trade, i.e. where the ships in question

[85] Decision on Maritime Transport Services, 1996 (para. VII).

[86] The NILOS Report, p. 75, Boyle Opinion, pp. 13-15

trade between the port state and another state. If the ships concerned are engaged in internal trade, a rather different legal picture emerges. Despite its obvious significance for the overall regulatory scheme for shipping, however, the international law rights and obligations that apply in domestic transport, or 'cabotage', are not very explicit. Since this is often regarded as a trade matter without international implications, UNCLOS and other jurisdictional treaties have not addressed this matter at all. Most international conventions in the maritime field limit themselves to regulating *international* transport, thereby excluding cabotage from their scope.[87] In conventions dealing with international trade and services, cabotage is similarly excluded from their scope, on the understanding that this matter is for the individual states to regulate in line with their domestic priorities.[88]

Cabotage is usually defined as the transport of goods or passengers from one port or place to another in the same country.[89] The term normally refers to a set of restrictions imposed by the state in question to reserve the domestic maritime trade for its own citizens, or to place particular conditions on foreigners engaged in this trade.[90] Such restrictions are widely used in practice, in all parts of the world,[91] typically

87 See e.g. Regulation I/1(a) of the International Convention on Safety of Life at Sea or Article 1(b) of the 1948 Convention on the International Maritime Organization.

88 See Article I(2) of GATS. Since cabotage is excluded from the concept of maritime transport services, it is also excluded from the standstill clause referred to in section 5. See also Article 9 of the 1923 International Ports Statute, providing that "This Statute does not in any way apply to the maritime coasting trade."

89 Black's Law Dictionary, 2004, p. 215.

90 Nationality requirements on ships and crew members in cabotage trade are quite common and a broad range of states implement such requirements. See, for example in the United States' 'Jones Act' (46 USC 55102), Brazilian Shipping Act (Law No. 9432/97) and in the Australian Fair Work Act. More detailed information of the requirements in individual states are given in Skinnarland and Mühlbradt, 2014, pp. 31-58.

91 Thus, for example, the Jones Act provides that trade between US ports is limited to ships owned and documented in the United States. Similarly Part 4 of the Australian Coastal Trading (Revitalising Australian Shipping) Act limits the right to engage in Australian domestic trade to ships that are specifically licensed for the purpose. Kvinge & Ødegård, 2010, p. 28, hold that "the regulations vary a great deal, and discriminating cabotage regulations are most conspicuous in North, South and Central America and South, East and South-East Asia." For a summary of practices

being justified by the need to protect the coastal transport market and the associated jobs from low-cost foreign competition. This practice has long traditions and is not usually objected to on legal grounds.

Whether transport services between the mainland and installations on the continental shelf form part of this concept is a more recent question, but one that has not been subject to much attention in legal literature or otherwise. There appears to be nothing to suggest a restrictive approach to this question. Traffic to and from off-shore installations is specifically included in the scope of EU Regulation 92/3577,[92] and the same appears to be assumed for the Norwegian trade.[93]

The legal foundation for cabotage restrictions lies in the state's territorial sovereignty and in the view that any restrictions applied on domestic voyages only concern the state's own territory.[94] The maritime zones concerned are not of relevance in this respect.[95] In the absence of specific treaty limitations, it is difficult to find limitations on the right to regulate domestic transport in general international law, even for employment conditions or (other) internal matters on board the ship. As Marten puts it, "[g]iven that the port state can legitimately prevent all foreign vessels from engaging its coastal trade, then how can international law limit its ability to allow foreign ships to compete in its domestic

within the EU, see Chapter 6 of the 'Study on the Labour Market and Employment Conditions in Intra-Community Regular Maritime Transport Services Carried out by Ships under Member States' or Third Countries' Flags', a study carried out for the European Commission by ECORYS, in 2008 and the more recent update in Skinnarland and Mühlbradt 2014, pp. 32-50.

92 Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), Article 2(1)(b).

93 E.g. Kvinge & Ødegård, 2010, p. 10.

94 See the NILOS Report, p. 104: "This discretion seems based on the specific interests of the port (or host) State and the circumstance that the extra-territorial effects are limited and do not affect the uniformity in the regulation of international maritime transport."

95 Ibid., Marten, 2014, pp. 200-201. See also Case C-323/03 *Commission of the European Communities v Kingdom of Spain* [2006] ECR I-2161 and Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), COM (2014) 232 pp. 6-7.

market, even under tight restrictions?"[96] This is particularly so in the envisaged case, where the question is not about excluding foreign ship operators or foreign nationals from engaging in cabotage services, but only about requiring them to engage in such services on an equal footing with the domestic operators.

Presumably however, at least some very basic limitations of general international law, such as those codified in UNCLOS Article 300 (abuse of a right or failure by the state to exercise good faith) would place some limits on the kind of restrictions that a port state may lawfully apply. It may be noted, though, that international law acknowledges no general customary rule prohibiting discrimination or preferential treatment between states[97] and it is doubtful if the various UNCLOS articles referring to non-discrimination between flags apply to cabotage.[98]

In practice, the most important limitations on states' flexibility to impose cabotage restrictions would normally follow from bilateral, regional or multilateral arrangements to limit restrictive practices in the interests of maintaining open maritime markets. A particularly significant instrument to this effect in Europe is EU Regulation 92/3577.[99]

7 Conclusion

This article has illustrated that the international law governing the right of states to impose employment conditions on foreign ships is a complex

[96] Marten, 2014, p. 201

[97] See Jennings & Watts, 1992, pp. 376-377: "The freedom of a state to grant preferential treatment to certain states, or to impose disadvantageous arrangements on others, has long been a valued instrument of policy in the conduct of international relations."

[98] See e.g. UNCLOS Article 227. See also Articles 24(1)(b), 25(3), 26(2), 42(2), 52(2) and 234.

[99] See note 73 above. The question as to whether transport *within* the EU, between its member states, could be considered to represent cabotage within the meaning of international law is discussed in the NILOS Report at pp. 104-105, where it is concluded that this interpretation is plausible, but not supported by state practice or even by statements and practice by the EU itself.

one. Many different areas of international law are involved, many of them remain uncodified, and even the ones that are regulated by international treaties, do not necessarily provide a very clear indication of where the legal borders lie. The uncertainty is further emphasised by the shortage of state practice and case law in the field.

It follows from the foregoing that states are not prevented from regulating conditions relating to employment, including wages, for foreign ships voluntarily entering their ports or installations. However, this right is subject to some significant limitations. In summary, the following observations may be made with respect to Norway's jurisdiction to regulate these matters.

- Traffic between off-shore installations on the continental shelf or EEZ and the same state's mainland is subject to very few international law limitations. This type of transport or services constitutes 'cabotage' trade which has long traditions and is continuously applied to some extent in all parts of the world. Even in the absence of a specific jurisdictional status of cabotage in international law, most maritime conventions, as well as the international trade law agreements, exclude domestic trade from their scope. The MLC applies to ships in domestic trade, but that convention does not prevent port states from exceeding the minimum standards laid down therein under general international law.
- The application of such conditions for ships in international trade also depends on the way it will be enforced. If non-complying ships are to be refused access to Norwegian ports or in-port services, the need for an express prescriptive basis will be reduced, which provides greater opportunities for national requirements.
- If enforcement is to be undertaken in ports, and the measures extend beyond merely declining non-complying ships some services, the matter becomes more complex. A number of different legal considerations apply and the limits of legality differ depending on the nature of the employment condition concerned. The

critical test is arguably that there needs to be a substantial and genuine connection between the requirement and the Norwegian interests regulating it.

- It is clearly easiest to justify measures that concern ships in a near-coastal trade, while the jurisdictional authority decreases with a weaker link between the ship and Norway. Local employment conditions seem particularly justifiable if the crew in question actually lives in Norway, as this strengthens the legitimacy of the measure in terms of preventing social dumping. A broadly similar picture emerges from the application of international private law on applicable law for maritime employment contracts.
- In a substantive sense, it is clear that requirements that can be linked to the safety of the port states will achieve additional weight in favour of the port state under any of the above legal assessments.
- Norway does probably not have jurisdiction to impose employment standards on ships trading between Norwegian off-shore installations and other states. However, limitations on access to the installations, or the right to provide services to them, could be justified on the basis of the 'regular' rules on port access if the connection to Norway is sufficiently strong, that is to say, where the service has strong links to Norway.
- This area of international law is quite unsettled and in a state of continuous change in the direction away from exclusive flag state jurisdiction.
- There is very little state practice on port state requirements that involve employment conditions on foreign vessels. This means that individual measures by a single state at this stage may have an important impact on the state and the boundaries of international law in this area.
- In view of the uncertainty of the legal status of this matter, considerable importance will also be attached to how other states react to the measures. In this respect it may be important to

note that one of the few examples so far of a national law that extends employment requirements to foreign ships in ports, the Australian Fair Work legislation, which maintains a close link to Australia in relation to the ships covered, has not met much opposition by other states in this respect.

Developments in the regulation of agreements on forum and choice of law

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Content

1 Introduction

The parties to international trade transactions often enter into agreements on choice of law or forum. In principle, the choice of law clause is the most far-reaching of the two, enabling a potential shift of the parties' whole legal relationship from one (background) law to another. This is normally coupled with a clause on choice of forum. This could either be the choice of the Courts of a specific country (a jurisdiction clause), or the parties could opt for an alternative dispute resolution measure, such as mediation or arbitration. In the latter case (if the clause is effective), the parties may not need the assistance of the national Courts at all, and if they do, hopefully it will only be to help the winning party enforce the judgment.

The two clauses are interlinked. On the one hand, it will be for the forum seized with the case to determine if the choice of law made by the parties is valid. And vice versa: The drafters of the parties' contract need to make sure that the choice of law does not render the forum and/or choice of law clause itself invalid or inoperable. The circularity is clear, but unavoidable.

The purpose of the clauses is to create predictability and certainty in the contractual relationship, and to make sure that any dispute between the parties is limited to a dispute on the facts and merit of the case, and thus avoid disputes regarding which forum should deal with the case, according to which rules. Further, the clauses aim at securing the dispute within one set of background rules, be they substantive or procedural, thus avoiding the adverse effects of forum shopping. This is particularly relevant in disputes within international trade and commerce, where the whole point of the parties' business is to move assets through different jurisdictions, potentially creating both Court jurisdiction and sufficient real connection to a certain set of background rules to warrant their application. Thus, the need for predictability and certainty should be of particular focus in such transactions.

At the same time, the legislator will sometimes find that certain rules

in national law are of such importance that the parties cannot derogate from them. This could be because the rules are seen as being of internationally overriding mandatory nature, such as e.g. anti-trust laws, rules on trade embargos etc. Such rules (either in the forum or in other states with which the contract is particularly connected) may potentially be applied by the Courts, especially in situations where not doing so would cause a circumvention of justice. Thus, if a certain rule is seen to be of an "internationally overriding mandatory nature", it may be applied to the case despite the fact that the parties have made a choice of law to the contrary. Finally, any Court may refuse to recognise or enforce a ruling or participate in the adjudication of a substance matter, if doing so would lead to results that are incompatible with the international public policy (or ordre public) of the forum.

In this article, the development in the regulation of the blackletter rules on formation of agreements on forum and choice of law will be considered. As an initial step, agreements on forum and choice of law will be briefly presented in an economy of law context. Both the perspective of the parties to international trade transactions and the perspective of the legislator will be deliberated. In doing this, the writer will seek to pinpoint what interests should be balanced in the legislators' decisions on how to regulate such agreements. This part of the article provides the writer with a tool with which to evaluate the regulations discussed in the remainder of the article. Secondly, the relevant international rules, when seen from an EU perspective, will be evaluated in order to assess the status quo in the current regulation of these agreements. It will be shown that in the EU international regulations are becoming less restrictive and are moving away from stringent formal criteria towards more substantive ones, and that the Courts' capacity to disallow the application of foreign law is similarly decreasing. However, non-EU international regulations are also considered in this context, in particular the regulation of the 1958 New York Convention on Recognition and Enforcement of Arbitration Awards, together with the 2005 Hague Convention on Choice of Court Agreements. Finally, at the end of the article, the writer will consider how (or indeed if) the developments

described in the main part of the article tally with the relevant provisions in the international conventions on contracts of carriage.

2 Agreements on forum and choice of law in the context of legal economy

2.1 In general

The fact that the parties to international trade transactions should have the need for predictability in their contractual relationship is normally implicitly understood by lawyers. However: the theory of legal economics may explain it more stringently. Below we will make a short excursion into the theory of legal economics, with view to creating a tool in the evaluation of the legal developments in the regulation of agreements on forum and choice of law.

As per Eide/Stavang, from an economics of law perspective, the general purpose of contracts may be defined as follows:

> "The purpose of contract law is to facilitate that the prerequisite of free competition may be better achieved, to alleviate imperfections in the market and to reduce transaction costs.

And further:

> The purpose of contract law is to (i) stimulate the parties' cooperation, (ii) create the optimal degree of performance, (iii) create the maximum of reliance, and (iv) to ***minimise negotiation costs.***"[1]

Obviously, the assumptions of the existence of informed, rational parties[2] and a perfect competition in the theory of economics are theoretical

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1 Eide/Stavang, Rettsøkonomi, 2nd. ed. Oslo, 2009, p. 291. This writer's translation and emphasis.

2 Ibid. p. 54, f.

assumptions, but in order to consider the rationale for choice of law and forum agreements the theories are apt. Below, some of these considerations will be examined, applying first the parties' and then the legislators' point of view.

2.2 The parties' perspective

Under the doctrine of *Pareto efficiency* (the transaction values are placed so that they cannot be moved to another entity and create more value for the parties to the transaction as a whole) a contract is considered effective in economic terms if it is carried out in accordance with the parties' common intention at the time of the formation of contract, at the lowest possible transaction cost, thus maximising profit.[3] From the point of view of legal economics, choice of law and forum clauses form a part of the perceived equilibrium of the contract into which the informed parties, who (at least theoretically) have the sole intention of maximizing profit, have voluntarily entered.[4] This presupposes that the parties may determine the nature of their risk and potential profit, entailing amongst other things a firm assessment of their legal rights and obligations as well as the overall transaction costs. The legal rights and obligations may only be determined if the parties know in advance which law governs their contractual relationship. As regards the potential transaction costs, these include costs for dispute resolution. Consequently, in order to assess these the parties must know in advance which forum will deal with any dispute that may arise between the parties as a result of the contract. If they cannot pinpoint these two issues with certainty, *i.e.* the choice of law and the forum, they run the risk of their legal obligations and transaction costs shifting after the conclusion of the contract – thus disturbing the perceived equilibrium and making the contract inefficient

[3] *Mentz*, Indgåelse af værnetingsaftaler i internationale kommercielle kontraktforhold, Copenhagen 2010, regarding juridsdiction agreements, and as regards alternative dispute resolution clauses *Shavell*, Alternative Dispute Resolution: An economic analysis, 24 Journal of Legal Studies (1995) 1, p. 2, ff.

[4] *Eide/Stavang* op. cit. p. 109f, and *Lando* in *Røsæg* et al., Law and Economics, Essays in honour of Erling Eide, p. 121 f.

under the Pareto doctrine.[5]

In conclusion, this means that firm choices rather than options or "floating choices" will always be more efficient under the Pareto doctrine,[6] and that it is generally in the interest of the parties to international transactions that a firm choice of law and an exclusive and firm choice of forum is made, and that it is accepted as effective by the courts.

2.3 The legislator's perspective

From the point of view of the legislator, the picture is more multi-faceted. Certainly, legislators have a real interest in supporting the efficiency of contracts in international trade, but the legislators' focus are not (and should not be) on the parties' contract *in concreto*, but on the needs of society in general. Below, some of these considerations will be briefly considered.

For our purpose, two different considerations may be distinguished:

Consideration 1: The legislators wish to ensure that the parties' consent is real.

Consideration 2: The legislators wish to limit the freedom of contract between what are perceived as unequal contractual parties, in order to ensure that the stronger party does not abuse its position.

In terms of legal economics, the legislators are compensating for the imperfections of the market.[7] In relation to contracts of carriage (as well as in relation to many other contracts) two of the main obstacles to the "perfect market" theory are that one provider of a service cannot always be substituted by another,[8] and

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5 *Ghei/Parisi*, Adverse selection and moral hazard in forum shopping: Conflicts law as spontaneous order, 25 Cardozo Law Review 1370 2003-2004, p. 1380 ff.

6 See regarding jurisdiction agreements *Mentz* op. cit. p. 98.

7 See Eide/Stavang op. cit. p. 75 ff regarding the preconditions for perfect competition.

8 Certain shipping lines do have a de facto monopoly on certain services or certain ports. And even if competing lines operate at the same port, their schedules will differ, so to send e.g. one container to a certain port at a certain point in time may realistically only be possible if the sender contracts with one particular line.

that the parties are not always equally informed.[9]

Both the first and the second consideration entail reflections as to whether or not the contract is bona fide[10] and if the parties have the same level of information. The bona fide element of *consideration 1* may be supported by substantive rules on the invalidity of contracts due to e.g. misrepresentation, fraud and duress, while the bona fide element of *consideration 2* may be supported by substantive rules outlawing certain types of contracts or contractual provisions.[11] As regards the information requirement element, *considerations 1* and *2* may be taken care of by making substantive rules that invalidate contracts of which (one of) the parties could not foresee the consequences, either in concreto[12] or in general.[13] However, the information element may also be supported by criteria designed to ensure that certain provisions have been brought to the attention of the parties and thus that in general parties will tend to be informed. Such criteria may be found in the relevant rules on formation of contracts. The criteria may be substantive, focusing on the parties'

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9 E.g. the line will have a considerably better knowledge of the conditions of its own service and its own standard terms than will the general sender of goods.

10 Eide/Stavang op. cit. p. 76.

11 Staying in the forum and choice of law frame of mind, as e.g. when Article II (1) and V(2)a of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitration Awards allow the contracting States to make provisions that certain types of disputes may not be arbitrated.

12 As e.g. the Danish Contracts Act § 36, allowing the court to invalidate a contract in whole or in part if it is perceived as unfair in concreto, which includes unfairness based on unforeseeability. Unforeseeability may also arise from the application of rules which are very different from (one of) the parties' expectations, see e.g. [1982] 1 Lloyd's Rep. 1 *"The Morviken"* in which a jurisdiction clause leading to the application of substantially lower limits of liability than allowed by the Hague Visby Rules Art. 3(8) was rendered null and void by the House of Lords. (Danish Courts have so far not accepted this line of argument, see U 1987. 492/2 Danish Supreme Court, "Tropic Jade").

13 As e.g. letters f, h, j and k listed in the Annex to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The letters consider situations where the seller is able to unilaterally change the equilibrium of the parties' contractual relationship. Such provisions are generally presumed to be unfair if they have not been individually negotiated and if they result in a significant imbalance of the parties' rights and obligations to the detriment of the consumer, see the regulation Article 3.

knowledge, and thus implicitly on the de facto consent, but not setting specific requirements as to how that knowledge is obtained. Alternatively, the criteria may be formal, focusing on how the knowledge is communicated and requiring that the information, on which the parties' knowledge and thus their implied consent is based, has been given in a specific form. In the relevant international conventions, the focus has been on the information element, and the preferred regulation has been that of applying formal criteria.[14] This will be considered further below, in point 3.1.

As has already been mentioned, the legislators have, at the same time, a real interest in supporting the (Pareto) efficiency of contracts in international trade. Since one of the preconditions of perfect competition in a contract law perspective is freedom of contract,[15] in theory even the regulations that the legislators may provide to alleviate the imperfections of the market create new imperfections. Keeping this in mind, the legislator must ask itself what regard is to be taken of *considerations 1 and 2* respectively, what regard is to be given to allowing the parties' freedom of contract. In considering this, the legislator must make a cost-benefit analysis. In terms of legal economic theory, this means that the legislators will not only consider whether the regulation is Pareto efficient, but also whether it is *Kaldor-Hicks* efficient.[16] A rule is Kaldor-Hicks efficient if the gains of the parties who benefit from the rule exceed the losses of the parties to whom the rule is detrimental. To make this analysis, the legislators must evaluate the socioeconomic value of the benefit and the detriment respectively.

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[14] See e.g. 1958 New York Convention, Article II (b); 1988 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention), Article 17; 2005 Hague Convention on Choice of Court Agreements, Article 3 and Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Art. 3.

[15] Eide/Stavang op. cit. p. 76.

[16] Eide/Stavang op. cit., p. 36f and Mentz op.c it., p. 18f with further references.

2.4 Balancing the considerations

In international business-to-business transactions, international legislators preparing conventions and EU-regulations have generally accepted the validity of agreements on forum and choice of law, provided that the information element is satisfied, meaning that the agreements and clauses will be accepted by the courts if they fulfil certain formal criteria. The satisfaction of the information criterion has been taken as an indication that the parties' consent is real.[17] In other words, in cases where it is considered evident that the parties have given an informed consent, the parties may opt out of the protection given by both the substantive provisions of the relevant national laws and protection offered by the relevant Courts.

From the point of view of legal economics it makes sense to focus on the information criterion. *Informed* business parties should be considered able to evaluate the impact and risk connected with the relevant clauses and the formal criteria will support the Pareto-efficiency of the parties' contract, both by maximising profit due to the (presumed) lessening of the transaction costs and by ensuring that it is in fact the parties' real intentions at the time of the contract that are carried out. Consequently, in Business-To-Business transactions it seems reasonable to uphold such proven choices. However, in certain situations international legislators have reserved loopholes for the application of other national laws than the ones chosen by the parties, despite the fact that the formal criteria are satisfied. Below a selection of the main blackletter rules dealing with this issue will be considered in order to pinpoint two issues, namely: 1) what the formal criteria look like and if a distinct development may be proven, and 2) the situations in which the applicable general rules of choice of forum or choice of law allow for the choice to be set aside to the benefit of national law.

[17] See e.g. regarding Article 17 in the (then) Brussels Convention on Jurisdiction and Enforcement of Judgments, Case 24/76 [1976] ECHR 1831, summary para.1, sentence 2: "The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established", and similarly Case 25/76 [1976] ECHR 1851, summary para 1, sentence 1.

3 The development in international blackletter rules

3.1 From formal criteria towards a more substantive approach

In keeping with what has been indicated above, the legislator, when introducing a formal criterion for the validity of agreements on choice of forum or choice of law, must strike a balance. If the legislator opts to introduce a stringent formal criterion, there is a good chance that the parties are indeed sufficiently informed and also that the parties will not need to litigate to determine their legal position. At the same time, however, there is a risk that that an agreement may become invalid in cases where, de facto, the parties had consented. In this way, the agreement may become *Pareto inefficient* as the parties' common intentions are not carried out. On the other hand, if the legislator opts to introduce a less stringent criterion or no formal criterion at all, relying instead on substantive rules of contract law, there is a risk that the consent is only apparent: e.g. that one of the parties has consented to the substantive provisions of the contract, but has overlooked or ignored the provisions on forum and choice of law. This might increase transaction costs, as the parties may need to litigate in order to establish whether the agreement has been entered into or not.

Generally, over the last 50 years the development in the blackletter regulation has been towards less formalism regarding agreements on choice of law and forum. This may be seen in the regulation of choice of law, jurisdiction and arbitration agreements alike, but to a diverging degree. As regards agreements on choice of law clauses, the 1955 Hague Convention on the law applicable to the international sale of goods, Article 3, establishes party autonomy but requires that the parties' choice of law follows from an *"express clause, or unambiguously result[s] from*

the provisions of the contract".[18] However, the 1980 Rome Convention on the law applicable to contractual obligations,[19] and the Rome 1 Regulation, copying that criteria,[20] only require that the choice is *"expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case"*, thus moving from a formal criterion to what must generally be seen as a substantive one. In addition, the 1968 Brussels Convention and the 2001 Brussels 1 Regulation[21] have moved from a formalistic towards a more substantive formal requirement. Originally, Article 17 of the Brussels Convention allowed for the effectiveness of jurisdiction agreements *"in writing or ... evidenced in writing."* However, the wording was changed first with the 1978 Accession Convention[22] and later with the 1988 Lugano Convention,[23] since the provision was seen to be out of step with commercial practice. The wording of the Lugano Convention, which was then adopted into the Brussels-system,[24] provides that the parties' agreement on jurisdiction should be

> "(a) in writing or evidenced in writing, or
>
> (b) in a form which accords with practices which the parties have established between themselves, or

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18 An "inferred" choice, see Cheshire/North/Fawcettt, Private international law, 14th ed., Oxford 2008, p. 701 ff.

19 OJ.C.27, 26/01/1998, p. 34–46.

20 Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

21 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

22 O.J. C 59/71, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Schlosser Report), para. 179.

23 Council Convention on jurisdiction and the enforcement of judgments in civil and commercial matters held at Lugano on 16 September 1988, Report by Mr. P. Jenard (Jenard Report), para. 55 ff.

24 See Nielsen in Magnus/Mankowski, European Commentaries on Private International Law, Brussels I Regulation, München 2011, Art. 23, paras. 7-9.

> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

Thus, as far as international trade transactions are concerned, the in writing criterion has effectively been substituted by a substantive knowledge-based criterion. In this way, the development regarding how to ensure the fulfilment of *consideration 1*, discussed above in point 2.3 (that the parties' consent is real), has moved from focusing on a formal information element towards a focus on the bona fide knowledge of the parties, irrespectively of how this knowledge is obtained.

In theory one could expect that a more informal approach to ensuring consent would lead to increased risk of forum shopping. However, in the Brussels system, the regulation on jurisdiction agreements should be seen in correlation with the regulation of lis pendens and related actions in the Brussels Convention Articles 21-23 and the Brussels I Regulation Articles 27-30. According to Article 17(1) of the Brussels Convention, prorogation agreements provide the chosen Court with exclusive jurisdiction, and according to Article 23(1) of the Brussels I Regulation there is a presumption of exclusivity for such Court. Further, it follows from Article 23 of the Brussels Convention that if a Court has exclusive jurisdiction, any other Court should refuse to handle the case. This is also presumed under Article 29 of the Brussels Regulation, which further provides for a "first past the post" regulation, according to which competing Courts have to decline jurisdiction in favour of the court first seized with the case in cases where more than one Court has "exclusive" jurisdiction. The possibility of mala fide forum shopping / a race to the court room is thus limited. In the terms of legal economics the regulation is apt, since it diminishes the risk of the same dispute being adjudicated simultaneously in different jurisdictions within the Member States, thus reducing potential transaction costs. When considering the interrelation between the regulation on the validity of jurisdiction agreements and the regulation of lis pendens in the Brussels system, the Pareto efficiency

of the parties' contract remains adequately protected.

An even further-reaching development away from formal criteria may be seen in relation to the developments in the international regulation of agreements to arbitrate. The 1958 New York Convention on Recognition and Enforcement of Arbitration Agreements Article II(1) provides that the Courts of contracting States should recognise and enforce arbitration agreements in writing. In Article II(2), it is stated that this *"shall include"* agreements to arbitrate that are *"signed by the parties or contained in an exchange of letters or telegrams"*.[25] The 1985 UNCITRAL Model Law on International Commercial Arbitration (which is not a convention, but a suggestion on an appropriate Arbitration Act for states to implement in whole or in part as national law, if they should so wish)[26] also applies the in writing criterion, however it considers it fulfilled if the parties' agreement is *"... contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange or statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another …"*. The provisions of the 1985 UNCITRAL Model law are based on[27] the wording of the 1958 New York Convention Art. II(2), and are often argued to contain only what can be seen to be acceptable under this provision.[28] However, some authors find the provision to be slightly wider than what is permissible under the 1958 New York Convention Article II(2).[29] Still,

[25] See e.g. Born, International Commercial Arbitration, Kluwer 2009, Vol. 1, p. 587 ff.

[26] As seen in the different Scandinavian states in later years.

[27] See the traveaux préparatiores, A/CN.)/207, First Secretarial Note, Possible Features of a Model Law, para. 40 ff, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL8/102/47/PDF/NL810247.pdf?OpenElement (webpage visited on 20 December 2010).

[28] See Siig, Arbitration Agreements in a Transport Law Perspective, Copenhagen 2003, p. 221 f, and United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, p. 27f. http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (webpage visited on 16 April 2015).

[29] See Born, op. cit., p. 602 f, ft. note. 193, with reference to A/40/17: Report of the UNCITRAL on the work of its eighteenth session, para. 87, http://www.uncitral.org/pdf/english/yearbooks/yb-1985-e/vol16-p3-46-e.pdf (webpage visited on 16 April

the criterion is mainly based on form. In the 2006 version of the 1985 UNCITRAL Model Law, a further step was taken away from the formal wording applied in the 1958 New York Convention. The 2006 version contains two different options; one (version 1) containing a criterion that the agreement be in writing, but that this criterion is fulfilled if "*its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.*"[30] Finally, however, the 2006 amendment of the 1985 Model Law contains a version 2, which dispatches with the in writing criterion altogether. According to the suggested provision, an arbitration agreement "*... is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*" The Model Law in this version simply does away with any formal criteria and it will consequently depend on the applicable law whether an arbitration agreement has been concluded or not; in other words, a totally substantive approach. Considering the wording of the 1958 New York Convention Article II (2), it is difficult to conclude that an approach that transforms the in writing criterion to a recorded criterion, and certainly one that dispenses with the formal criterion all together, conforms with the Convention. Consequently, arbitration agreements only fulfilling the 2006 criteria, and not the 1958 criterion, will not necessarily be enforced by the Courts of the contracting states to the New York Convention. Generally, this would entail the Convention being amended; however this may cause further uncertainties and a scattered legal framework.[31] Consequently, in order to avoid this situation, UNCITRAL has instead suggested a "recommendation" regarding the interpretation of Article II(2).[32]

2015).

30 See similarly the English Arbitration Act 1996, sec. 5: "Reference in this Part to anything being written or in writing includes it being recorded by any means."

31 See the travaux préparatoires, e.g. A/CN.9/485, point III.A, p. 15 regarding the proposed declaration on the interpretation.

32 Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958", adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session,

> "Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention ... Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards, ... Recommends that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards … 1958, should be applied recognizing that the circumstances described therein are not exhaustive."

The fact that the ways in which an arbitration agreement may be entered into, as described in Article II(2), are not exhaustive, might be acceptable, however, this does not mean that the in writing requirement may be dispensed with altogether. Consequently, UNCITRAL suggests that the Contracting States should use the more favourable rights rule in the 1958 New York Convention Article VII(1). According to that provision, contracting states are always allowed to recognise and enforce arbitration agreements and awards to a greater extent than provided by the Convention. Thus, the contracting states may opt to recognise such agreements, not basing this on the New York Convention, but based on national law. In this way, the recommendation will help keep transaction costs down, or will at least will not increase transaction costs by forcing the winning party to start new proceedings.

Considering the above findings regarding the development in other international rules, one could have expected the 2005 Hague Convention on Choice of Court Agreements to have adopted a substantive criterion as regards the formation of jurisdiction agreements. This has not, however, been the case. The Convention Article 3(c)(i)i provides that the jurisdiction agreement should be *"in writing"*, however, this is supplemented by Article 3(c)(ii), according to which *"any other means of communication which renders information accessible so as to be usable for subsequent*

United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, p. 39f. http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (webpage visited on 16 April 2015).

reference" is acceptable.[33] It is a formal requirement, but one which does not concern itself with the means of communication, but rather with securing firm evidence for the agreement. In this way, even if adopting a different approach, the regulation in the Convention is on a par with the development under the Brussels system: the focus has shifted from ensuring the satisfaction of the information element by requiring a strict adherence to form, to instead ensuring it by the satisfaction of proof of knowledge (see above point 3.1.). Again a development towards the more substantive criteria.

3.2 Loopholes for national law

As a starting point, if the formal – or in later years, to an increasing degree substantive – criteria for formation of agreements on choice of law or forum are satisfied, the Courts in States that are bound by the above regulations will enforce the agreement. However, certain safeguards are provided for, allowing national courts to refuse to enforce the parties' agreement.

3.2.1 Application of other mandatory rules to the dispute despite the parties' choice of law to the contrary

3.2.1.1 a) The content of the blackletter rules

Even if a choice of law provision has been validly entered into by the parties, it may not always lead to total exclusion of the application of other rules of law in the adjudication of the case. Thus, it follows from Article 3(3) in both the Rome Convention 1980 and the Rome I Regulation that, in the absence of an international element to the parties' contract, they cannot derogate from the mandatory rules that would otherwise apply. A choice of law agreement is, in itself, not a carte blanche, allowing the parties to circumvent undesirable national rules. For contracts where there is a bona fide international element, it follows from the Rome

[33] Similarly to the 1996 English Arbitration Act, sec. 5, applying the criterion "recorded in any form".

Convention 1980 Art. 7(2) and the Rome I Regulation Article 9(2) that the forum which is judging the dispute, may apply those provisions of its own law which are seen as internationally mandatory. In the Rome I Regulation internationally mandatory rules are named *"overriding mandatory rules"* and are defined in Article 9(1), as rules that *"... are regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation"*.

The inclusion of a definition of the term "overriding mandatory rules" is a novelty compared to the 1980 Rome Convention,[34] and stresses that in order to be "internationally mandatory" the rule should not only protect weaker parties but should also have regard to the collective, and protect a real public interest. Pauknerová[35] gives as examples traditional public law rules, such as *"... foreign exchange control, price regulations, foreign trade embargos, various tariff provisions, rules on cartels ..."* etc.

Finally, under both the Rome Convention 1980 Article 7(1) and the Rome I Regulation Article 9(3), the Courts have a discretionary competence to apply internationally mandatory rules of another state to which the contractual relationship has a close connection. Under both set of rules the Courts should consider "[the] *nature and purpose and …the consequences of* [the] *application or non-application"* of the rules they are purporting to invoke. However, under the Rome I Regulation, only the rules at the place of performance of the contract may be applied, and even then, such rules may only be applied if *"those overriding mandatory provisions render the performance of the contract unlawful."* In this way, the de facto protection of party autonomy, and thus the *Pareto efficiency* of the parties' contract, has been awarded a considerably higher level of protection. It is no longer sufficient for the potential application of other rules that they are somehow connected to the contract – which may be said for the rules of many jurisdictions in a contract of international character. They are only relevant if they apply at the place of performance. And going further: not only must the application of the rules lead to a different result than what follows from the rules that the parties wished

[34] Nielsen, Rom-I-forordningen, U 2008B.234, p. 240 ff.

[35] Paukerová, op. cit. p. 30.

to employ; they must render the contract unlawful as such.[36]

3.2.1.2 b) Evaluation of the blackletter rules in the light of the economic efficiency of the parties' contract

If we consider the development in the rules from the point of view of the economic efficiency of the contract,[37] one must note that the situations in which the parties' choice of law is set aside in whole or in part are limited to situations where there is a clear connection between the (performance of the) parties' contract and the mandatory rules sought to be applied. If we apply the presumption (however fictitious) of the informed party, provided the application of such rules is foreseeable at the time of the conclusion of the contract, the *Pareto efficiency* of the contract is not impaired. The balance of the contractual relationship is not altered by what the parties already knew. From the legislator's point of view, limiting the freedom of contract (*consideration 2* under point 2.3. above) may therefore be acceptable. This is especially so if the elements weighed, when balancing the interests made when evaluating the *Kaldor-Hicks efficiency* of the rule in its national context, remain unaltered when applied to the parties' contractual relationship.

In situations where the contract has no international element at all, the rationale for allowing the parties to choose the law of their contract, namely to create foreseeability in the contractual relationship, is negligible. The parties already benefit from the foreseeability provided by the law applicable to the contract. Attempting to evade the general national mandatory rules by making a choice of law on the substance matter of the dispute may therefore be seen as being simply that: an attempt to evade. This applies even if the choice of law is bona fide as such, and has been made e.g. because the rules of other jurisdictions seem more apt, e.g. because those rules are more up-to-date. The regulations in the Rome Convention and the Rome I Regulation Article 3(3), barring the parties from lifting their contractual relationship out of their own national rules

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36 Nielsen, International Handelsret, 3rd ed, Copenhagen 2015, p. 204 f.

37 See above point 2.3.

when there is no international connection, consequently seem appropriate. The balancing of interests made under the *Kaldor-Hicks*' evaluation of the mandatory rules in the (only) national law to which the contract is connected, remains intact and should be respected despite the parties' choice of law to the contrary.

As far as contracts with a real international element are concerned, the possibility of applying the internationally mandatory rules of a forum not chosen by the parties is more problematic. In those cases, the parties' interest in securing the contractual relationship inside a distinct legal framework is real. With regard to the rules in the Rome Convention Article 7(2) and the Rome I Regulation Article 9(2), according to which the Courts may always apply the internationally mandatory rules of the forum, that regulation only comes into play when the parties' contractual relationship contains features that allow the Courts of the forum to assume jurisdiction. In cases where the Court's jurisdiction is based on the parties' prorogation agreement, the parties cannot realistically expect that internationally mandatory rules of the chosen forum will be irrelevant to the case. Equally, in cases where the Courts have established their jurisdiction based on other rules, such rules normally require a connecting factor between the parties' contractual relationship and the (performance of their) contract. Nonetheless, it is not possible in reality for the parties to an international contract, and particularly an international contract within the shipping trade, to pinpoint in advance which Courts may potentially deal with the case in the future. On this basis, any application of the law based solely on a lex fori rule may challenge the *Pareto efficiency* of the parties' contract, if the forum is not the forum chosen by the parties in advance.

Turning finally to the possibility of applying the internationally mandatory rules of other jurisdictions than that the forum state, the more restrictive approach towards the application of overriding mandatory rules, provided for in the Rome I Regulation Article 9(3), is to be preferred over the regulation given in the Rome Convention Article 7(1). The place of performance of the obligations under the contract will either follow explicitly from the parties' contract, or may at least be inferred

from it under the application of the law of the contract. Consequently, the place of performance may be pinpointed in advance and is thus one of the facts of which the informed parties ought to be aware. In principle, therefore, the application of the internationally mandatory rule of that jurisdiction does not (necessarily) provide for a reduction of the *Pareto efficiency* of the contract. When one considers further that the Rome I Regulation Article 9(3), last sentence, explicitly warrants that the Courts may only apply such mandatory rules after an evaluation of both the nature of the rule and a balancing of the pros and cons of the application of the rule, the regulation seems to both allow and direct the Courts to take into account the need to ensure foreseeability in international contractual relationships. The same provision is found in the Rome Convention Article 7(1), last sentence, and if applied properly by the Courts, it may ease some of the potential uncertainties created by the fact that Article 7(1) allows the Courts to potentially apply the mandatory rules of other jurisdictions, as long as those jurisdictions have a "close connection" to the contract.

3.2.2 Refusal of recognition and/or enforcement of a ruling based on the public policy exception

3.2.2.1 a) The blackletter rules

It is a generally recognised principle of international private law that the Courts of a state may refuse to enforce consequences of the application of other laws, if those consequences amount to breach of public policy in the enforcing state. Public policy rules are rules which contain "*... such principles of the forum state as must be insisted upon without any exceptions,* i.e. *the most basic notions of morality and justice.*"[38]

Instead of insisting on applying their own law, the public policy exception allows the Courts of the forum to refuse to deal with a matter which they find unacceptable. Indeed, this may indirectly lead to a situation akin to applying the national rules of the forum state; however, the

[38] Paukerová, Mandatory rules and public policy in international contract law, ERA Forum (2010) 11:29-43, p. 31.

national rules are not applied to the case as such. They simply provide the rationale behind the non-recognition or non-enforcement.

Taking as our starting point the EU: under Brussels I, Article 34(1),[39] the Courts of Member States may refuse the recognition of judgments of another Member State in cases where such recognition is *manifestly* contrary to public policy in the recognising state. This is a development in the direction of supporting party autonomy, since originally the 1968 Brussels Convention Article 27(1) only required that recognition should be contrary – but not *manifestly* contrary – to public policy in the Member State. The same regulation is found in Rome I, Article 21,[40] allowing the Courts of a state to refuse the application of one or more provisions of the law chosen by the parties, if the provision(s) is *manifestly* incompatible with public policy in that state. However, apart from EU regulations, there is normally no need for "manifest" incompatibility. For example, the 1958 New York Convention, Article V(2)b states that recognition and enforcement of foreign arbitral awards may be refused if "*... the recognition or enforcement of the award would be contrary to the public policy...*" of the enforcing state. In this respect, one must keep in mind that the Brussels I and the Rome I regulations are meant to work within the EU; they are being applied in states in which the legal and socio-political systems are perceived as being quite similar. Combining this with the general paradigm that EU Law takes precedence over national law in the EU Member States, it is to be expected that the scope for refusing enforcement through reference to considerations of national public policy should be more limited within EU based regulations.

Nonetheless, even within e.g. the 1958 New York Convention, which is applied not only regionally but also internationally, the scope for refusing the recognition or enforcement of an arbitral award on the grounds of it being contrary to public policy has generally been seen as being very limited by the national Courts applying the Convention. For example,

[39] As well as Article 34(1) of the 2007 Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters.

[40] 1980 Convention on the law applicable to contractual obligations, 80/934/ECC, Article 16.

the ruling of the Supreme Court of the Basque Country of 19 April 2012 found that in order to set aside an arbitral award, it was not sufficient for "domestic public policy" to be transgressed, but "international public policy" should be violated, *"as being identified with internationally binding law and the core values of the Spanish Constitution"*.[41] Similar wording has been applied by the German Courts: *"A violation of public policy could only be assumed if a decision violated a norm, which governed the fundamental rules of political and economic life or if it was in unbearable conflict with the German notion of justice."*[42] Furthermore, rulings from Egyptian,[43] Chinese[44] and Russian Federation[45] Courts also maintain the basic distinction between being in conflict with national mandatory rules and national notions of what is just and fair, and the notion of what is contrary to international ordre public/public policy. Only in the case of transgressions of the latter, should the recognition and/or enforcement be refused.

Similarly to the New York Convention 1958, the 2005 Hague Convention on Choice of Court Agreements is aimed at regulating recognition and enforcement of the rulings of other fora on the international level. According to Article 9(f) of the Convention, a refusal of recognition, on grounds of infringement of substantive or procedural public policy, does not require the infringement to be manifest. Again, considering that the Convention is to be applied worldwide, this is hardly surprising. The close relations and comparatively high level of trust between the different EU and EFTA states, facilitating a less stringent approach, cannot be

41 CLOUT Case 1416, A/CN.9/SER.C/ABSTRACTS/151.

42 CLOUT Case 875, Bayerisches Oberstes Landesgeriche, 23. September 2004, original published in http://www.dis-arb.de; English translation in Yearbook Commercial Arbitration 2005, p. 568. See similarly the same Court's ruling of 20 March 2003, CLOUT Case 868, original published in http://www.dis-arb.de.

43 CLOUT Case 1325, ruling of the Egyptian Court de Cassation, 22. January 2008, published in the Journal of Arab Arbitration 2009, No. 1, pp. 145-147 and 174-178.

44 CLOUT Case 1322, ruling of the Supreme People's Court, 13 March 2009, [2008] Min Si Ta Zi No. 48, published in the Guide on Foreign-related Commercial and Maritime Trial, pp. 135-142.

45 CLOUT Case 1142, the ruling of the Civil Chamber of the Supreme Court of the Russian Federation, 2 [?]April 2002, original available at www.consultant.ru and www.garant.ru.

expected to exist to the same degree elsewhere. If the convention ever enters into force (which at present, 10 years after its conception remains doubtful) it is to be hoped that the stringent approach applied by the national Courts under the New York Convention 1958, Article V(2)b will be followed.

3.2.2.2 b) Evaluation of the blackletter rules in the light of the economic efficiency of the parties' contract

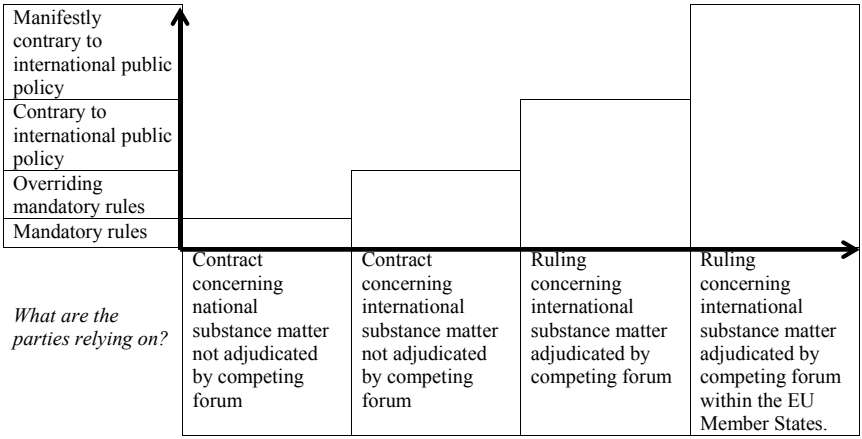
From the point of view of the economic efficiency of the parties' contract, the risk of not having the contract enforced by the Courts, after a process before a Court or e.g. an arbitral tribunal, is the worst possible outcome. Not only will any transaction costs concerned with firstly genuinely attempting an amicable settlement and then the considerable costs concerned with the Court or arbitral procedure have been spent in vain, but also, the ultimate demarcation of the parties' rights and obligations under the contract, which should have been the outcome of the procedure, is lost. Obviously, the unsuccessful party may attempt the enforcement of the ruling in other jurisdictions, but this cannot be done without risking further transaction costs and in the meantime the counterparty may initiate counter-lawsuits. A Court that will not recognise or enforce a ruling of a different forum, might equally not bestow the ruling with any lis pendens effects.

Consequently, tampering with the parties' contractual relationship at this point in time ("post ruling") should be the absolute exception, and for that reason the restrictive case law under the New York Convention should be applauded as being in keeping with the need for contractual economic efficiency. Even better is the regulation within the EU, where refusal of recognition and enforcement requires the breach of public policy to be manifest. However, it is accepted by this writer that applying such a stringent approach on an international level is unrealistic.

3.3 Summing up

In general, the legislator can choose between not (always) allowing the parties' choice to be effective, or else decide that it (the legislator) is simply not concerned about the application of its own rules or its own courts/arbitral tribunals, because the rules and fora of other jurisdictions will do just as well. As can be seen, there is a general development towards this latter point of view in both the regulation of international arbitration and in the regulation of jurisdiction and choice of law agreements in the EU Member States. This development is supported by the writer when considering international Business-to-Business transactions as a whole. This should not be taken to indicate that this writer is against formal criteria as such, but to this writer it is hard to accept that the choice of a forum or choice of law clause should fulfill different criteria from those of a different clause in the same contract limiting the liability of one of the parties. This writer is not convinced that the first type of clause is more problematic that the latter.

Returning to the protection of the economic efficiency of the parties' contract, it is apparent that the extent to which the parties are allowed to expect that a choice of law made in their contract will be accepted by the Courts is dependent upon the legal nature of what they are relying upon. Certainly, ultimately, they are relying on their contract but the nature of that contract and whether the matter arrives before the Court before or after adjudication of a competing forum are decisive in determining if and to what extent the content of the parties' contract will be respected to the letter. In the schematics below, the nature of the legal basis being invoked by the parties is represented by the X-axis, whereas the nature of the competing rules that the Court is allowed to apply is represented by the Y-axis.



In this way, the reliability of the parties' choice corresponds well with both the level of reasonable expectation that the parties may have regarding the firmness of their choice, and the level of foreseeability on the part of the parties. Thus, in this writer's view, the development overall in the international blackletter rules on agreements on forum and choice of law strikes a reasonable balance between the legislators' interest in the application of a different level of mandatory regulation and the parties' interest in protecting the Pareto-efficiency of the parties' contract.

4 The maritime angle

Before concluding the article, a short digression will be made into the maritime domain. Thus, the last question is how this looks in a maritime context. Firstly, maritime conventions on the carrier's liability are normally applied according to a lex fori choice of law rule, irrespectively of which law would (otherwise) apply to the parties' contract.[46] Thus, under the 1968 Hague Visby Rules, the Courts of contracting states seized with

[46] 1968 Hague Visby Rules Art. X, 1978 Hamburg Rules Art. 2, 2008 Rotterdam Rules Art. 5-7, Danish Maritime Code § 252.

a matter will apply the Rules to contracts under a Bill of Lading relating to *"…the carriage of goods between ports in two different States if (a) the bill of lading is issued in a Contracting State, or (b) the carriage is from a port in a Contracting State, or (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract."* Similarly, under the 1978 Hamburg Rules Article 2, and the Rotterdam Rules Article 5, the Rules are applied by the Courts if a list of connecting factors present themselves, including if the carriage is to or from a contracting state or if the transport document is issued in a contracting state. The application takes place regardless of the parties' potential choice of law to the contrary.

In other words, the conventions are applied in the same way as if they were overriding mandatory rules of the forum. Admittedly, there is no international standard for what is an overriding mandatory rule, but accepting the argument that the definition found in the Rome I Regulation must be considered to have some backing, it is quite clear to this writer that the maritime conventions are protective of the weaker party, but are not *"crucial ... for safeguarding ... public interests, such as its political, social or economic organisation ..."*. They are private law rules protecting an individual – not public law rules important for the collective, and therefore should be deemed on a par with other mandatory rules. Consequently, one should not expect them to be applied despite another choice of law in contracts that have a clear international element, as do contracts of carriage of goods by sea. The level of public interest, which in other areas of private international law is seen as a prerequisite for characterising a rule as being of an "overriding mandatory" nature, simply fails to present itself.

A similar argument may be made regarding the restrictions on jurisdiction and arbitration agreements found in the 1978 Hamburg[47] and the 2008 Rotterdam Rules.[48] Under the 1978 Hamburg Rules Article 21, prorogation agreements are allowed, however the rules provide that in addition to any venue chosen by the parties, the plaintiff may always ini-

[47] 1978 Hamburg Rules Art. 21 and 22.

[48] 2008 Rotterdam Rules Chapter 14 and 15.

tiate proceedings: 1) at the venue of the defendant, 2) at the place where the contract of carriage was entered into, and 3) before the Courts at the port of loading or discharge. A similar regulation is found in the 1978 Hamburg Rules Article 22 on arbitration. Not only are such mandatory options on venue and the seat of the arbitration distinctly out of step with what the theory of legal economics would suggest, see e.g. Mainz, who strongly discourages such clauses from being included in a contractual relationship at all:

> "Under a non-exclusive jurisdiction agreement the contract parties still have the opportunity to initiate law suits in other fora … Consequently, the agreement does not reduce the parties' access to forum shopping … It is hard to imagine a contractual relationship where both parties wish to increase the risk of a reduction of the economic effectiveness of the contract as well as the legal certainty and the legal protection of the contractual relationship."[49]

The regulation is also distinctly contrary to what applies within the sphere of international Business-To-Business transactions as such. This writer simply fails to see why e.g. a FOB buyer of goods, sold by a seller domiciled far away, needs a different type of protection and regulation when he wishes to direct a claim in damages against the carrier of the goods, from when he wishes to direct a claim in damages against the seller for non-conformity.

This regulation on jurisdiction and arbitration found in the 1978 Hamburg Rules is largely repeated in the 2008 Rotterdam Rules. Especially when considering the development of the rules of international private and procedural law which has taken place since the 1978 Hamburg Rules, as outlined above, it is notable that the 2008 Rotterdam Rules are so restrictive. Luckily, the restrictions on arbitration and jurisdiction agreements in the 2008 Rotterdam Rules are not obligatory, but only "opt in"[50] and may thus be ignored by the states when considering whether to sign and implement the convention.

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[49] Mentz, op. cit. p. 85. (Writer's translation).

[50] 2008 Rotterdam Rules Art. 74 and Art. 78.

The regulation of the scope of application in the convention, however, is not made on such an opt-in basis. The idea that private law rules on the liability of the carrier should be considered on a par with public law regulations regarding the "organisation" of a state thus remains. For future legislators the question is, how this restriction of the freedom of contract, in what are effectively always business-to-business transactions, might be defended in the future. Maybe it is time to embrace the notion of the informed parties and leave them to get on with it?

The application of the Gas Directive to small-scale LNG markets

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Content

1 Introduction[1]

The Gas Directive 2009/73/EC (the "Directive") was adopted by the EU on 13 July 2009.[2] The Directive is intended to continue the process of establishing a competitive, secure and environmentally sustainable market in natural gas in the EU.[3] It thus continues the process started by the first Gas Directive 98/30/EC and later progressed by the second Gas Directive 2003/55/EC. This article looks at the extent to which the Directive, as well as the related Gas Regulation (EC) No 713/2009 adopted on the same date, is applicable to small-scale markets for liquefied natural gas (LNG), such as the Norwegian LNG market.[4]

The new Directive and Gas Regulation from 2009 replace the Gas Directive 2003/55/EC and the corresponding Gas Regulation (EC) No 1775/2005. The 2003 Gas Directive and related Gas Regulation were incorporated into the EEA Agreement. Although the new legislation from 2009 has yet to be incorporated, it must be considered EEA relevant and it will therefore probably be incorporated and become binding for Norway soon.[5]

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1 Contact info: henrik.bjornebye@jus.uio.no. This article is based on a memo dated 10 April 2013 (written in Norwegian) commissioned by Næringslivets NOx-fond ("The Business Sector's NOx Fund") and attached to their report "Et bedre fungerende LNG-marked" (June 18, 2013) (transl.: "A better functioning LNG market"), see https://www.nho.no/siteassets/nhos-filer-og-bilder/filer-og-dokumenter/nox-fondet/hovedside-nox-fondet/les-mer/presentasjoner-og-rapporter/et-bedre-fungerende-lng-marked-24.06.13.pdf (last accessed 27 February 2015).

2 The EU member states were under an obligation to implement the Directive in national legislation by 3 March 2011, see the Directive's Article 54 (where it is also stated that the Directive's article 11 shall be applicable in national legislation from 3 March 2013).

3 See *inter alia* Directive 2009/73/EC paragraph (1) of the preamble and Article 3(1)

4 The Directive constitutes a part of the EU's Third Energy Package, which in addition to the Directive consists of four other legislative measures; Gas Regulation (EC) No 715/2009, Electricity Directive 2009/72/EC, Electricity Regulation (EC) No 713/2009 and the ACER Regulation (EC) No 713/2009.

5 See the Ministry of Petroleum and Energy, hearing memo 5 December 2014 for proposed amendments to the Natural Gas Act, p. 4, where such incorporation is assumed. See also in this respect *inter alia* the EEA note on Regulation (EC) No 715/2009 (adjustment), created 22.11.2007 and last changed 26.04.2010, where it is assumed that the regulation is EEA-relevant, see (next page)

Norway was ranked as the world's sixth largest gas producer and third largest gas exporter in 2012.[6] The offshore gas pipeline infrastructure for the transportation of natural gas from the Norwegian Continental Shelf to the UK and the European continent is the largest offshore gas pipeline system in the world. This infrastructure is, however, to be considered as an upstream pipeline network within the meaning of the Directive and it is therefore not subject to the Directive's more comprehensive regulation of gas transmission and distribution activities.[7] Norwegian domestic gas consumption is, on the other hand, limited.[8] Consequently, the domestic gas transportation infrastructure is also limited.[9] Against this background, the Norwegian gas market was exempted from several key provisions in Gas Directive 2003/55/EC as an "*emergent market*" pursuant to that Gas Directive's Article 28(2).[10] This exemption expired on 10 April 2014.[11] An important question is consequently to what extent the incor-

http://www.regjeringen.no/nb/sub/europaportalen/eos/eos-notatbasen/notatene/2007/nov/gasstransmisjonsforordning-justering.html?id=522815 (last accessed 23 February 2015)

6 The Ministry of Petroleum and Energy, Facts 2014 The Norwegian Petroleum Sector, p. 13.

7 See Article 34 of Gas Directive 2009/73/EC as well as the definition of "upstream pipeline network" in Article 2(2) of the Directive. Correspondingly, the Gas Regulation will be of particular significance for the onshore market for natural gas. A closer evaluation of the regulation of upstream pipeline networks is beyond the scope of this article.

8 In 2013, Norwegian gas exports totaled approximately 107 billion Sm3, while only approximately 1,5 billion SM3 was delivered for domestic consumption, see op. cit., p. 45,

9 See the Ministry of Petroleum and Energy, hearing memo 5 December 2014 for proposed amendments to the Natural Gas Act, pp. 5-6, which describes two distribution pipelines in Western Norway with a length of 120 and 620 km.

10 The provision sets out that a *"Member State, qualifying as an emergent market, which because of the implementation of this Directive would experience substantial problems"* may derogate from Articles 4, 7, 8(1) and (2), 9, 11, 12(5), 13, 17, 18, 23(1) and/or 24 in the Directive. See also the Decision of the EEA Joint Committee NO 146/2005 of 2 December 2005 amending Annex IV (Energy) to the EEA Agreement, article 1(2) (new point 23(g), where the exemption decision is included.

11 The time of expiry follows from the Decision of the EEA Joint Committee NO 146/2005 of 2 December 2005, where the exemption is granted with effect from 10 April 2004, read in conjunction with the Directive's definition of an "emergent market" as "a member state in which the first commercial supply of its first long-term

poration of the new Gas Directive, in absence of an emergent market exemption, will require that amendments be made to Norwegian domestic gas market legislation.

While the onshore gas pipeline distribution system in Norway is still very limited, a small-scale LNG distribution market has gradually developed over the past decade.[12] In this market, LNG is transported by tankers and freighters rather than by pipeline, and the LNG is regasified at the end-user's site or it is applied directly as fuel for ships or heavy road transport.[13]

At the outset, the Directive applies to LNG and LNG infrastructure.[14] However, the Norwegian LNG market differs from most European Continental markets after which the Directive is modelled. Within the latter markets, LNG is typically transported to large-scale LNG terminals for regasification and further transportation through a gas transmission pipeline system. The Norwegian LNG market, on the other hand, is not connected to a transmission or a distribution pipeline system. This raises the question of to what extent the Directive applies to small-scale LNG markets such as the Norwegian market.

Below, I will first give a brief overview of the Gas Directive 2009/73/

natural gas supply contract was made not more than 10 years earlier", see Gas Directive 2003/55/EC Article 2(31). Several Norwegian public documents also appear to build on the assumption that the exemption expired in 2014, see, *inter alia,* the Ministry of Petroleum and Energy consultative paper on amendments to the law on common rules for the internal market for natural gas 28 January 2002 No. 61 (The natural gas law) etc., pp. 1 and 3 (available at www.regjeringen.no/upload/kilde/oed/hdk/2005/0004/ddd/pdfv/240784-horingsnotat_naturgassloven.pdf (last accessed 24 February 2015) and Proposition to the Odelsting No. 57 (2005-2006) on the law of changes to law 28 June 2002 No. 61 regarding common rules for the internal market on natural gas, in law 29 November 1996 NO.72 on petroleum activity (The Petroleum Act) and in some other laws, pp. 5 and 7. Moreover, the Ministry of Petroleum and Energy sets out clearly in its hearing memo 5 December 2014 for proposed amendments to the Natural Gas Act, p. 7, that the exemption has expired and cannot be renewed.

12 Domestic use of LNG amounted to 293 million Sm3 in 2013, see the Ministry of Petroleum and Energy, hearing memo 5 December 2014 for proposed amendments to the Natural Gas Act, p. 6.

13 Op.cit.

14 See further below in section 3.

EC and the related Gas Regulation (EC) No 715/2009 in section 2. Thereafter, I will consider the particular questions which arise for the application of the Directive to small-scale LNG markets such as the Norwegian market in sections 3 to 6. Although it is unlikely that the Norwegian market will be subject to another emergent market exemption, the Directive also includes several other exemption grounds. For the sake of completeness I will briefly describe these exemption grounds in section 7, although without discussing their possible application to the Norwegian market in any detail. Section 8 concludes.

2 An introduction to the Gas Directive and the Gas Regulation

The Gas Directive 2009/73/EC seeks to establish *"common rules for the transmission, distribution, supply and storage of natural gas"*.[15] One of the overall aims of the Directive is to promote the development of an internal gas market where the free movement of gas between Member States is ensured. A key regulatory instrument for achieving such cross-border trade has been to open the market to competition by separating production and sales activities on the one hand and monopoly based pipeline activities on the other hand. While the former activities may be made subject to competition among market participants, the latter activities will always remain a monopoly and therefore need to be tightly regulated to ensure that the pipeline owners do not discriminate between system users or charge excessive tariffs for pipeline transportation services. In order to avoid integrated utilities cross-subsidising between regulated monopoly activities and competitive supply activities, or giving priority to affiliated supply activities through the operation of their monopoly activities, the gas directives have introduced gradually stricter unbundling requirements between monopoly based pipeline activities and competitive supply activities.

[15] See Article 1(1) of the Directive.

The new Gas Directive 2009/73/EC introduces stricter unbundling requirements between monopoly based pipeline activities and competitive production and sales activities than what was the case under Gas Directive 2003/55/EC. Similarly to Gas Directive 2003/55/EC, the new Directive has some specific provisions regulating LNG facilities and storage facilities. Although these latter categories of facilities are not pipelines, the operation of such facilities may – depending on factors such as, *inter alia*, cost structures, demand and capacity – nevertheless amount to monopoly activities. LNG facilities and storage facilities could also amount to important ancillary infrastructure to a gas pipeline system, although this is not necessarily the case for a small-scale LNG market, such as the Norwegian market. Consequently, infrastructure which is to be regarded as LNG facilities and storage facilities is also subject to parts of the Directive's monopoly regulation.

The new Directive must be read in conjunction with the Gas Regulation (EC) No 715/2009. The Gas Regulation was made binding for EU member states from 3 September 2009.[16] The new Regulation replaces the previous Gas Regulation (EC) No 1775/2005, which was repealed in the EU countries by the new Regulation with effect from 3 March 2011.[17] The main purposes of the Regulation are set out in Article 1. With respect to LNG markets, the purpose of the Regulation is to establish non-discriminatory access conditions to LNG facilities and storage facilities, taking into account the special characteristics of national and regional markets.[18]

When the Gas Directive 2009/73/EC and the Gas Regulation (EC) No 715/2009 have been incorporated into the EEA Agreement, the Gas Regulation as such must then be made a part of Norwegian law, while Norwegian authorities may decide the form and method of implementation of the Directive, see further Article 7 of the EEA Agreement. Since the Gas Directive 2009/73/EC is not a total harmonisation directive, the Norwegian authorities are free to adopt stricter rules than required by

16 See Gas Regulation (EC) No 715/2009, Article 32.

17 See Gas Regulation (EC) No 715/2009, Article 31.

18 See Gas Regulation (EC) No 715/2009, Article 1(b).

it, for example by setting out third party access requirements which go beyond the minimum requirements of the directive.

The general area of application of Gas Directive 2009/73/EC is described in the following way in article 1(1)

> "This Directive establishes common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organisation and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas and the operation of systems."

According to its wording, the Directive encompasses all stages of the resource chain from gas transmission to supply.[19] Similarly to the title of the Directive, the provision refers explicitly to the term *"natural gas"*. This term is not further defined in the Directive. From a straightforward linguistic interpretation it can be argued that natural gas only encompasses hydrocarbons in gas form, and that LNG is therefore not comprised by the term.[20] In practice, there are both examples of definitions where LNG is encompassed and where it is not encompassed by the natural gas term.[21]

It is, however, specified in several of the provisions of the Gas Directive

[19] Strictly speaking, the Directive has a wider area of application than what is explicitly set out in Article 1, as the Directive also contains a provision on access to upstream pipeline networks in article 34. At the same time, the Directive focuses primarily on the regulation of transmission, distribution and storage of natural gas. On the other hand, the production of natural gas as such is not governed by the Directive, but certain aspects of the extraction and production activities for hydrocarbons are regulated by the Hydrocarbons Directive 94/22/EC.

[20] See, for example, the Norwegian Petroleum Directorate's oil dictionary, where the first part of the definition of natural gas specifies that it encompasses hydrocarbons in gas form, while the definition of condensed natural gas (LNG) refers to natural gas which is condensed to fluid by lowering the temperature, see http://www.npd.no/om-od/informasjonstjenester/oljeordliste/ (last visited 24 February 2015).

[21] An example where LNG is included in the definition of natural gas follows from the Swedish law on natural gas chapter 1, 2 §, second paragraph, which sets out that *"Med naturgas avses även flytande (kondenserad) naturgas"* ["Natural gas means even fluid (condensed) natural gas"].

that LNG is included within the Directive's area of application. For example, it is stated in Article 1(2) that *"The rules established by this Directive for natural gas, including LNG, shall also apply"* for certain other types of gas (emphasis added). Correspondingly, the term *"supply"* is defined as *"sale, including resale, of natural gas, including LNG, to customers"*.[22] Given that the sale of LNG is covered by the Directive, several of the general provisions of the Directive, such as, for example, the requirements for national regulatory authorities in chapter VIII of the Directive, could also have significance for the LNG market.

The Directive sets out comprehensive requirements for the organisation and the operation of the gas pipeline system with a view to achieving the aim of establishing a well-functioning internal market for natural gas. Therefore, an important question is what parts of the *transport infrastructure* for LNG are subject to such specific regulation in the Directive. In this respect, LNG facilities and storage facilities are subject to detailed regulation. In section 3 below, I will consider some general points of departure for the application of the Directive and the Gas Regulation to LNG facilities and storage facilities. With respect to small-scale LNG markets, such as the Norwegian market, particular questions arise concerning the area of application of the secondary law. These questions will be considered in more detail in sections 4 and 5. Finally, the question of whether the secondary law applies to transport of LNG by commercial vehicle and vessel is considered in section 6.

3 The Gas Directive's application to LNG and storage facilities

The Directive sets out rules regarding *"the operation of systems"*.[23] The term "system" is defined in the Directive as:

[22] The Gas Directive 2009/73/EC, Article 2(7)

[23] The Gas Directive 2009/73/EC, Article 1(1)

> "…any transmission networks, distribution networks, LNG facilities and/or storage facilities owned and/or operated by a natural gas undertaking, including linepack and its facilities supplying ancillary services and those of related undertakings necessary for providing access to transmission, distribution and LNG;"[24]

The definition includes at least two forms of infrastructure significant to the transport and sale of LNG: LNG facilities and storage facilities. The Directive and the Gas Regulation set out a number of requirements for the regulation of such facilities. In this respect, the secondary law's requirements for third party access to infrastructure are of significant importance. These requirements differ slightly between LNG and storage facilities.

For LNG facilities, Article 32 of the Gas Directive contains a requirement for the member states to ensure the implementation of a system of third party access *"to the transmission and distribution system, and LNG facilities"* which fulfills more detailed requirements.[25] Thus, the Directive sets out an independent right of access to LNG facilities.[26]

For access to storage facilities, a somewhat different solution has been chosen in Article 33 of the Directive. According to this provision, there is a requirement to ensure third party access to storage facilities *"when technically and/or economically necessary for providing efficient access to the system for the supply of customers, as well as for the organisation of access to ancillary services"*.[27] In such cases, the Member States can basically choose between a negotiated or regulated access regime.[28] Accordingly, the access to storage facilities is a conditional right.[29] The requi-

[24] The Gas Directive 2009/73/EC, Article 2(13)

[25] The Gas Directive 2009/73/EC, Article 32(1)

[26] See Anne-Karin Nesdam, *Det indre transportmarkedet – en analyse av virkemiddelbruken i den fellesskapsrettslige energimarkedslovgivningen* (Oslo 2007, dissertation submitted for evaluation for a doctorate at the faculty of law, University of Oslo), p. 163 on the corresponding condition in Gas Directive 2003/55/EC Article 18.

[27] The Gas Directive 2009/73/EC, Article 33(1)

[28] See further The Gas Directive 2009/73/EC, Article 33(1) cf. Articles 33(3) and (4)

[29] See Anne-Karin Nesdam, *Det indre transportmarkedet – en analyse av virkemiddelbruken i den fellesskapsrettslige energimarkedslovgivningen* (Oslo 2007, dissertation submitted for evaluation for a doctorate at the faculty of law, University of Oslo), page

rement in Article 33(1) that access to storage facilities must be necessary to provide effective system access, is decisive for whether the Directive's requirements concerning legal and functional unbundling of storage operators will apply.[30] Correspondingly, most of the relevant provisions in the Gas Regulation are only applicable to storage facilities which are subject to regulated or negotiated third party access pursuant to Article 33 of the Directive.[31]

Moreover, the Directive and the Gas Regulation also set out several requirements for the regulation of LNG facilities and relevant storage facilities. For example, the Member States are required to designate, or to require natural gas undertakings which own storage or LNG facilities to designate, one or more storage and LNG system operators.[32] These system operators are required to carry out the tasks conferred on them in Article 13 of the Directive. Other key provisions include the aforementioned unbundling requirements for system operators of storage facilities (Article 15), the confidentiality obligation for system operators of LNG and storage facilities (Article 16), rules on the unbundling of accounts (Article 31), the aforementioned regulations on third party access to LNG facilities (Article 32) and access to storage facilities (Article 33),[33] as well as the right to refuse system access on certain conditions (Article 35).

The Gas Regulation (EC) No. 715/2009 supplements the Gas Directive 2009/73/EC in several respects regarding the regulation of LNG and storage facilities. The new Gas Regulation to a large extent renders binding the previous voluntary "Guidelines for Good Third Party Access Practice for Storage System Operators".[34] Without reviewing the Regulation in

170 on the corresponding condition in Gas Directive 2003/55/EC article 19.

30 The Gas Directive 2009/73/EC, Article 15(1), second paragraph.

31 The Gas Regulation (EC) No 715/2009, Article 1, third paragraph, where it says that article 19(4) in the regulation applies regardless.

32 The Gas Directive 2009/73/EC, Article 12

33 See also the Gas Directive 2009/73/EC, Article 21(1)(n), which states that the national regulator shall monitor and review the access conditions for storage facilities.

34 Silke Goldberg and Henrik Bjørnebye, "Introduction and Comment", in Bram Delvaux, Michaël Hunt and Kim Talus (eds.), *EU Energy Law and Policy Issues*, Volume 3 (Intersentia, 2012), page 29.

any detail, it is worth highlighting that it includes further rules on third party access to storage and LNG facilities (Article 15), the principles of capacity-allocation mechanisms concerning storage and LNG facilities (Article 17), transparency requirements (Article 19), record keeping requirements (Article 20), balancing rules (Article 21) and trading of capacity rights (Article 22). Also, the Gas Regulation allows for the adoption of further rules on several areas within the Regulation's area of application.

Considering the comprehensive regulation of LNG and storage facilities in the Directive and the Regulation, it is important to determine which type of facilities that are comprised by these terms as they are defined in the Directive.

The term *"LNG facility"* is defined in the Directive as:

> "a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gasification of LNG, and includes ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system, but does not include any part of LNG terminals used for storage".[35]

The part of an LNG terminals which is used for storage and therefore falls outside the scope of the abovementioned definition of LNG facility is still covered by the Directive through the definition of storage facility. *"Storage facility"* is defined as:

> "a facility used for the stocking of natural gas and owned and/or operated by a natural gas undertaking, including the part of LNG facilities used for storage but excluding the portion used for production operations, and excluding facilities reserved exclusively for transmission system operators in carrying out their functions".[36]

Based on the above, temporary storage facilities that are necessary for

[35] The Gas Directive 2009/73/EC, Article 2(11)

[36] The Gas Directive 2009/73/EC, Article 2(9)

the re-gasification process are included in the definition of LNG facilities, while other parts of terminals that are used for storage are included in the definition of storage facilities.[37] It is of significance how the line should be drawn more specifically between temporary storage facilities that are included in the definition of LNG facilities and other storage facilities which are defined as storage facilities, since different third party access rules apply to LNG facilities and storage facilities.[38]

Furthermore, it follows from the wording of the Directive that parts of facilities that are used for production purposes, as well as facilities that are exclusively reserved for transmission system operators, fall outside the definition of a storage facility.[39]

4 The Gas Directive's application to LNG storage facilities

A specific question which may arise in relation to the Directive's application to LNG markets is whether the definition of storage facility also includes LNG storage facilities, or if only storage facilities for natural gas (excluding LNG) are included. The definition of storage facility comprises facilities *"used for the stocking of natural gas"*.[40]

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37 See the corresponding Commission Staff Working Paper, Interpretative Note on Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas – Third Party Access to Storage Facilities (22 January 2010), pages 5-6.

38 See for example Anton Ming-Zhi Gao, The Discovery of the Concept of LNG Storage in the European Gas Directive, http://ssrn.com/abstract=1167795 (last accessed 27 February 2015) for a more detailed assessment of this issue.

39 See Commission Staff Working Paper, Interpretative Note on Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas – Third Party Access to Storage Facilities (22 January 2010) , pages 4-5, for a more thorough assessment of the EU Commission's interpretation of these delimitations. See also Anne-Karin Nesdam, Det indre transportmarkedet – en analyse av virkemiddelbruken i den fellesskapsrettslige energimarkedslovgivningen (Oslo 2007), particularly pages 152-181, for a more detailed assessment of categories of infrastructure, including the terms LNG facilities and storage facilities.

40 The Gas Directive 2009/73/EC, Article 2(9)

Unlike several other provisions in the directive where it is explicitly specified that the rules for natural gas includes LNG, the definition of storage facility does not include a similar clarification.[41] The lack of such clarification could imply that the definition of storage facility does not encompass LNG storage facilities.

On the other hand, the temporary storage facilities that are included in the definition of LNG facilities do not seem to be limited to only encompass storage of natural gas excluding LNG.[42] Moreover, the definition of *"natural gas undertaking"* does not seem to separate between undertakings connected to storage of natural gas and storage of LNG.[43] The wording of the definition of storage facilities does not exclude that storage of natural gas can be achieved through the cooling of the gas to LNG.

Although the conclusion is not entirely clear, the most likely interpretation of the Gas Directive is in my view to understand the wording as including facilities for storage both in natural gas form and for LNG.

5 The significance of whether LNG and storage facilities are connected to a pipeline infrastructure

5.1 Introduction

Another specific question that arises for the assessment of the Directive's application to small scale LNG markets, such as the Norwegian market, is whether the rules apply to facilities which are not physically connected

41 See for example the Gas Directive 2009/73/EC, Article 1(2), Article 2(1) and Article 2(7).

42 See the definition in the Gas Directive 2009/73/EC Article 2(11). A corresponding interpretation seems to be the basis of the EU Commission in Commission Staff Working Paper, Interpretative Note on Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas – Third Party Access to Storage Facilities (22 January 2010), pages 5-6.

43 The Gas Directive 2009/73/EC, Article 2(1)

to pipeline infrastructure. In European countries with large scale import of LNG, the LNG is usually brought ashore through an LNG terminal for regasification and subsequent transfer to the transmission pipeline network, and possibly further to a distribution network for customer sale. LNG and storage facilities, in these cases, will typically constitute a physically integrated part of the pipeline network. In Norway, on the other hand, little onshore pipeline infrastructure exists and LNG is usually transported by commercial vehicle and/or vessel to the customers without the regasification of LNG and transport through gas pipelines. In 2012, around 50 LNG storage and bunker facilities were established in Norway and customers were additionally supplied from vessels and around 50 tank trucks.[44]

The Gas Directive aims in particular at regulating the gas infrastructure as a natural monopoly, in order to facilitate a well-functioning gas market. Access to the transport infrastructure on non-discriminatory, objective and transparent terms is a fundamental condition to ensuring equal treatment of the market operators and thereby a well-functioning market. Considering that the gas market mainly is a pipeline-bound market, the regulation of the pipeline infrastructure is central. This point of departure is also reflected in the Directive's preamble, which emphasises, *inter alia*, that *"The development of a true internal market in natural gas, through a network connected across the Community, should be one of the main goals of this Directive…"*.[45] Against this background it could be argued that LNG and storage facilities are only included under the Gas Directive's scope of application to the extent that such facilities constitute a necessary part of the gas pipeline infrastructure.

5.2 LNG facilities

As previously mentioned in chapter 3, Article 32(1) of the Directive sets out a requirement for independent access rights to LNG facilities. Con-

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44 See The Business Sector's NOx Fund's report "A better functioning LNG market, (18 June 2013), pages 21-22.

45 The Gas Directive 2009/73/EC, paragraph 57 of the preamble.

sequently, the provision does not establish a separate requirement that LNG facilities must be connected to pipeline infrastructure for the rules of third party access to apply. Therefore, the question is whether such a requirement can be deduced from the definition of LNG facility in Article 2(11) of the Directive.

The definition of LNG facilities comprises both terminals for liquefaction of natural gas to LNG and terminals used for the *"importation, offloading, and re-gasification of LNG"*.[46] Moreover, the definition contains a specification that the latter import terminals include *"ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system"* (my emphasis).[47] As far as I understand, it is of particular interest to clarify the scope of the LNG facility definition for *import terminals* in the Norwegian markets. Thus, I will focus on this question in the following, and I will not evaluate further the Directive's application to terminals for conversion of natural gas into LNG.

One question that arises regarding the interpretation of the definition of LNG facilities is whether only reception terminals with importation, offloading, *and* re-gasification functions are included in the definition, or whether terminals without regasification functions where further transport is in the form of LNG, are also included. In practice, regasification will be relevant where the gas is either transported further through a pipeline system, or where it will be used as an input at the regasification point. The wording of the provision seems to indicate that the conditions are cumulative so that only facilities that are used for import, offloading *and* regasification are included by the definition of reception terminals.[48]

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[46] The Gas Directive 2009/73/EC, Article 2(11)

[47] The Gas Directive 2009/73/EC, Article 2(11). See also the corresponding wording in the Directive's article 33(2).

[48] The wording in the Swedish and English language versions of the Directive also seems to express a corresponding interpretation. The Council of European Energy Regulators (CEER) seem to be basing their newly published status review on the same interpretation, see CEER Status Review and evaluation of access at LNG terminals in the EU, C12-LNG-15-03, 12 March 2013 (available at url: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Gas/Tab3/C12-%20LNG-15-03_Acces%20at%20LNG%20

The specification in the definition that reception terminals also include necessary ancillary services for regasification and subsequent delivery to the transmission system supports this understanding.

However, based on the wording of the definition of LNG facilities it could be argued that the provision aims at categorising LNG cooling terminals and reception terminals as two main alternatives, and that a reception terminal for the import and offloading, but without regasification, could also be included in the definition. Provided the terminal is considered to be a natural monopoly, the aim of the regulatory framework could also support such an interpretation.

Even though the conclusion is unclear, the most logical interpretation is, in my view, that LNG import facilities without regasification are not covered by the Directive's definition of LNG facilities. At the same time, it can be questioned whether the storage function in a facility for import, loading and offloading of LNG can still be considered a storage facility within the meaning of the Directive.

5.3 Storage facilities

The definition of storage facility contains no clear reference to the transmission system, even though this definition also to some extent seems to presuppose a pipeline connection by exempting from the definition facilities *"reserved exclusively for transmission system operators in carrying out their functions"*.[49] On the other hand, the substantive rules concerning third party access to storage facilities only apply *"when technically and/or economically necessary for providing efficient access to the system for the supply of customers, as well as for the organisation of access to ancillary services"*, as stated in Article 33(1) of the Directive. The requirement that access has to be necessary to provide system access gives rise to the

Terminals_13032013_final_published.pdf (last visited 7 April 2013)). In the report on page 14 CEER holds that "LNG terminals provide regasification facilities to convert the LNG which arrives by ship into its gaseous form, in order to be transported by land via pipelines". On page 10 in the report, CEER points to the existence of 19 LNG facilities in Europe.

49 The Gas Directive 2009/73/EC, Article 2(9)

question of which parts of the gas transport infrastructure are included in the Directive's definition of "system".

The definition of "system" comprises *"any transmission networks, distribution networks, LNG facilities and/or storage facilities owned and/or operated by a natural gas undertaking[…]"*. This wording may be interpreted initially to the effect that the rules on third party access to storage facilities only apply where access is necessary for the efficient access to pipeline infrastructure and LNG facilities for the purpose of supplying customers. In the alternative, the conditions might be intepreted to mean that there shall also be third party access to storage facilities if it is technically and/or economically necessary for providing efficient access to the storage facility for the purpose of supplying customers, although with this latter interpretation the definition will to some extent be circular and have little meaning.

The definition specifies that "system" also entails *"linepack and its facilities supplying ancillary services and those of related undertakings necessary for providing access to transmission, distribution and LNG"* (my emphasis).[50] Furthermore, the Directive contains a definition of *"ancillary services"*.[51] Read in conjunction with this definition, the definition of system appears to include, *inter alia*, the related facilities which provide necessary functions for the access to and operation of a transmission network, distribution network, LNG facilities and/or storage facilities, which again are necessary to provide access to transmission, distribution and LNG.

The wording of the corresponding definition of "system" in the first Gas Directive 98/30/EC was limited to facilities which were *"necessary for providing access to transmission and distribution"*.[52] Against this background the directive seemed to limit itself to regulating the access to facilities necessary for pipeline access.[53] The significance of the expan-

[50] The Gas Directive 2009/73/EC, Article 2(13)

[51] The Gas Directive 2009/73/EC, Article 2(14)

[52] The Gas Directive 98/30/EC, Article 2(12).

[53] See further Ketil Bøe Moen and Sondre Dyrland, EU's Gas Market Directive (Fagbokforlaget, 2001), pages 71-73 on the definition of system in Gas Directive 98/30/EC

sion of the wording in later directives to include facilities *"necessary for providing access to transmission, distribution and LNG"* (my emphasis) is not very clear.[54] The requirement that facilities must be necessary to provide access to transmission and distribution is related to the facilities' significance for access to the central pipeline infrastructure (transmission pipelines and distribution pipelines). On the other hand, the requirement that facilities must be necessary in order to provide access to LNG, is, according to its wording, related to access to LNG as a product.

The fact that the definition of *"system"* partly comprises the facilities necessary to ensure access to infrastructure, and partly comprises LNG as a product, leaves the wording ambiguous. For example, it is not very clear how the preamble to the Directive should be understood, when it emphasises that:

> "It is necessary to ensure the independence of storage system operators in order to improve third-party access to storage facilities that are technically and/or economically necessary for providing **efficient access to the system for the supply of customers**.[…]"(my emphasis)[55]

The Directive contains several examples of provisions where it seems to be assumed that LNG and storage facilities are connected to a more extensive pipeline infrastructure, although without making it clear that such connection is a pre-condition for the the Directive to apply.[56] A possible interpretation of the definition of system is to read the reference to necessary access to LNG as a reference to access to *LNG facilities*. Interpreted to this effect, the condition could be viewed as including the overall integrated system of infrastructure from LNG terminal and potential storage to pipeline transmission and distribution. The Directive's

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[54] This addition of LNG was also included in the definition of system in the Gas Directive 2003/55/EC, Article 2(13)

[55] The Gas Directive 2009/73/EC, paragraph 24 of the preamble. See also another example in Article 52(6) paragraph 8.

[56] See for example the Gas Directive 2009/73/EC, Articles 8, 13(1)(c), 22(3), 23 and 25(3). See also amongst others Article 15(1)(a) and (4) in the Gas Regulation.

definition of "*interconnected system*" as *"a number of systems which are linked with each other"* may possibly also be applied as an argument for understanding the definition of system as only encompassing physical installations and not LNG as a product.[57] On the other hand, it can be argued that it should have been specified in the definition of system that it includes LNG facilities, and not LNG as a product, if the provision was meant to contain such delimitation.

The purpose of the regulatory framework could support the interpretation that pipeline connection is a necessary condition, considering that one of the main aims of the Directive is to secure the development of an internal market of natural gas through a cross-border network.[58] On the other hand, arguments concerning the purpose of the scheme could also support the view that detached LNG storage facilities constitute natural monopolies which should be included in the scope of the Directive in order to facilitate competition in the LNG market.

In legal literature, Peter Cameron seems to assume that the provisions on storage facilities in the previous Gas Directive 2003/55/EC only apply where access to such facilities is technically necessary to ensure efficient access to pipeline network for transmission or distribution.[59] The Swedish law on natural gas also seems to presuppose that only LNG and storage facilities that are connected to pipeline network for transmission or distribution are included in the law's requirement for third party access etc.[60]

The wording of the Directive gives rise to several interpretational difficulties. It is unclear whether storage facilities that are not connected to pipeline infrastructure are included in the Directive's and the Gas

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57 See the definition in the Gas Directive 2009/73/EC, Article 2(16).

58 The Gas Directive 2009/73/EC, paragraph 57 of the preamble. See also the Directive's article 23 which seems to assume that storage and LNG facilities should be able to connect to the transmission pipeline network.

59 Peter D. Cameron, Competition in Energy Markets – Law and Regulation in the European Union (Oxford, 2nd ed., 2007) page 183, paragraph 6.32, where this view is not further substantiated.

60 See in particular the Natural Gas Law, Chapter 1, paragraph 4 (definition of "lagringsanläggning"), paragraph 5 (definition of "överföring av naturgas"), see further http://www.notisum.se/pub/Doc.aspx?url=/rnp/sls/lag/20050403.htm (last visited 27 February 2015).

Regulation's substantive provisions concerning third party access. Based on the wording of the Directive I am inclined to conclude, although with reservations, that storage facilities necessary to secure access to LNG as a product are included in the definition of system in the same manner as facilities necessary to secure access to transmission and distribution systems. On this basis, the Directive can be interpreted as not setting forth any absolute requirement that storage facilities be physically connected to a pipeline infrastructure, in order for those facilities to be included by the Directive's substantive provisions.

Even if the Directive's applicability to storage facilities should not be dependent upon physical pipeline connection, the rules regarding third party access in Article 33, including the unbundling rules in Article 15, will only apply "*when technically and/or economically necessary for providing efficient access to the system for the supply of customers, as well as for the organisation of access to ancillary services*". This entails that an assessment of necessity is required in order to establish whether a storage facility should be subject to third party access or not. Consequently, Member States must review which storage facilities are subject to third party access and make public what criteria apply for the regulated or negotiated access.[61] I will not go further into the question of the choice of threshold that should be the basis for this necessity assessment in this article.[62]

5.4 Conclusion

In summary, it is my understanding that the Directive's definition of LNG facilities does not include LNG import and loading facilities which do not have a regasification function, but the conclusion is not clear. At the same time, I assume, although with reservation, that LNG storage facilities that are not connected to pipeline networks for transmission or distribution can still be comprised by the Directive. The reasons for these interpretational problems could be that the Directive may primarily be

[61] See Gas Directive 2009/73/EC, Article 33(1), Second paragraph

[62] See Cristopher Jones (ed.) EU Energy Law, Volume I, The Internal Energy Market (Claeys &Casteels, Third ed., 2010), pages 56-57 for a closer assessment of this question.

drafted having in mind large-scale LNG that is re-gasified and transported further by transmission pipeline network, as well as storage in connection with pipeline transportation. At the same time, the wording of the Directive, and partly also the aims of the Directive, may be applied as arguments in favour of a wider interpretation. If the interpretation argued above is applied, a specific assessment of each storage facility has to be carried out, where some facilities may be considered necessary to ensure system access, and hence should be subject to third party access, while others may not be subject to third party access. It should, however, be emphasised that the wording of the Directive is unclear in several respects and that the conclusion is therefore uncertain.

6 LNG transport by commercial vehicle and vessel

In contrast to the regulation of LNG and storage facilities, the transport of LNG by vessel or commercial vehicle is not further regulated as such in the Directive. Another solution would potentially have to be based on an argument that LNG transport by vessel and commercial vehicle falls within the Directive's regulation of transmission and distribution activities. The Directive's regulation of such activities appears, however, to be limited to encompassing pipeline transportation activities.

The Directive's definition of *"transmission"* is as follows:

> "the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply"[63].

The wording points in the direction that transmission only includes

[63] The Gas Directive 2009/73/EC, Article 2(3)

pipeline transportation.[64] The Swedish language version of the Directive supports the same conclusion through its reference to transport of natural gas through *"nät"*("net").

The Directive's definition of "*distribution*" is clearer in terms of the area of application. The term is defined as *"the transport of natural gas through local or regional* **pipeline networks** *with a view to its delivery to customers, but not including supply" (my emphasis).*[65] Against this background, the Directive must, in my view, be interpreted to the effect that LNG transport by vessel or commercial vehicles is not considered as distribution within the meaning of the Directive. Based on the wording in Article 2(3), as well as the Directive's structure and system, LNG transport that is not pipeline-bound cannot, in my view, be considered transmission within the meaning of the Directive.

LNG transportation by vessel or commercial vehicle, or other potential transportation which is not pipeline-bound, is therefore not particularly regulated as transmission or distribution activities in the Directive. On the other hand, some of the general requirements of the Directive may still be of significance to the sale of LNG, even though transportation by road or shipping is not regulated as such.[66]

7 A Brief look at exemption grounds in the Gas Directive

It is highly unlikely that Norway will qualify for a new emergent market exemption under the latest Gas Directive 2009/73/EC. The Gas Directive

64 The Norwegian natural gas law § 2 letter b) defines "transmission" as " transport of natural gas through a high-pressure pipeline network, except upstream pipeline networks, with the aim of customer supply", and thus bases the term on including pipeline transmission only.

65 The Gas Directive 2009/73/EC, Article 2(5).

66 For the sake of good order, it should be emphasised that I have not considered whether a storage tank on a movable device, such as a ship, could, in certain circumstances, fulfill the Directive's definition of a storage facility.

does, however, also contain certain other exemption grounds. Without providing any detailed analysis of these exemption grounds, or whether Norway would potentially qualify for any exemption, I will provide a brief overview below for the sake of completeness.

First, Article 49(1) sets out the possibility of granting exemptions from certain provisions of the Directive for isolated markets. The provision reads as follows:

> "Member States not directly connected to the interconnected system of any other Member State and having only one main external supplier may derogate from Articles 4, 9, 37 and/or 38. A supply undertaking having a market share of more than 75% shall be considered to be a main supplier. Any such derogation shall automatically expire where at least one of the conditions referred to in this subparagraph no longer applies. Any such derogation shall be notified to the Commission."

The provision continues the exemption ground for isolated markets set out in Article 28(1) of Gas Directive 2003/55/EC. The reasoning behind the exemption ground appears to be that the prerequisites for functional competition simply do not exist in isolated markets that would fulfill the conditions in Article 28(1).[67]

The right to exemption from provisions in the Directive is narrower under Article 49(1) than is the case for the emergent market exemption under Article 49(2). For example, Article 49(1) does not extend to making exemptions from the third party access requirements in Article 32. On the other hand, the exemption from the provisions in the Gas Regulation is also valid where there are grounds for exemptions under the Directive Article 49(1).[68] Member States are required to comply with the provisions that are not encompassed by the exemption ground.

Cyprus has been granted such an exemption in accordance with the

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[67] Christopher Jones, (ed.), EU Energy Law, Volume I, The Internal Energy Market (Claeys & Casteels, Third ed., 2010), page 450

[68] See The Gas Regulation (EC) No. 715/2009, Article 30.

Directive.[69] Moreover, Estonia, Latvia and Finland have been granted exemptions on slightly different conditions.[70]

Furthermore, Articles 49(4) and (5) set out that a Member State, subject to further conditions, may apply to the Commission to grant temporary exemptions from several of the provisions of the Directive for particular geographical regions. Article 49(4) reads as follows:

> "Where the implementation of this Directive would cause substantial problems in a geographically limited area of a Member State, in particular concerning the development of the transmission and major distribution infrastructure, and with a view to encouraging investments, the Member State may apply to the Commission for a temporary derogation from Articles 4 and 9, Article 13(1) and (3), Articles 14 and 24, Article 25(5), Articles 26, 31 and 32, Article 37(1) and/or Article 38 for developments in that area."

The right to exemption and the Commission's assessment of a request is regulated in more detail in Article 49(5), where a number of criteria are set out. The provision also specifies that:

> "For gas infrastructure other than distribution infrastructure, a derogation may be granted only if no gas infrastructure has been established in the area or if gas infrastructure has been established for less than 10 years. The temporary derogation shall not exceed 10 years from the time gas is first supplied in the area."[71]

Moreover, with respect to new investments in infrastructure, there is also reason to point out that Article 36 in Gas Directive 2009/73/EC extends to stating that *"Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities"* can be exempted from several of the Directive's provisions for a certain period in order to facilitate the realisation of the investment. The right of exemption shall also apply *"to significant increases of capacity in existing infrastructure and to modifications of such in-*

[69] Article 49(1), second paragraph.
[70] Article 49(1), third paragraph.
[71] Article 49(5), second paragraph

frastructure which enable the development of new sources of gas supply."[72] Exemptions pursuant to Article 36 are subject to several conditions and a comprehensive procedure, which I will not go into further here.

The Commission has assessed a number of cases where national regulators have decided to grant exemptions pursuant to article 36 and – to a greater extent – the predecessor to this provision in Gas Directive 2003/55/EC. The Commission has also assessed some cases on LNG terminals. In several cases the decision of the national regulators to grant exemption has been accepted by the Commission.[73] In other cases the EU Commission has requested that changes are made to the exemption decision.[74] For gas storage facilities, the EU Commission has demanded in one case that the national regulator withdraws a decision to grant exemption in accordance with Gas Directive 2009/73/EC.[75]

8 Conclusion

The transmission of natural gas through pipeline networks is subject to extensive regulation both in the Gas Directive 2009/73/EC and in the closely related Gas Regulation (EC) No. 715/2009 on conditions for access to the natural gas transmission networks. Moreover, LNG facilities and storage facilities are also subject to extensive regulation as parts of the

72 Article 36(2)

73 See for example Grain LNG Terminal and South Hook LNG Terminal (both UK, and both dated by letter 10.02.2005). Exemption as granted in accordance with Gas Directive 2003/55/EC. Also, there are examples of cases where the EU Commission has accepted an exemption and simultaneously given certain comments to the decision, see for example Dragon LNG Terminal (UK) (29.03.2005) (exemption in accordance with Gas Directive 2003/55/EC).

74 See for example the decision for Eemshaven LNG-terminal (Netherlands) (15.05.2009), LNG Livorno (Italy)(11.12.2009) and LNG Shannon (Ireland) (26.07.2010), all in connection to the access to exemption in accordance with Gas Directive 2003/55/EC. See also Porto Empedocle (Italy)(07.05.2012), where the EU Commission demanded changes to an exemption decision in accordance with Gas Directive 2008/73/EC.

75 Damborice (Czech Republic)(27.06.2011).

transmission system for natural gas. Given the specific features of small-scale LNG markets, such as the Norwegian LNG market, a central question in this article has been whether the EU secondary legislation encompasses LNG facilities and LNG storage facilities not physically connected to a pipeline infrastructure for transmission of natural gas.

The Directive requires regulated third-party access to LNG facilities, see Article 32 in the Directive. Whether an LNG facility without re-gasification, where LNG is instead offloaded to be transported further in its LNG form, qualifies as an LNG facility within the meaning of the definition in Article 2(11), is not entirely clear. In my opinion, the most likely interpretation is to understand the definition as not including an LNG facility without a re-gasification function. Hence, in that case, the latter category of facilities will not be encompassed by the Directive's requirement for regulated third-party access.

An independent facility for storing LNG will, in my opinion, constitute a storage facility as defined in the Directive. The question of whether an LNG storage facility which is not connected to pipeline network infrastructure could be encompassed by the Directive's third-party access provisions does, however, raise difficult interpretational problems. Article 33 of the Directive sets out a requirement for regulated or negotiated third-party access to storage facilities in cases where it is "technically and/or economically necessary for providing efficient access to the system for the supply of customers, as well as for the organisation of access to ancillary services". The condition that third party access has to be necessary to ensure efficient access to the system, compared with the Directive's definition of "system", does not provide a clear answer as to whether a connection to a pipeline network is a condition for third-party access provisions to become applicable to storage facilities. Even though the conclusion is not clear, the most logical interpretation of the Directive is, in my view, that it does not require storage facilities to be physically connected to a pipeline infrastructure for the facilities to be encompassed by the Directive's provisions. In practice, each facility must be made subject to individual assessment, where some storage facilities may be considered necessary to secure access to the system and consequently

must be subject to third-party access, while other facilities do not have to be made subject to third-party access.

Although the Directive and the Gas Regulation clearly apply to LNG and certain categories of LNG related facilities, this article has shown that the specific application to small-scale markets which are not part of a larger gas pipeline infrastructure is less clear. One possible explanation for this lack of clarity may be that the legislation at issue was, most probably, not drafted having in mind such small-scale markets in the first place, but rather large-scale LNG infrastructures as integral parts of gas transmission and distribution pipeline systems on the European continent. Consequently, the application of the Directive's provisions to small-scale LNG systems is not necessarily a straightforward task.

Managing the Nation's Wealth – the Government Take and the Resource Curse

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Content

1 Introduction

Countries with major natural resources, especially oil and gas, face some well recognised problems. The effect of the income from these resources on the national economy is often inflation, and in tandem, there are negative impacts on other sectors of the economy. Accordingly, the expected welfare effects are not realised to the extent that one would expect. Furthermore, it is also the experience of many countries that income from oil and gas is not distributed within the population, but is instead captured by a narrow elite. At the same time, this may reinforce an autocratic development. The paradox is therefore that discovery of vast natural resources may have a negative impact on the development of a country, instead of what might be anticipated. Norway has sought to overcome these problems through several legal and organisational measures.

For the management of Norway's petroleum resources, the starting point is given in the Norwegian Petroleum Act[1] § 1-2 paragraph 2:

> "Resource management of petroleum resources shall be carried out in a long-term perspective for the benefit of the Norwegian society as a whole. In this regard the resource management shall provide revenues to the country and shall contribute to ensuring welfare, employment and an improved environment, as well as to the strengthening of Norwegian trade and industry and industrial development, and at the same time take due regard of regional and local policy considerations and other activities."

That the management of the oil and gas resources shall benefit "the Norwegian society as a whole" is the basic principle. Revenues to the country are secured mainly through taxation, direct state participation in the industry and indirect state participation through share ownership in the oil company Statoil (see section 2 below). Further, to control the effect on the national economy, the net government income from all oil

[1] Act No. 72 of 29 November 1996.

and gas activities is channeled into a special vehicle: the Government Pension Fund Global. The income is not treated as one would expect, as normal income on the state budget. The Government Pension Fund Global does not invest in Norway. All of its capital is invested abroad (see section 3 below). When investing abroad, the Fund is governed by a specific mandate. It has to invest in shares in listed companies, in fixed income instruments, and, to a small extent, in real property. Ethical guidelines also apply to the Fund's investments (see section 4 below). To promote transparency about the oil and gas income, Norway is also participating in the Extractive Industry Transparency Initiative (EITI) which requires collection of data on payments to the government by the industry and easily available publication of the data collected (see section 5 below).

2 Government income from the production of oil and gas

Government income from petroleum activities mainly comes from three sources. Firstly, taxation. The oil companies pay ordinary corporate tax, which is currently 27 per cent on net income. Further, due to the extraordinary profits associated with producing oil and gas, an additional special tax with a tax rate of 51 per cent is levied on net income from oil and gas production.[2] These tax rates are not directly comparable to ordinary taxation, because there are some special rules related to depreciation and deductable costs which do not interest us in this context.

Secondly, the state is a direct participant in most production licences on the Norwegian Continental Shelf. This is organised as the State Direct Financial Interest (SDFI, Norwegian: SDØE) and is managed by a special state owned company: Petoro AS. As of 1 January 2014, the State had direct financial interests in 179 production licences, as well as interests

[2] Taxation is based on the special Petroleum Taxation Act (No. 35 of 13 June 1975).

in 15 joint ventures in pipelines and onshore facilities.[3] This direct investment has developed since 1985. At first it was managed by Statoil, which at the time was a 100 per cent state owned company. After Statoil was listed on the stock exchange and part privatised in 2001, Petoro AS was established to manage the SDFI. The implication of the SDFI is that the state, out of the state budget, invests according to its stipulated percentage in the joint venture under each production licence and receives its share of revenue from the production. Accordingly, the investments necessary for state participation do not go through Petoro's budget. Sale of the oil and gas is done through Statoil, but the revenue goes to the state directly. This mechanism gives the state the direct income while at the same time giving Statoil an advantage in the markets, since it controls larger volumes than its own part of the production.

Petoro is an ordinary limited liability company with some special regulations, according to chapter 11 of the Petroleum Act which contains the rules relating to the SDFI. In the management committees in the joint ventures, the SDFI, acting through Petoro, participates basically in line with the other participants except for some special situations. Petoro is not allowed to be operator under any licences.

Thirdly, the state is the controlling owner of Statoil ASA, with an ownership of 67 per cent of Statoil's shares. In 2013, the dividend paid to the Norwegian State amounted to NOK 14.42 billion. Statoil was established in 1972 as an instrument for state participation in the petroleum industry and is today Norway's largest corporate group with respect to both turnover and results. When it was established, it was 100 per cent state owned. That changed in 2001 when it was part privatised and listed in Oslo and New York. Statoil participates as an ordinary licensee and/or operator under licences on the Norwegian Continental Shelf and is also active in exploration and production in many other countries.

There is also other state income from the oil and gas industry, such as an area fee and the CO_2 and NOx taxes, which have special purposes but which we exclude from consideration, since the amounts received do

[3] Source Facts 2014 The Norwegian Petroleum Sector at www.regjeringen.no/globalassets/upload/oed/pdf_filer_2/faktaheftet/fakta2014og/facts_2014_nett.pdf

not merit special attention.

In total, income from the petroleum industry in 2013 amounted to 30 per cent of government income. On a national level, the petroleum industry represents 22 per cent of the Gross Domestic Product (GDP) and 50 per cent of the total Norwegian export volume. These figures show that the Norwegian economy is highly dependant on oil and gas income.

3 The Government Pension Fund Global

The Government Pension Fund Global serves several purposes.[4] One is to avoid the effect of more money being transferred into the Norwegian economy over a shorter period of time than the economy can handle. The oil and gas dependency is buffered through the Fund. Another purpose is to save up for future generations. Petroleum is a depletable resource and building up a fund means that resources in the form of financial resources will be a lasting legacy of the oil and gas period – in principle, forever. It represents a type of transgenerational solidarity.

Whether saving up for future state pension liabilities is a separate purpose, or part of this transgenerational solidarity, is a matter of classification. But the renaming of the Fund from the Petroleum Fund to the Government Pension Fund Global points directly to this purpose. It should be stressed, however, that the Fund is not formally linked to pension liabilities. In formal terms, it is a general state asset in the form of a separate state account in the Central Bank of Norway (Norges Bank). A third and more practical purpose of the Fund is to decouple the state budget from the normal large fluctuations in income from the oil and gas sector, due to the varying prices of oil and gas.

A separate act governs the establishment and management of the Fund,[5] but the more detailed rules on the management of the Fund are laid down by the Ministry of Finance. The management of the Fund is

[4] Until 2006, it was named the Petroleum Fund.

[5] Act. No. 123 of 21 December 2005.

performed by a separate unit of the Central Bank called Norges Bank Investment Management (NBIM). The growth of the Fund is shown in Figure 1. Currently the Fund owns approximately 1.3 per cent of all listed shares in the world.

It is a sovereign wealth fund – currently the world's largest, ahead of the Abu Dhabi and Saudi Arabia funds.[6] As a sovereign wealth fund, it is a member of the International Forum of Sovereign Wealth Funds which has its own guiding principles, the so-called Santiago Principles.[7]

On 28 January 2015, the value of the Fund was 6.643 billion NOK (860 billion USD).[8]

Not until 1996 did the first transfer to the Fund occur, even though the Fund had already been established by statute in 1990.[9] Since then it has grown considerably.

Which part of the state income should be transferred *to* the Fund is precisely stipulated in the Act on the Government Pension Fund of 2005 § 3. All net state income from the oil and gas sector must be channeled into the Fund. That means: all taxes from the sector, all net income from the State Direct Financial Interest and all dividends from Statoil ASA, as well as some other minor types of income. These regular transfers, together with the return on the investments of the Fund, explain in themselves the growth of the Fund. Over time the average annual net return of the Fund has been 3.6 per cent.[10]

Transfers *from* the Fund to the annual state budget can only take place based on a decision by the Storting (the Norwegian parliament), as set out in the Pension Fund Act § 5. Such decision normally takes place as part of the adoption of the annual state budget every autumn. The practical application of this rule has been developed through an understanding between a large majority of the political parties represented in the Storting. The rule of thumb ("handlingsregelen" – the spending

6 But China has several sovereign wealth funds which, taken together, would surpass all the others.

7 See www.ifswf.org/

8 Source: http://www.nbim.no/

9 Through Act No. 36 of 22 June 1990 on the State Petroleum Fund.

10 http://www.nbim.no/en/ (vistited 28 January 2015).

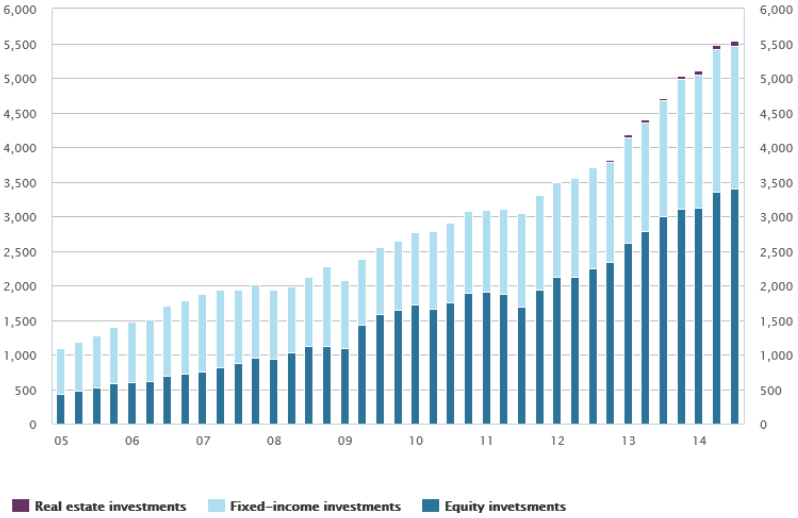
guideline) which was established in 2001 is that the transfer should be aligned with the expected annual net real return of the Fund. At the time, that was expected to be 4 per cent. As we have seen above, it has in fact been somewhat lower and there are discussions about whether the percentage should be set at 3 per cent. This rule should, in principle, lead to the Fund lasting for ever. All governments have been somewhat flexible with respect to the actual transfer of money from the Fund, mainly staying below 4 per cent.

The investments of the Fund are governed by a mandate set by the Ministry of Finance.[11] Sixty per cent of the Fund should be invested in listed shares. Shares listed in Norway are excluded. Currently, the Fund holds shares in approximately 9000 companies in all regions of the world. The spread of the holdings closely follows an index set by the Ministry. In practice, the Fund is a universal investor – an investor that holds shares in all important markets and all important companies, with an exposure that follows the general weighting of the markets. The main exception is companies that are explicitly excluded from ownership by the Fund, see section 4 below. The Fund is not allowed to own more than 10 per cent of the shares with voting rights in any company. Normally, the percentage is much lower. The limit and the practice mean that the Fund will never be a controlling shareholder in any company. Basically the Fund follows the general development of the equity markets, but with some active deviations from the index allowed within certain risk parameters.

Forty per cent of the Fund, less what is invested in real property must be invested in fixed income instruments issued by states or by companies. Up to 5 per cent of the Fund may be invested in real property, typically in large cities in the Western hemisphere. Investment in real property is a fairly new development and has not yet reached its 5 per cent limit.

[11] See: https://www.regjeringen.no/globalassets/upload/fin/statens-pensjonsfond/gpfg-management-mandate-14-april-2015.pdf

Figure 1: Development of the holdings of the Government Pension Fund Global. Figures in billion NOK.[12]



4 Ethical considerations. Responsible investment by the Government Pension Fund Global

Since 2004 guidelines have been in place on the exclusion of specific companies from the Fund due to either the products they produce or to certain types of conduct. The basic idea underlying these ethical guidelines was that the Norwegian people, as owner of the Fund, should not derive profits from activities that grossly violated the rights and interests of people who came into contact with the activities of the individual companies in the portfolio. Over the years, the guidelines have been

[12] Source: http://www.nbim.no/

somewhat amended, but the basic content is still the same.

The current guidelines are titled "Guidelines for observation and exclusion of Companies from the Government Pension Fund Global" and were revised in December 2014.[13] The basic rule with respect to *product* exclusion or formal observation is that the Fund "shall not be invested in companies which themselves or through entities they control … produce weapons that violate fundamental humanitarian principles through their normal use [or] produce tobacco". This is a prohibition on investments in companies that produce nuclear weapons, chemical weapons etc, ref. section 2 of the guidelines.[14]

The other category, related to companies' *conduct*, is more complex, both with respect to the mandate and the application. Section 3 of the guidelines reads as follows:

> "Criteria for conduct-based observation and exclusion of companies: Companies may be put under observation or be excluded if there is an unacceptable risk that the company contributes to or is responsible for:
>
> i) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour and the worst forms of child labour
>
> ii) serious violations of the rights of individuals in situations of war or conflict
>
> iii) severe environmental damage
>
> iv) gross corruption
>
> v) other particularly serious violations of fundamental ethical norms."

[13] See: www.etikkradet.no/en/guidelines/

[14] See the list of excluded companies here: www.nbim.no/en/responsibility/exclusion-of-companies/

A separate body, the Council on Ethics, issues recommendations to the Central Bank about exclusion from the Fund or formal observation without exclusion.[15] Human rights and environmental damage have been the two most important bases for consideration of exclusion.[16] To give some indications about how the guidelines work, we will present some cases where oil companies have been involved. Since the Fund is a universal investor and a number of oil companies are among the world's largest companies, the Fund has holdings in several oil companies. Let us look at four such cases:

1) The French oil company Total SA was accused of complicity in human rights violations in connection with the construction of the Yadana gas pipeline in Burma/Myanmar during the period 1995-1998.[17] The Council on Ethics found in its recommendation dated 14 November 2005 that Total had been involved with human rights violations by the Burmese security forces connected to the project, which had taken place during the construction period. Subsequently, the attitude of the company had changed. Previous conduct was not a sufficient reason for exclusion under the guidelines. Only the risk of present or future violations of the guidelines could lead to exclusion. The Council found "that in future construction projects Total is hardly likely to put itself in a situation in which it is associated with the use of forced labour". The Council concluded that it considered it "unlikely that Total will go ahead with projects in the future without ensuring that the company does not find itself in a situation akin to the one that arose in the period 1995-1998. Hence the Council is of the view that there is not an unacceptable risk that Total will repeat its previous pattern of action in the future".

[15] Before 1 January 2015, the recommendations were issued to the Ministry of Finance. Here, the author must declare an interest because in the period from 2004 to 2014 he was a member, and later vice chair and chair of the Council on Ethics.

[16] On the development of the practise and the reasoning behind application of the Guidelines, see G. Nystuen, A. Follesdal & O. Mestad (eds.), *Human Rights, Corporate Complicity and Disinvestment*, Cambridge UP, 2011.

[17] See the recommendation at http://etikkradet.no/files/2014/12/Total-ENG.pdf

2) The American oil company Kerr-McGee Corporation was excluded from the Government Pension Fund Global, based on a recommendation from the Council on Ethics dated 11 April 2005.[18] The company was working under a contract with the governmental Moroccan oil company ONAREP, regarding geological and geophysical studies off shore Western Sahara. Western Sahara was and is a territory controlled by Morocco, but Moroccan sovereignty over the territory has never been recognised by the United Nations. According to the UN, Western Sahara is still a Non-Self-Governing Territory and the UN General Assembly has adopted a number of resolutions confirming this. The Council found that the economic activities of Kerr-McGee off shore Western Sahara, on behalf of Morocco, contributed to a possible strengthening of Morocco's sovereignty claims regarding the territory, in violation of international law. Accordingly, Kerr-McGee was excluded from the Fund, because its conduct was considered to constitute an unacceptable risk of contributing to other particularly serious violations of fundamental ethical norms.

3) The Anglo-Dutch oil company Royal Dutch Shell plc was recommended to be placed under formal observation due to severe environmental damage caused by oil production in the Niger Delta in Nigeria, in a recommendation dated 20 March 2013.[19] Shell's leading role in oil production in the delta had, for a long time, led to frequent and, in total, extensive oil spills. The volume of the reported oil spills was far higher than would be normal in an international perspective and those which Shell experienced in other operations. This applied to oil spills resulting from both operational failure and sabotage. The Council found that "Shell has a clear responsibility for the unacceptable damage situation, but the company is not solely responsible for this situation". The company would have to "implement extraordinary and effective

[18] http://etikkradet.no/files/2014/12/KMG-eng-april-2005.pdf. It was later included again after the operations were completed.

[19] See http://etikkradet.no/files/2014/12/Shell_ENG.pdf

measures to a much greater extent" than had been the case. Because of the uncertainty about future developments in Nigeria and the role of Nigerian local and central government, the Council did not recommend exclusion from the Fund, but instead putting the company under observation. This observation should especially monitor "how Shell utilises its varying freedom of action in the complex situation in the Niger Delta". The Council added that "what freedom of action the company will have depends, among other things, on political developments". The Ministry of Finance did not follow the recommendation completely, but instead instructed the Central bank to include oil spills and the environmental conditions in the Niger Delta in its ownership efforts for a period of between five and ten years, and report annually on its exercise of ownership.

4) The Spanish oil company Repsol SA was recommended to be excluded from the Fund in 2010 because of oil exploration activities in an area of Amazon Peru where there was a risk of coming in contact with peoples living in voluntary isolation.[20] The core principle in the protection of such uncontacted indigenous peoples is the principle of no-contact, which implies that these groups should be protected from outside intrusion into their territories. This was the basis for the recommendation. In February 2014, Repsol informed the Council that it had entered into an agreement to sell its share in the joint venture and confirmed that all operations in the block had ceased. Accordingly, the Council reversed its recommendation.[21]

What do these four examples demonstrate about the management of the

[20] See for the various documents with regard to Repsol: http://etikkradet.no/en/tilradninger-og-dokumenter/recommendations/serious-violations-of-human-rights/recommendations-from-2010-2012-and-2014-regarding-the-companies-repsol-s-a-and-reliance-industries-limited/

[21] The Ministry had not yet acted on the first recommendation, a delay that has not been explained. Accordingly, Repsol was never formally excluded, but did of course know about the content of the recommendation which awaited decision by the Ministry.

so called oil fund? Firstly, it shows that even if the basic capital of the Fund comes from the petroleum activities, such activities are also monitored. Further, it is a reminder that the international oil industry may be involved with different types of unethical conduct, from violations of human rights and violations of international law to severe environmental damage. Thirdly, it also indicates that ethical monitoring of companies may have an impact on companies' conduct. At least such an effect is probable when the monitoring is done through a very large fund, which makes public its assessments of companies' conduct in relatively detailed and thoroughly researched recommendations.

5 The Extractive Industries Transparency Initiative (EITI)

The core of the EITI initiative is to publish information about payments from oil and mining companies to states and mirror this with information received by the state from oil and mining industry. The purpose is to increase democratic control, prevent corruption, create development and give better distribution of income from natural resources. The thinking behind the initiative, which was taken by the British Prime Minister Tony Blair in 2002, was aimed at preventing the so-called "Resource Curse". An organisation, the EITI Association, has been set up and the core of the organisation is set out in Article 2 of the association:

> "The EITI Association is an international multi-stakeholder initiative with participation of representatives from governments and their agencies, oil, gas and mining companies, asset management companies and pension funds, , local civil society groups and international non-governmental organisations."[22]

[22] See the home page at https://eiti.org/. EITI is currently based in Norway.

The regulation of the activities of EITI is based on the so-called "EITI Standard" which was adopted in 2013 as a modernisation of the previous principles that had been applied.[23]

EITI has three categories of member: member countries, companies and investors, and NGOs. Of compliant countries, that is, countries following the standard, there are currently 31. This includes important oil producing countries like Nigeria, Kazakhstan and Iraq. Norway is the only OECD member country that is also a compliant country of the EITI. Currently, there are also 17 candidate countries. In addition there is a list of mainly Western supporting countries, including Australia, Canada, Germany, Norway, UK, Qatar and the USA. 90 companies are supporting EITI, including among others the following oil companies: BP, Chevron, ConocoPhillips, Eni, ExxonMobil, Hess, Marathon, Pemex, Petrobras, Repsol, Shell, Statoil, Talisman and TOTAL. In addition, more than 80 institional investors support EITI, including DNBNor, GoldmanSachs, JPMorgan, the Norwegian Government Pension Fund Global and Storebrand.

Then, importantly, there are some NGO members which are key actors in the field of publishing oil and gas income. They are the Publish What You Pay Coalition, Oxfam, Global Witness, the Natural Resource Governance Institute and Transparency International.

In Norway, the EITI Standard has been implemented through a separate Regulation from 2009.[24] The main content of the Regulation is a requirement for reporting of payments by all oil companies, Petoro and Statoil and the reporting of received payments by tax authorities, the central bank, the Petroleum Directorate etc.[25] Furthermore, there are provisions on audit and publishing of reported sums, as well as stakeholder group control and validation of process.

Why has Norway joined an initiative which, on the face of it, appears to be tailor made for developing countries? It seems to be part of Norway's

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23 https://eiti.org/document/standard

24 Forskrift 2009-06-26 No. 856: Forskrift om rapportering og avstemming av pengestrømmer fra petroleumsvirksomheten, in force from 1 July, 2009.

25 See the latest Norwegian report at https://eiti.org/report/norway/2012

international initiatives with respect to training developing countries in managing their oil wealth. It was thought that Norway also should also "walk the walk".

Has the EITI been a success? At the very least it has increased the pressure on publishing the enormous amounts that are often involved in the oil industry. But other national home state initiatives may have even better effects.

Fundamental Principles of Petroleum Law

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Content

1 Introduction

This text was originally written as an introductory article to a compendium used for the course in petroleum law at the University of Oslo. Its original aim was to draw out some of the characteristic features of petroleum law as a separate branch of Norwegian public law, while at the same time placing Norwegian petroleum law into a more international perspective. It takes as a starting point that while the regulatory model and positive legal regulations may change from one country to the next, the fundamental issues and challenges that need to be addressed by the law usually have clear similarities. In light of this, the modest aim of the following is to try to identify some of the more fundamental, general and pervasive issues and concerns that distinguish petroleum law as a distinct field of law.

Petroleum law in a broad sense can be taken to mean the law that relates to exploration for, exploitation of, and sale and distribution of petroleum worldwide. This means petroleum law is not a traditional branch of law such as contract law, property law or administrative law. Instead it has what we may call a functional scope, branching out from a set of real concerns, issues and problems relating to the factual exploitation of petroleum as a natural resource, and its primary use as an energy commodity. In principle, this covers a large and multifaceted legal landscape. In the broadest sense, everything from public international law relating to jurisdiction over petroleum activities, to public law concerning the relationship between the government and private oil companies, tort law and liability issues relating to third parties affected by the activities, as well as commercial and contract law relating to the relationship between different private actors, comes within its reach. However, in a more narrow sense, and the sense we primarily will use it here, Petroleum Law may be considered to encompass primarily the law concerned with government regulation and management of petroleum activities. At least in a Norwegian perspective, it thus constitutes a special branch of public and administrative law, but taking in significant elements of contract

and commercial law, tort law and international law.

From a Norwegian perspective, the natural focus of petroleum law is on the legal system for petroleum exploration and exploitation on the Norwegian continental shelf. In a broader, international context, the Norwegian system can be characterised as a *concession- or license based model*, representing one of two main regulatory models for structuring the private exploration and exploitation of petroleum internationally. The other main form of regulatory model is what we can designate the *contract based model*, which is characterised by private oil companies being given rights to explore for and exploit petroleum on the basis of a negotiated contract with the government. As I will discuss further below, the Norwegian licensing system is characterized by an extraordinarily high degree of government involvement, supervision and control, at every stage of the activities, something which distinguishes it in several respects from more typically contract based systems. On a more fundamental level, this aspect of the Norwegian system can be seen in light of the overriding concern that the petroleum resources shall be managed for the benefit of society as a whole. This is a legal principle of considerable importance under Norwegian law as I come back to below.[1] It also has consequences beyond the need for government approvals and consent at different stages of the activities. An important element of the Norwegian system is for instance the government's role in putting together individual license groups, and laying down the contractual terms and conditions that shall apply within the group. Moreover, the rules on mandatory unitization and third party access to key infrastructure and installations[2], which form key parts of the Norwegian regulatory framework, must also be seen in this light.

Below I argue *inter alia* that these aspects of the Norwegian system all branch out from a root principle relating to ownership of natural resources, which also has its equivalent in international and human rights law in the principle of permanent sovereignty over natural resources. This is further discussed in section 2. In practice this fundamental issue

[1] The Petroleum Act § 1-2.

[2] Cf. the Petroleum Act §§ 4-7 and 4-8.

of ownership is related to and its implementation dependent on two further issues and concerns of pervasive importance. The first concerns the extent of government powers and necessary involvement during different phases of the petroleum activities, which shall be further discussed in section 3 below. The second concerns the entitlement of the private oil companies to security of their rights and expectations under a license or contract to explore for and exploit petroleum. This shall be further discussed in section 4 below. Another very important issue and concern relates to the potential impact of petroleum activities on third parties and the environment, including the global climate. This is further discussed in section 5 below. Finally, an important perspective on petroleum law that cannot be forgotten is provided by the singular importance of oil and gas in world affairs as an energy commodity. Important legal issues and legal concerns in this regard relate to the security of supply and functioning markets for petroleum products. I shall say something more about this issue in section 6 below.

2 Ownership to petroleum resources

Petroleum, that is, oil and gas, is usually found deep underground or in subsea reservoirs. Much work, large investments and advanced technology, is usually necessary just to find the petroleum. Exploration requires the drilling of wells often several thousand meters down into the ground or the seabed, and there is no guarantee that the drilling of a well will lead to a discovery. Oil companies and host governments invest large resources in seismic exploration of the ground and the seabed to find promising locations where there might be petroleum, but no certainty can be achieved before an actual well is drilled. The drilling of exploration wells is expensive. It requires advanced drilling rigs, which offshore can cost more than 500 000 US Dollars per day to rent. The drilling of one well may take on average around 60 days. Most exploration wells that are drilled also turn out to be dry or to find only reservoirs that are too

small or not of sufficiently good quality to be commercially developed. Moreover, it is only once the petroleum is discovered that the really large investments are required. In order to actually extract the petroleum discovered from the subsoil, complex technology and enormous investments in facilities and infrastructure are usually needed. Exploiting petroleum reserves is consequently not simply a windfall, it requires tremendous work and effort. When commercially prospective discoveries are made, petroleum may however represent an enormously valuable source of wealth. A fundamental question in this regard is who can be considered to own the petroleum resources in the subsoil, and how ownership to petroleum resources is conferred and acquired.

The answer here may depend both on different legal traditions and on where the petroleum is located. It is also an issue which has wide reaching ramifications, ranging from the international allocation of resources between states, to the relationship between private oil companies or owners of the land beneath which the petroleum is found, as well as to the broader population of the nation. Petroleum means wealth, and wealth means power, so these issues are often the subject of fierce controversy, both between nations, between different private land owners or concessionaires, and between private proprietors and the political leaders and officials representing the nation. Drawing on different conceptions about property and justice it is also possible to hold different conceptions about who *should* be considered the rightful owner of petroleum in the subsoil. Someone sworn to Locke's conception of property as the fruit of labour, or the old Roman law conception of property as the fruit of first acquisition or occupation, might have a very different conception in this regard from someone adhering to a socialist perception about individual property being fundamentally unjust. Put differently, and before the ownership to the petroleum resources on the continental shelf was definitively established in Norwegian legislation, might for instance an international oil company having discovered a petroleum deposit in the North Sea have claimed ownership on the basis of first discovery or acquisition? And, in case not, why?

The tremendous work and resources usually required both to find

and to produce petroleum resources may suggest that it is not unfair that an oil company undertaking this work should get ownership of the resources produced in return. At the same time, it may be held that the state and people under whose territory or continental shelf the resources are found also have a legitimate claim to benefit from the resources. Despite what one may think about the legitimate ownership interest of a land owner to resources found under his land, it is not either unreasonable to consider that at least the manner in which the resources are exploited, and who should be entitled to engage in exploitation activities, ought to be subject to some measure of state control and regulation. One of the fundamental issues in petroleum law consequently concerns precisely this relationship between public and private rights to natural resources. Here we must start with the allocation of resources between different states and nations as the representatives of the public interest.

Under international law, the generally recognized principle is that petroleum and mineral resources in the ground or under the seabed belongs to the state under whose territory or continental shelf the resources are found. A reflection of this is found in the United Convention on the Law of the Seas (UNCLOS), article 77, which states that the coastal state has exclusive sovereign rights over the continental shelf "for the purpose of exploring it and exploiting its natural resources." This basically means that the state itself is free to decide upon the allocation of rights to and exploitation of any petroleum (or other) resources under its continental shelf. In Norway, the basic principle regarding ownership to petroleum under the continental shelf is, in accordance with this, that ownership rights to "subsea petroleum deposits" are vested in the state, which also has "the exclusive right to resource management."[3] It would however not be in violation of UNCLOS if the state instead allocated full and exclusive ownership rights to private interests on the basis of some prior proprietary claim, such as first acquisition, although it might be considered both unjust and bad resource management from the point of view of the collective interests.

International law does however also recognize to some extent what

[3] The Petroleum Act § 1-1

may be deemed a collective proprietary interest of the nation in the natural resources on its territory. This is enshrined in the so called principle of "permanent sovereignty over natural resources" which today can be considered a part of the corpus of generally recognized principles of universal human rights. The principle was first recognised by the UN General Assembly in several resolutions in the 1960s and -70s, responding to the aspirations of newly independent nations for economic independence from their former colonial masters. The widely accepted resolution 1803 on Permanent Sovereignty over Natural Resources adopted by the UN General Assembly in 1962, set out the following main principle concerning the fundamental rights to a country's natural resources:

> The right of peoples and nations to permanent sovereignty over their wealth and resources must be exercised in the interest of their national development and of the well-being of the State concerned.[4]

Today the principle has found an authoritative expression as common article 1 of the two main UN Human Rights Covenants, which has the following wording:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its means of subsistence.[5]

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[4] This was grandly heralded as a movement towards a "New International Economic Order". It continued with the adoption by the UN General Assembly, against the votes of most developed states, of a set of highly normative GA resolutions on national sovereignty over natural resources, culminating with the so called Charter of Economic Rights and Duties of States in 1974 (GA res. 3281 (XXIX)). While no consensus was or has been reached on the exact legal consequences of the principle, the basic idea it contains must be considered to have become largely accepted in international law, as evidenced e.g. in its adoption in the two UN Covenants on Human Rights.

[5] International Covenants on Economic, Social and Cultural Rights/Civil and Political Rights (UN, 1966) Article 1, para. 2.

At its core, and as reflected in the final sentence, this contains the notion that national sovereignty over natural resources shall be exercised in the collective interest of the people or nation as in a sense the true owners, and that, for this reason, it is in its very essence "permanent" or inalienable.[6]

The subject of the right to permanent sovereignty is consequently not the state as such but the "people". This reflects the principle that the right over the nation's resources is conceived as a human right vested in the collective of individuals constituting the people or nation and not in the state as a political entity.[7] In principle the concept of permanent sovereignty consequently also entails duties for the state towards its people, since the idea it enshrines is that the sovereignty exercised by the state is rooted in a fiduciary responsibility towards the "people" as the true owners. If a country's petroleum resources are used almost exclusively to enrich a small, ruling elite, it may, at least in principle, constitute a violation of the principle of permanent sovereignty. The principle also provides the rationale for the right of states to nationalize or expropriate private rights over natural resources, and suggests that although expropriation requires payment of adequate compensation, the right to expropriate as such can never be lost.[8]

In Norwegian law it is essentially the same concerns that underlie the main principle of resource management set down by the Petroleum Act § 1-2, the second sentence of which requires that "[t]he resource management of the petroleum resources shall be carried out in a long-term perspective for the benefit of the Norwegian society as a whole."[9] The rationale of this is that all subsea petroleum deposits are the collective property of the state, as expressly stipulated in the Petroleum Act § 1-1.

6 See e.g. Abi-Saab, 'Permanent Sovereignty over Natural Resources and Economic Activities' in Bedjaoui (ed.): *International Law: Achievements and Prospects* (Paris (UNESCO), 1991) p. 597. And see also my own discussion of this in Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing, Oxford, 2011) p. 245 et seq.

7 See further about this e.g. Crawford, 'The Rights of Peoples: Peoples or Governments' in Crawford (ed.), *The Rights of Peoples* (Clarendon Press, Oxford, 1988).

8 See further Alvik (2011) p. 245 et seq.

9 See also further right below, section 3.

Such a fiduciary responsibility again has a constitutional basis in § 19 of the Norwegian Constitution, which stipulates that "[t]he King ensures that the properties and prerogatives of the State are utilized and administered in the manner determined by the Parliament [Storting] *and in the best interests of the general public*" (my emphasis).

The common denominator is consequently a concept of collective ownership, at the core of which is a concept of *responsible* resource management for the benefit of society as a whole. It is nevertheless clear that what we are dealing with here are legal principles at a high level of abstraction. It is obviously difficult to draw any firm conclusions with legal validity about what responsible resource management means under different circumstances. In Norway, the main restrictions on the government's management strategies are that they must be in accordance with the framework of the Petroleum Act, and that they are subject to the parliament's control and powers. Under the political conditions prevailing in Norway, it is consequently difficult to envisage a situation where regulations or strategies decided upon by the sitting government would be considered an outright breach of the principle of responsible resource management as such. The principle may however have some importance as a general consideration or statement of purpose to be taken into account when interpreting the Petroleum Act and underlying regulations.[10]

The legal concept of natural resources belonging to the people as a collective does not necessarily mean that petroleum in the ground is incapable of being subject to private ownership. It nevertheless carries the underlying idea that natural resources as such are not *prima facie* and naturally subject to private ownership, in the same sense as for instance the product of an individual's work. Being a resource provided by nature one could argue that it would not be just and reasonable for an individual to be able to lay claim to an exclusive and unlimited proprietary right to a petroleum reservoir merely by virtue of first discovery, appropriation, or ownership of the land in the subsoil of which the pe-

[10] See further about this e.g. in the commentary to the Petroleum Act, Hammer (et al.), *Petroleumsloven* (Universitetsforlaget, 2009) p. 35 et seq.

troleum is found. The state has a prima facie legitimate proprietary interest, which means that it is not necessarily expropriation to fail to recognize any other individual ownership interest.

In Norway these considerations are enshrined in the general principle that ownership to the petroleum resources rests with the state, which nevertheless does not prevent the concessionaire being considered as acquiring full ownership to the petroleum once produced. But the concessionaires' revenues from the petroleum activities are again subject to a special petroleum tax of 51 % (which comes in addition to ordinary income tax of 27 %, bringing the total taxation rate to 78 %). This represents the so called resource rent ("*grunnrenten*" in Norwegian) which again can be seen to reflect the state's proprietary interest in the resources in the ground. Conceptually, the crucial point when the resources go from public to private ownership is deemed to be when the petroleum leaves the wellhead. However, determining the precise point when ownership changes, does not have much practical significance. The main basis of the concessionaire's rights is in any case the license or concession to produce petroleum. To some extent this also has a proprietary character in itself, in that it may, subject to the government's approval in each case, be both bought and sold and pledged as security in the manner of any other commercial asset.[11] And although the production license does not give a definitive right to develop and produce any resources found, it does give the licensee an exclusive right, in the sense that no one else can be given this right. Difficult questions relating to the extent of the private proprietary interest under a license also arise where a petroleum reservoir is found to straddle several license areas. Here a general regulatory requirement in Norway is to require that the licenses are "unitized" in order to ensure joint development of the reservoir, which effectively requires the creation of a new unitized group.[12] In such cases it is often difficult to determine the respective ownership shares that the different license groups should have in the unitized group, and the competing claims will usually have some root in different conceptions of what

[11] Cf. the Petroleum Act, § 10-12, and §§ 6-1 – 6-4

[12] Cf. The Petroleum Act, § 4-7.

constitutes a fair *rationale* of the underlying proprietary interest.

Where the petroleum is found offshore on the continental shelf, the absence of any private proprietary rights is quite logical (at least if we disregard the possible notion of first acquisition), since the seabed is not subject to private ownership. The situation is more complex where petroleum is found on land in underground reservoirs. Here it would not be wholly illogical to consider that the owner of the land above has a prima facie proprietary interest in resources found on or under his land. Under US petroleum law this is also generally the main principle (i.e. in most states), although originally this was again subject to the so called 'rule of capture' which meant that the land owner, or whoever he leased out his land to for this purpose, became the legitimate owner of all petroleum that could be produced from a given well. In other words, the ownership of the land above mainly gave a right to drill wells and produce, it did not give any firm rights to the petroleum located directly beneath the land area owned. This was subject, effectively, to first acquisition or appropriation, in the same manner as for water in a river or birds in the air. Later this was however again made subject to the so called "*doctrine of correlative rights*" which requires that owners of different land areas above a common reservoir shall have equal opportunities to secure their proportionate share of the reservoir.[13] US law is however not representative of a common system for acquiring ownership to petroleum and other natural resources found deep underground. In Norway, although no petroleum has been found on land here, the principle has nonetheless been set down in legislation that any underground petroleum resources on land belong to the state.[14] The same principle applies to most other valuable minerals found underground, which in the Minerals Act are defined to be the "state's minerals".[15] It is also the system in most other countries that proprietary interests in petroleum resources can only be

[13] See e.g. Duval et al., *International Petroleum Exploration and Exploitation Agreements: Legal, Economic and Policy Aspects* (Barrows Company, New York, 2nd edn. 2009), p. 14.

[14] See Act of 4 May 1973 no. 21, regarding exploration for and production of petroleum in the ground under Norwegian land territory.

[15] Cf. the Minerals Act of 19 June 2009 No. 101 § 7.

obtained through a specific license from the government, they do not exist merely by virtue of land ownership as under the US system.

Quite often a license to produce petroleum may be combined with or granted directly through a contract entered into by the government with the private oil company. Until about 50 years ago, it was most common for such contracts to be entered into in the form of concession contracts, giving wide reaching and exclusive rights to private oil companies to produce and sell all the petroleum discovered in a certain area. The concession contracts entered into by international oil companies in the Middle East against payment of royalties later led to fierce controversies,[16] and have since given the very name concession contract a negative connotation.[17] This also led to the development of another form of contract, which is the most common type today, namely the so called "production sharing" type of agreement (PSA).[18] Under these contracts, the company has a right and an obligation to produce petroleum for the state, and merely receives in return a certain share of the petroleum produced. In terms of ownership, the main distinction from modern concessions, such as those under the Norwegian system, is consequently that the private oil company only receives a share of the petroleum produced instead of full ownership of all that is produced. The practical reality is nevertheless not much different in a system such as that of Norway, where the difference is only that the state's proprietary interest is converted into a high petroleum tax. In some countries, however, one can also find another type of contract, which is often called risk service agreements, where the company has, in principle, no proprietary interest in the oil produced. Instead the oil company is conceived as an ordinary contractor producing the petroleum for the state against payment.[19]

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16 See for a fascinating account of the history here e.g. Yergin, *The prize: the epic quest for oil, money & power* (Free Press, New York, 2008).

17 See below Duval et al. (2009), p. 62

18 Ibid. Chapter 6.

19 But sometimes such contracts provide for payment in kind, or include a so called «buy back» clause, which provides for an amount of oil equal in value to the agreed payment for the services to be transferred to the company, see further Duval et al. (2009), chapter 7.

3 Resource management and government powers

Considering petroleum resources a part of each country's collective wealth means that the main concern from the government's point of view generally ought to be how the resources can be managed in order to secure the most benefit to society as a whole. This is the concern that above was labelled *responsible resource management*. Under Norwegian law, this constitutes the main underlying concern and objective of the petroleum legislation as a whole, as set out in the Petroleum Act § 1-2, part of which has already been cited above. The full wording of the provision is as follows:

> Resource management is executed by the King in accordance with the provisions of this Act and decisions made by the Storting (Parliament).
>
> Resource management of petroleum resources shall be carried out in a long-term perspective for the benefit of the Norwegian society as a whole. In this regard the resource management shall provide revenues to the country and shall contribute to ensuring welfare, employment and an improved environment, as well as to the strengthening of Norwegian trade and industry and industrial development, and at the same time take due regard to regional and local policy considerations and other activities.

In addition to the duty to manage the resources in a long time perspective for the benefit of society as a whole, the provision thus expressly stipulates that this is the responsibility of the King (which really means the cabinet headed by the prime minister), to be carried out in accordance with the provisions of the Petroleum Act and decisions of the Parliament.

As further indicated by the last part of the provision, responsible resource management can in this regard be considered to have two main aspects. On the one hand, it requires that exploration and production activities must be organized and carried out in a manner facilitating the

most efficient exploitation of the petroleum resources. This purpose is expressly stipulated in the Petroleum Act § 4-1.[20] However, the purpose of responsible resource management goes beyond and is both much broader and less straightforward than this concern to facilitate maximum efficient production. It demands that account must also be taken of the effect of the petroleum activities on the rest of the society and the economy, i.e. beyond merely providing revenues to the treasury. This means, for instance, that to the extent certain activities, which may well maximize the exploitation of existing resources, in the larger picture, are nevertheless deemed more harmful than beneficial to society as a whole, the overriding purpose of responsible resource management requires that they are not carried out. It may be that the risk of environmental harm or disruption of other economic activities, such as fisheries, is deemed so high in some areas that the society as a whole is better served by petroleum resources in such areas not being developed at all. The emerging awareness of climate change as a result of consumption of fossil fuels is also an issue that is sometimes raised in this connection. Specifically, this suggests that CO_2 efficiency is now a concern that ought to be taken into account when it is decided whether and how particular petroleum resources are developed. In the early days it was also a specific goal when the petroleum resources in the North Sea were being developed, that the activities should be carried out in a manner favouring Norwegian companies. The objective was to facilitate the development of a Norwegian petroleum industry. This meant that strict maximum efficiency was sacrificed in order to develop national oil companies and a national industry of supply. Today such a policy has been largely abandoned, since it would in most cases constitute a blatant breach of the EEA-agreement, but its significance for building up a national pe-

[20] § 4-1 has the following wording: « Production of petroleum shall take place in such a manner that as much as possible of the petroleum in place in each individual petroleum deposit, or in several deposits in combination, will be produced. The production shall take place in accordance with prudent technical and sound economic principles and in such a manner that waste of petroleum or reservoir energy is avoided. The licensee shall carry out continuous evaluation of production strategy and technical solutions and shall take the necessary measures in order to achieve this."

troleum industry in the early days of petroleum activities in Norway can hardly be overestimated.

As already pointed out in section 2 above, the main significance of the principle of responsible resource management is nevertheless not one of constituting a duty of the government that can be tested by the courts. Its main significance is that it constitutes the justification of what was noted above to be perhaps the most characteristic feature of the Norwegian system, namely the high degree of government involvement, supervision and control at every important stage of the petroleum activities. All the main elements of the Norwegian system are meant to provide government control over the most important aspects of the petroleum activities, and to reserve government power to make or approve all significant decisions. The system for direct state participation in most licenses can be seen in this light, as can the detailed regulation and key powers reserved to the state at most stages of the activities. This starts already at the time of the award, where standard government policy is to compose individual license groups from amongst all contenders in the relevant license round. The companies constituting a particular license group are required to enter into the government's standard cooperation agreement (or Joint Operating Agreement in more common international terminology), the terms and condition of which are set by the government for each license round. In practice, neither the composition of the license groups nor the contractual terms regulating the relationship between the license partners are subject to any real measure of freedom of contract. The underlying concern here is that the state should have freedom at all relevant stages to choose the manner of exploitation most in line with the overarching objective of responsible resource management.

Also the license system itself is strongly shaped by this concern. The key license under the Norwegian system is the production license,[21] which gives an exclusive license to explore for and produce any discovered petroleum in a pre-defined area. But the production license does not itself give a decisive right or legitimate expectation to develop and produce any discoveries made. This is subject to governmental approval

[21] Cf. the Petroleum Act § 3-3.

of a plan for development and operation (PDO). Thus, as already mentioned, the exclusivity only means that no one else can be given this right. This system is often characterized as a step-by-step approach, where the concession to explore and produce develops as a legal right in stages. At first, the concessionaire naturally has no real certainty of finding petroleum at all. But even if he finds petroleum he does not have a firm right to be allowed to develop any such discovery for production. When the government's consent to develop is granted through its approval of the PDO, and large investments are made in production facilities and other infrastructure, this naturally also means that the government's flexibility must be considerably reduced. An underlying concern is nevertheless that of always reserving necessary freedom to the government at all important stages of the activities to ensure the best possible resource management for society as a whole. Also important regulatory requirements, such as for instance the rules on mandatory unitization, and third party access to production facilities and pipelines, must be seen in this light. This means two things. First, it means the rights and interests of individual oil companies generally become to some extent subordinate to the public interest in what constitutes responsible resource management in the long term. And secondly and in the extension of this, it means that petroleum law in Norway becomes to a large extent a special branch of administrative law, occupied primarily with the powers and authority reserved to the government at every stage of the activities.

This provides, at least in principle, one of the main distinctions between a license system and a regulatory system based on a contractual model. Under the latter, the general assumption will usually be that the parties have mutual rights and obligations as provided for by the contract. This may also require that the Government's powers are exercised within relatively strict limitations set by the contract. Much of what is in a system such as that of Norway subject to the unilateral decision making power of the state, will then instead be assumed subject to predetermined contractual rights and obligations, or specific contractual mechanisms, restricting the power of the state. Where the rights to explore for and

exploit resources are subject to a contractual undertaking with the state, this also means that the perspective on the law becomes different. While the administrative law perspective provided by a licensing system will have the unilateral powers reserved to the state as its main focus and starting point, a contractual perspective naturally entails a stronger focus on the mutual rights and obligations of the parties in the relationship. While a licensing model envisages the relationship between government and company primarily as a relationship of subordination, the contractual model consequently envisages it primarily as a relationship of equality.

These characteristics usually mean that a contractual model appears more attractive for oil companies, especially in countries without a strong tradition of political stability and the rule of law. Often such contracts even include specific stability undertakings committing the government not to use its powers to change the terms and regulations of the investment in resource exploration and development. This does not mean that the public interest does not also remain a significant concern in the host government contracts that are entered into with private, often foreign, oil companies in many of the traditionally developing countries. But since the focus here will often be on the rights of the foreign companies, at least where a dispute arises and must be legally settled, the government's reserved powers here often will come to the forefront as natural limitations on those rights. The principle of permanent sovereignty under international law can be seen as a conceptualization of this.

Conversely, while concerns relating to contractual stability and security for established rights may be considered to constitute a main purpose of contractual systems and of relevant international law concerned with protection of foreign investment more generally, they clearly also remain significant legal concerns in a licensing system such as that of Norway, as already alluded to. But here they will mainly be addressed as constitutional or administrative law restrictions on what fundamentally represents a unilateral power of the state. In the next section I shall go somewhat further into how this concern for stability and security of legal positions is addressed, both under the Norwegian system and other municipal laws, and under the international law that in many other

countries will, at least in practice, constitute the most significant protection of private rights and investments.

4 Security of investments

It has already been described how exploitation of petroleum resources usually requires large investments, both in order to explore for and find the resources, and to develop producing fields with production facilities and other necessary infrastructure, such as pipelines and transport facilities. Most of the investments must be done up front before the field yields a steady production and cash flow, and can only be expected to be recovered after several years of production. Often the fields have a long life span of 30 or 50 years or more, and the contracts or concessions granted to the oil companies developing the fields may have a similar expected duration, at least with extensions.

The nature of these investments means that a key concern for the commercial oil companies is the predictability and stability of legal conditions, during the time required for recovering the investment and obtaining a reasonable profit. At the same time, both the characteristic features of petroleum as a natural resource and part of the nation's wealth, and the environmental concerns and broader impact of petroleum activities on society, has as a consequence that petroleum activities will often be the subject of intense government scrutiny and control. When this is combined with the fact that most petroleum projects have a very long lifespan, it means that a change of regulatory conditions during the life of the project is not merely a risk, it is almost a certainty. That regulatory change must be expected does not detract from the fact that political intervention or changes constitute a considerable risk in any petroleum development project. This is often called 'political risk'.

The worst case scenario is that the government confiscates or nationalizes the investment, or that the investment must be abandoned due to war, insurrection and similar threats. The 1970s and 1980s in particular

saw a wave of nationalizations, and civil wars and political unrest during our own time shows that these are not empty risks. The most commonly manifested form of political risk is less dramatic, in that the host country may implement individual or general regulatory changes with negative consequences for the economy of the project. The host government may for instance impose more onerous environmental or safety requirements making production more costly, or it may raise taxes in order to recover more of the revenues from production. In Norway, a current example of what may be considered such political risk, manifested in relation to a particular investment in the petroleum sector, is the government's recent adjustment of tariffs relating to transport of gas through the gas pipeline network owned by the company known as Gasled. This occurred after a large share of the company had been sold to foreign pension funds regarding this as a safe investment with a secure income. The case is currently pending in the Norwegian court system and its conclusion is not given, but it illustrates that political risk is neither a purely developing country phenomenon nor something which exclusively relates to clear instances of abuse of power. What may be considered political risk in this regard is simply the possibility that the legal and political basis of an investment may change with time.

The general and overarching issue this raises is whether and to what extent these large investments should be seen as creating legally protected rights for the investing companies, which the host government must be prevented from interfering with, for instance by imposing regulatory changes. This is an issue that in most countries can be seen as primarily belonging to the realm of constitutional and administrative law. Both in Norway and in other countries, a concession will usually enjoy some degree of protection against change. The basic principle in Norway is that a change must be based on stated reasons, these must not be unreasonable, and in addition legitimate expectations shall be respected unless a revocation or change of terms is required by strong and overwhelming public concerns. In Norway, established legal positions furthermore enjoy a certain constitutional protection against legislative change through the constitutional protection of property and the prohibition of retroactive

legislation. A petroleum license must in general be considered a form of property or an acquired right subject to constitutional protection. The extent to which the license interests are protected against regulatory changes must nevertheless be seen in light of the basic constitutional principle of legislative freedom, as a paramount concern. It is a general principle that existing property rights are not as a rule protected against regulations that merely restrict the use of the property. This must also apply to other rights, such as a license to produce petroleum. At the same time, it is arguable, though still somewhat controversial how far this extends, that the constitutional protection under Norwegian law also gives some substantial protection against regulations which can be seen to attack the individual substance of a right.[22] This suggests that no branch of the government will be entirely free to alter individual license terms meant to form the substantial basis for commercial investments and activities, including both the license as such and the agreement that each licensee is required to enter into with other licensees. At least implicitly, the Norwegian Supreme Court has in one important case assumed that established legal positions based on petroleum licenses are protected under the Norwegian constitution.[23]

Under international law, the same concerns for stability and security of investments form the main objective of the body of law known as international investment law. While many of the substantive principles of this law can be considered part of customary international law, the applicability of the law in individual cases will often be based on a so called bilateral investment treaty (BIT) between the home state of the international oil company and the host state. What makes international law relevant in practice is that it is applied by an international arbitral tribunal having been given explicit authority to decide an individual case between a private investor and a state. One of the key characteristics and main objectives of a bilateral investment treaty is precisely to give indi-

[22] To some extent this also follows from the protection of property under the European Convention on Human Rights, first protocol article 1, which is directly binding and applicable under Norwegian law.

[23] Rt. 1985 p. 1355. See also Mestad, 'The Ekofisk Royalty Case: Construction of Regulations to Avoid Retroactivity' *ICSID Review – FILJ* 2 (1) 1987 p. 139-151.

vidual investors of one state the right to present claims against the other state directly through international arbitration. Together with the substantive standards of protection contained in these treaties, such as the right to be paid full compensation in case of direct or indirect expropriation, the right to fair and equitable treatment and full protection and security, and the right not to be subject to any form of discriminatory measures, the combined effect of all this is to give individual, private investors, direct and enforceable rights under international law. To some extent, a comparable situation is however also achieved merely by virtue of including an ordinary arbitration clause in a contract with the host government, providing for international arbitration.[24] Also customary international law requires that foreign property and acquired rights shall be respected, although the extent of such required protection remains controversial.

Irrespective of which law applies, the degree of protection of an oil company's legal position will to a large extent depend on what is the actual and individual legal basis of its investments and activities. A distinction can, as already mentioned, be drawn between license based and contract based systems. In a license system, such as in Norway, most legal conditions and requirements will not be regulated in the license itself, and the underlying assumption is consequently that they are subject to change. Where the petroleum activities are based on a contract, this carries with it an underlying assumption of reciprocity, which usually means that the state to a greater extent is bound to exercise its authority within limitations prescribed by the contract. A contractual regulation of production sharing and how much of the production can be retained by the oil company to cover its upfront costs, is not subject to the same assumption that the regulation may be changed as will be the case with the Norwegian system of petroleum taxation, which in substance regulates exactly the same issues.

Often such a commitment not to change the regulatory framework

[24] See Alvik, 'Arbitration in Long-Term International Petroleum Contracts: the "Internationalization" of the Applicable Law' In Karl P. Sauvant (ed.), *Yearbook on international investment law and policy 2011-2012* (Oxford University Press, 2013).

applicable to a contract is made explicit through specific stabilization commitments included in the contract – so called stabilization clauses. Such clauses raise difficult issues in international petroleum agreements, both because they extend for a long time, often 30 or 50 years or more, and because they often provide for a sweeping restriction of the government's authority to regulate, which in itself may be problematic. For these reasons they have also been the subject of much controversy and arbitral practice both in the past and still continuing today.[25] Such commitments are virtually never made by developed countries such as Norway, but they are common in contracts entered into with developing countries. The earliest and classical forms of stabilization commitments are often described as "freezing" clauses, which may be contrasted with the more modern form of stabilization, often termed "balancing-" or "economic equilibrium"-clauses. The distinction between these two main categories is that the former involves a strict contractual obligation not to alter the regulatory framework applicable to the contract or the investment, while the latter only provides for an obligation to render some form of financial compensation to the company for additional costs or losses incurred as a result of regulatory changes. There seems to be a clear trend for stabilization commitments increasingly to be of the latter type, although one of the findings in a recent joint UN/IFC report was that a surprisingly large number of the contracts reviewed still contained stabilization commitments of the old "freezing" type.[26]

Despite the considerable differences pointed to here between different laws, rules and instruments that may form the legal basis of an investment in petroleum activities, one should not forget that the substantive issue and the underlying concerns are largely similar in most cases, where a host government wants to change the regulatory conditions and an oil company tries to shield behind established rights. The underlying conflict

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25 Ibid.

26 'Stabilization Clauses and Human Rights': A research project conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights (May 2009), available at http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES, see especially p. 17 et seq.

of interests here invokes certain *prima facie* legitimate concerns, represented by the legal and normative core of the main interests involved. It is generally a legitimate concern of the host government to have sufficient regulatory freedom at all stages of the petroleum activities to ensure that the petroleum resources are managed in a manner beneficial to society as a whole. Even in the context of an express commitment to stabilize, this represents a strong and relevant legal concern that ought to be taken into account in determining the proper reach and content of the commitment. In this regard, the ultimate rationale and basis of the government's authority in the nation's collective ownership, as discussed above, is a legitimate concern of considerable strength. Conversely however, it is also a legitimate concern of the oil companies that the legal and regulatory framework must be sufficiently stable and predictable for them to be able to rely on it when they make their commercial decision to invest. It should, however, not be forgotten in this picture that companies simply cannot expect that the world will remain unchanged when an investment is made to develop a petroleum resource. This is an aspect of reality that has to do with a variety of other reasons than political change. An ever present reality in the petroleum sector is, for instance, that prices may change, and that what was a promising field with high prices may be turned into a loss making project when prices are low. Increasing oil prices may however also exacerbate political risk, if this leads to exorbitant profits for the oil companies, which may again induce host states to raise taxes or change the share of oil allotted to the company in order to re-establish a fair balance. The tension between the companies' desire for stability, and the host governments' need for freedom to regulate in accordance with the immediate public interest at any given moment, consequently represents one of the general and pervasive issues of petroleum law.

5 Health, safety and environmental concerns

Petroleum exploration and production can have a strong impact on other interests and third parties not voluntarily involved in the activities. It is in the nature of the activities both that they will have an impact on the environment and also that there is a risk of accidents that may cause loss of life and injury to personnel and large scale pollution. Where the activities take place offshore in harsh weather conditions, as is the case on the Norwegian continental shelf, this poses particular challenges relating to dealing with health, safety and environmental concerns. A main concern here is to avoid accidents, injuries, risks to health and pollution. These are not regular consequences of petroleum activities, but incidents that in principle can be avoided. But in a broader perspective, the concern for the external impact of petroleum activities also extends further than merely avoiding negative incidents. Petroleum activities may also have negative consequences which cannot be easily avoided and that may even be regular and foreseeable consequences of the activities, but that are nevertheless undesirable. Petroleum activities in a certain sea area may for instance damage fisheries in that area, or a land terminal with processing facilities may destroy a tropical beach with negative consequences both for the tourism industry, fisheries and animal life in the area. Further and more generally, the emerging awareness of the severe impact of oil and gas consumption on the world's climate is also something that cannot be ignored in this context. In Norway, the actual CO_2 emissions in connection with petroleum production are subject to the quota system for controlling emissions, and reduction of emissions is also an ever present concern that has led for instance to increased demands from the authorities for electrification of offshore installations.

From a political perspective it is natural that it should be an important concern to ensure that petroleum activities are conducted in a manner which minimizes both direct, negative impacts of the activities, and also risks and hazards relating to health, safety and the environment. In

Norway, considerable regulatory effort has been put into an elaborate regulatory framework to ensure adequate health, safety and environmental standards relating to the manner in which the activities are conducted. But environmental concerns are also an important underlying concern of the broader legislative framework and licensing system. One of the distinct regulatory challenges posed by petroleum activities undertaken offshore and under such challenging conditions as on the Norwegian continental shelf, is that adequate safety standards primarily depend on reliable technological solutions and good working procedures and not on regulation alone. The main regulatory challenge is consequently to facilitate the development of technology and internal work procedures that ensure safety. This underlies much of the Norwegian regulatory framework and its use of so called "function requirements" and "indirect" safety requirements to regulate petroleum activities.[27]

Ensuring adequate health, safety and environmental standards may be seen as a self-evident concern that ought to underlie the government's regulation of petroleum activities. It is, however, also something that has a more fundamental legal basis, both in Norwegian law and international law. In general, it is part of the government's fiduciary duty of responsible resource management to take environmental concerns into account when petroleum activities are planned. When it comes to the environment this also has a particular constitutional basis. § 112 of the Norwegian constitution stipulates that "everyone has a right to a healthy environment and a nature sustaining productivity and diversity", and further requires that "the resources of nature must be managed on the basis of long term and robust considerations sustaining this right also for generations to come" (unofficial translation). Also under international law, a similar duty can, to some extent, be grounded in the principle of permanent sovereignty over natural resources, and the concept of sustainable development, which today seems to have received some general recognition as a principle of international law with far-reaching ramifications.

It will however usually be challenging to draw any concrete conclusions about the government's duties from these principles. A crucial

[27] See Kaasen, 'Safety regulation' in *Articles in Petroleum Law,* MarIus No. 404 (2011).

significance that they may have is nevertheless that they provide a legal basis for emphasizing the weight of such concerns in a balancing of interests required by other legal rules, for instance where the government imposes new requirements in an existing concession. If these requirements are legitimately deemed necessary in order to safeguard important environmental concerns, this may in itself indicate that the concessionaire did not have a legitimate expectation to continue its activity unrestricted. Property or comparable rights do not generally give anyone a legitimate expectation to inflict serious harm on others or the environment. Such considerations may clearly also be relevant in relation to petroleum activities.

6 Security of supply and consumer interests

Another concern of a somewhat different character and significance from the other concerns mentioned above, relates to the use and significance of petroleum in the contemporary world economy as an energy commodity. Wars have been started, lost and won, solely for the sake of petroleum. Petroleum represents wealth, but as a factor in world politics it is even more essential as a form of energy that no society at present can be without. While the other concerns and issues that have been outlined so far mainly relate to exploration and production of petroleum, i.e. so called "upstream" issues, this concern is rather a reflection of the interests of the buyers and consumers of petroleum, i.e. it concerns so called downstream regulation. For virtually all societies in the world today, a steady supply of petroleum is crucial for the functioning of the economy. Most important in this regard is probably oil, which constitutes by far the most important form of energy used for transport in the world. Most of the world's cars, airplanes and ships run on some form of refined oil product, such as petrol or diesel. Without oil the global economy would suffocate, and most societies in the world today would literally stop, it is as simple as that. The crucial importance of oil in this respect has also

been used in the past as a potent weapon by oil producers, as illustrated by the embargo imposed by the Arabian countries after the Yom Kippur war in 1973, which brought about the famous oil crisis in most western countries. In Norway the picture of the King on the tram has become iconic and is known to most Norwegians. The main importance of gas is, by comparison, as a source of electric power where it is used in gas fired power plants, and it is also used in much of Europe as a direct source of heating and cooking in domestic households. Gas is also crucially important in many consumer countries, where it may be one of the main sources of energy. The current unease with the dependence on Russian gas in much of Europe, not to speak of the Ukraine, is a reflection of this.

The primary interest of consumers is usually that the supply of oil and gas should be steady and reliable, and not subject to violent fluctuations in price or overpricing due to abuse of a dominant market position. To some extent, this may be summed up as an interest in a functioning and reliable market for petroleum. Especially when it comes to sale of gas, this is subject to detailed market regulation in the EU, where the main concern of the regulatory framework is precisely to ensure a functioning market. Key concerns in this regard are to ensure that the market is ruled as far as possible by commercial considerations, and that no producer or supplier is allowed to become so large and powerful that they may dictate the market. Large consumers may, however, also seek to secure their interests through long-term supply agreements. This raises a number of issues in relation to the market rules of the EU. Today there is also a tendency towards a transformation of the market from long-term supply agreements to a more hub-based gas market. A further special characteristic of the gas market is that it is, to a large extent, bound to an existing infrastructure of pipelines. The producers are dependent on the existing pipelines to transport their gas to the market, while the availability of gas to consumers is similarly limited to what comes through the pipelines. This has as a consequence that the producers connected to a certain pipeline has a practical monopoly on sales to the market fed by that pipeline, but at the same time they will be unable to sell their gas in any other market. To some extent gas may also be transported as LNG

("Liquid Natural Gas") by ship in the same manner as oil, but this requires complex facilities and infrastructure at both ends of the transportation, both in order to transform the gas into LNG and load it into ships, and also to offload it and transform it back into gas of a quality that can be sold to consumers. In practice this means that LNG has a quite limited share of the total gas market.

Under most national laws, a monopoly supplier of a crucial commodity may have a general duty of supply. Despite the crucial importance of petroleum as an energy commodity in world affairs, international law can, however, probably not be deemed to recognize any such general right of consumers to be supplied with petroleum, or a concomitant duty of supply for large producers. On the other hand, there is little doubt that the EU market regulations today constitute the effective rules of the game for most of Norwegian gas sales as well as sale of gas from other nearby producers such as Russia and Algeria, connected by pipelines to the European market. Gas which is transported through pipelines to the European mainland can only be sold on the European market. In practice, and somewhat simplified, this explains why the EU as a large bloc of consumers has largely been able to dictate its own rules to its suppliers. In one sense this may perhaps be seen as a legitimate projection of consumer power to ensure precisely the security of supply as a legitimate concern. But it should not be forgotten that the EU-rules are largely shaped by consumer interests, which may stand opposed to the interests of producer countries. Where the consumer bias of the EU market rules is imposed on large producer nations such as Russia, recent events have shown this may also cause political controversy, which goes to show that politics is never far away where oil and gas is concerned. ’

Coexistence and interaction between offshore petroleum activities and the surrounding physical environment: area use and emissions regulation

The Norwegian case

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Content

1 Introduction

Norway can seem a country of paradoxes when it comes to natural resources. It has a very high share of renewable energy sources in its national electricity generation[1] and is at the same time the third largest gas exporter in the world and fifteenth largest oil exporter.[2] It might be seen as extremely fortunate to benefit from so many natural resources which ensure national welfare. But the good fortune may also have something to do with its management model. Indeed, abundant petroleum resources can be a blessing or a curse for a country. The whole Norwegian model in the petroleum sector is built on the premise that revenues from the exploitation of natural resources should be maximised to benefit the Norwegian people, and at the same time that the exploitation of petroleum resources should be undertaken in full recognition of economic, social and environmental interests. This is not an easy balance to strike, but the legislative and regulatory framework put in place should seek to ensure that those goals are both met.

Upstream oil and gas activities impact on their surrounding environment at different stages of their exploration, production and transformation into sellable assets. The purpose of this article is to examine the manner in which offshore petroleum activities are regulated, with respect to their interaction with the surrounding environment, at two stages before petroleum products are transported and transformed to reach the market. First, it examines how the different economic, social and environmental interests related to the use of relevant sea areas are weighted against each other at the stage of opening areas for petroleum exploration (2). Second, it reviews the regulation of emissions from offshore petroleum activities into the environment during the production phase (3).

Issues related to safety and working environment fall outside the topic

[1] Norwegian electricity production was 128 TWh in 2011 and was primarily based on hydro (122 TWh), wind energy (1,3 TWh) and gas-fired power plants as well as other thermal power plants (4,8 TWh).

[2] 2012 data

for this paper, which focuses on the regulation of the effects on and interaction with the external physical environment. Similarly, the liability regime for oil pollution or compensation to fishermen raises parallel questions, which are related but not central to what is discussed here.

2 Coexistence between offshore petroleum activities and other commercial or environmental interests: area use regulation

2.1 The general framework

Pursuant to §1-1 of the Petroleum Act (PA): "*The Norwegian State has the proprietary right to subsea petroleum deposits and the exclusive right to resource management*." This means that only the state can decide whether it will allow for the exploitation of petroleum resources on the Norwegian continental shelf (NCS). The Norwegian Parliament, *Storting*, will lay down the rules for resources management (§1-2, first sentence, PA). In its decisions on resources management, the state must follow the overriding principles defined in §1-2, second sentence, PA, which states:

> "Resource management of petroleum resources shall be carried out in a long-term perspective for the benefit of the Norwegian society as a whole. In this regard the resource management shall provide revenues to the country and shall contribute to ensuring welfare, employment and an improved environment, as well as to the strengthening of Norwegian trade and industry and industrial development, and at the same time take due regard of regional and local policy considerations and other activities."

The possible competing uses of the relevant sea areas are already underlined in these provisions, as well as the multiple considerations to take

into account when managing petroleum resources and deciding upon possible exploitation. These range from the maximisation of revenues and the strengthening of Norwegian trade and industry, to environmental protection and concern for local interests and activities. This requirement of the PA underlines the overall assessment and balance of interests that must be performed in the development and exploitation of petroleum resources by the state.

When it comes to the use of the Norwegian sea areas, several interests are at stake, sometimes within the very same area. These are, among others and in addition to petroleum exploitation: fishing, shipping, tourism and recreation, energy generation such as offshore wind and environmental protection. Preserving a constructive coexistence between the petroleum activities and other industries and interests is a central objective of the petroleum legislation.

2.2 Balancing interests in the use of sea areas – general approaches

Not all areas containing or suspected to contain petroleum resources are necessarily opened for exploration and exploitation. It has been decided that certain areas should remained closed to petroleum activities on the NCS. This is mainly a political decision, and the government's stance may vary according to the governing party's position on the matter. For example, the current government led by Erna Solberg is a coalition government between two governing parties which has the political support of two smaller parties. Before taking charge, the parties concluded a political agreement which specified that certain areas would not be opened to petroleum activities. As of today, it is agreed by the Storting that there will be no petroleum activity off Jan Mayen, the Ice-Edge, Skagerak or Møre fields.[3] Similarly, there will be no opening (or preparing) off Lofoten, Vesterålen or Senja during the 4-year period (2013-2017).

[3] See White Papers nr. 26 (1993-94), nr.37 (2008-2009), and nr. 10 (2010-2011).

During the last 10-15 years,[4] the Norwegian government has strengthened its efforts to elaborate a more consistent strategy for the management of the marine areas under its jurisdiction.[5] This move corresponds to a general trend in terms of environmental management, and is in line with Norway's international and EEA commitments. Concretely, it has resulted in the adoption of so-called "management plans" for the following three marine areas: the North Sea and Skagerrak[6], the Norwegian Sea[7], and the Barents Sea, including Lofoten[8].

The purpose of the Norwegian Management Plans for marine areas is to facilitate value creation, the coexistence between industries and the sustainable harvesting of resources.[9] The plans contribute to the implementation of an integrated ecosystem-based management of the marine environment in Norwegian waters. Ecosystem-based management is a well-known environmental management approach, which has found echoes in public international law and which has been applied to the marine environment since the year 2000.[10] It entails the management of human activities taking as a starting point the limits set by the ecosystem itself, as to maintaining its essential structure, functioning, production and biodiversity. It looks at the whole range of interactions within an ecosystem. In the Norwegian context, it must facilitate the coexistence of different industries such as fisheries, shipping and petroleum operations within the relevant marine environment. The Management Plans cover waters from the baseline to the open sea

4 See in particular, White Paper nr. (2001-2002) *Rent og rikt hav*. Innst. S. nr. 161 (2002-2003) White Paper nr.19 (2004-2005) *Marin næringsutvikling. Den blå åker* (Inst. S. nr. 192 (2004-2005).

5 For an analysis of the Management Plans for Norwegian Sea Areas, see H. C. Bugge: 'Har vi de rettslige redskapene som trengs for en god forvaltning av våre havområder?', in M. Stub and I. Hjort Kraby (eds.), *Forsker og formidler. Festskrift til Erik Magnus Boe på 70-årsdagen 17. april 2013* (Universitetsforlaget, 2013), pp. 65-87.

6 Adopted in 2013 (White Paper nr. 37 (2012-2013)), next review in 2030.

7 Adopted in 2009 (White Paper nr. 37 (2008-2009)), currently under review, next update in 2025.

8 Adopted 2006, updated in 2011(White Paper Nr. 10 (2010-2011), next update in 2020.

9 See White Paper nr. 37 (2008-2009)

10 The Convention on Biological Diversity is one of the most central pieces of public international law in the matter.

as well as the human activities in those areas.

The elaboration of the Management Plans starts with ecosystem-based assessments for each of the main economic activities concerned in the area, as well as an assessment of the interactions between the relevant commercial activities such as petroleum, fisheries and shipping. The plans also define measures to reduce the environmental burden of those activities or to solve competing uses of the same sea area.

In the case of petroleum and energy activities, this preliminary assessment falls under the competence of the Ministry for Petroleum and Energy (MPE). The MPE gathers representatives from the different interest groups in a working committee in charge of drafting the assessment.[11] Basically, the zone covered by a Management Plan can encompass four main types of petroleum areas: areas where there will be no petroleum activity; areas not yet opened for petroleum activity but subject to an opening process (e.g. Jan Mayen and the part of the previously disputed area to the west of the delimitation line in the Barents Sea South); areas where a process of opening has started; and opened areas (both in mature and frontier areas). Based on the results of the preliminary assessment, the Management Plans can, among other things: set conditions for the opening of new areas to petroleum exploration, decide to keep certain areas closed to petroleum activity or others activities, establish traffic separation systems (TSS), impose improved safety or emergency measures, and adopt measures to secure the state of the environment.

Areas not opened for exploration are subject to monitoring by Norwegian authorities. For example, the Norwegian Petroleum Directorate (NPD) acquires geological and geophysical data on these areas on a regular basis.

2.3 The opening of new areas

The decision to open areas for new petroleum activities is mostly a po-

[11] It must be make clear that the assessment provided by the working committee under the direction of the MPE is a different process from the traditional and regulated impact assessments, such as the ones applied under the Petroleum Act.

litical one as it falls under the competence of the Storting. The petroleum legislation lays down certain procedures and requirements to be followed when new areas are opened. Those are meant to identify and preserve the balance of interests just mentioned.

The opening of new areas is subject to the implementation of the opening process. Pursuant to Section 3-1(opening of new areas) of the PA:

> "Prior to the opening of new areas with a view to granting production licences, an evaluation shall be undertaken of the various interests involved in the relevant area. In this evaluation, an assessment shall be made of the impact of the petroleum activities on trade, industry and the environment, and of possible risks of pollution, as well as the economic and social effects that may result from the petroleum activities."

Further requirements as to the content of the impact assessment programme and the resulting impact assessment are defined in Chapter 2a of the Petroleum Regulations (Sections 6b and 6c respectively). The whole process is very similar to a Strategic Environmental Impact Assessment.

The opening process consequently starts with a proposal for an impact assessment programme, which, if it is approved, is followed up by the completion of the impact assessment itself. The purpose of the impact assessment is to "*describe the presumed impacts of opening of the area for petroleum activities, the different possible development solutions and the impact of future petroleum activities in the area*" (Section 6c, PR). In broad terms, when elaborating the impact assessment, the MPE will look at the environment, trade and industry, risk of pollution, economic and social effects of the opening for petroleum activities. In particular, the impact assessment shall include a description of:

- the area(s) planned to be opened for petroleum activities;
- the relationship to national plans relevant to the area to be opened, and of relevant environmental goals/standards laid down through national guidelines, national environmental goals, white papers, etc. and how these are reflected in the

impact assessment;
- the assumed impacts on employment and commercial activities, as well as expected economic and social effects, of the petroleum activities;
- important environmental issues and natural resources;
- the impact of the opening on, i.a.: living conditions for animals and plants, the sea bed, water, air, climate, landscape, emergency preparedness and risk;
- the possible transboundary effects of the opening;
- the need for, and any proposals relating to, further investigation before opening;
- the measures available to prevent or compensate for any possible damage and prejudice.[12]

The opening of new areas is also subject to a hearing process which involves local public authorities, central trade and industry associations and other interest organisations (Section 3-1, PA, second paragraph). The impact assessment must also be made available to the public on the Internet. Interested parties must be given a time period of no less than three months to present their views on both the impact assessment programme and the impact assessment.

If the impact assessment is conclusive, the MPE will usually propose the opening of the area for licensing. To do so, it submits a White Paper to the Parliament. If it agrees, the Storting opens the new areas for licensing. Again, the impact assessment is a full part of the White Paper, as the comments received during the consultation process and an evaluation of these comments. In its White Paper to the Storting, the MPE can make further recommendations in order to take into account the specific features of the area and the interests in presence. The ministry shall consider in the White Paper whether the opening should be made subject to requirements for further investigations to monitor and show the factual impacts of the petroleum activities. The White Paper shall also consider whether it is necessary to set specific conditions to reduce and compensate

[12] Section 6c, Petroleum Regulations.

for significant adverse effects (Section 6d, Petroleum Regulations).

Once the Storting has agreed and the area is opened, exploration and production licences can be granted (see Chapter 2 and Chapter 3 respectively). It can be noted here that the fact that the decision of opening new areas is made by the legislative branch makes it more difficult to review legally.

The last time a new area was opened for petroleum activity was in 2013, and before that in 1994. The announcement of new blocks under the 23rd licensing round in January 2015 covered certain of the areas subject to the political agreement reached in 2013 for opening new Northern provinces in the Barents Sea. The discussion is still ongoing for other provinces in the same area, following a re-calculation of the so-called "Ice Edge" as the Arctic Ocean ice retreats. The government has announced a White Paper on that topic in Spring 2015.

2.4 Conditions for the award of production licences in opened areas

When announcing and then awarding licences in opened areas, the Government sets *general obligations* as to the coexistence of the different economic activities in the zone and the environmental effects of petroleum exploitation. The Petroleum Act requires that petroleum activities be conducted in a prudent manner, and that they:

> "must not unnecessarily or to an unreasonable extent impede or obstruct shipping, fishing, aviation or other activities, or cause damage or threat of damage to pipelines, cables or other subsea facilities. All reasonable precautions shall be taken to prevent damage to animal life and vegetation in the sea, relics of the past on the sea bed and to prevent pollution and littering of the seabed, its subsoil, the sea, the atmosphere or onshore." (Section 10-1, second paragraph, PA)

The Petroleum regulations further detail, as a condition for the granting of a production licence, that the petroleum activities must be

carried out "*in a proper manner*".[13]

In addition, the licence can set *specific obligations* in order to reflect the specificities of the block. Again, those specific obligations can be related to effects of the envisaged petroleum activities on the environment and on other economic activities, such as fisheries. Such requirements are directly attached to the block and specified in the announcement for licensing and the granting of the licence.

The award of a production licence in a block does not preclude others obtaining a licence of rights to explore the same area for the purpose of production of natural resources other than petroleum resources or scientific research, on condition that it does not unreasonably hamper unreasonable the petroleum activities covered by the petroleum licence. If the exploration for other activities is conclusive and causes disruption to the petroleum activity, the King shall decide which of the activities shall continue or be postponed (Section 3-13, PA).

2.5 Impact Assessment procedure in plan for development and operation of a petroleum deposit (exploitation phase)

Once the licence has been awarded, and if the licensee decides to develop the petroleum deposit, the licensee must submit a plan for development and operation (PDO) to the MPE for approval.[14] The PDO must contain a series of information as to the development of the field, including environmental aspects. When deemed necessary, the Ministry may require the licensee to provide a detailed review of the impact on the environment, possible risks of pollution and the impact on other affected acti-

[13] The latter means that the granting of the licence shall be conditional to: "*consideration for national security, public order, public health, transport safety, environment protection, protection of biological resources and national treasures or artistic, historic or archaeological value, the safety of the facilities and employees, systematic resources management or the need to ensure fiscal revenues*" (Section 11, second paragraph, PR).

[14] And if necessary, the submission must also include a Plan for Installation and Operation (PIO), when there is a need for the installation and operation of facilities for transport and exploitation of petroleum.

vities, including in respect of a larger area than the defined bock (Section 4-2, PA).

In practice, the licensee is always required to carry out an environmental impact assessment (EIA) for the field in question. In accordance with the Petroleum Regulations, such assessment is an integral part of the process for submitting a PDO. Indeed, the licensee must a proposed programme for EIA submit to the MPE for approval "*well in advance*" of submission of a PDO (Section 22, PR). The proposal must contain a description of the development solutions, of envisaged effects in relation to other commercial activities and to the environment, including possible transboundary environmental impacts. The proposed programme for EIA is subject to a hearing process, after which the Ministry will decide on the content of the final EIA programme. The overall impact assessment to be undertaken for the development and operation of the petroleum deposit must be prepared on the basis of the IEA. It must therefore also cover aspects related to environmental impact and effects on other commercial activities. The impact assessment is forwarded to the interested parties and published on the Internet for comments. The MPE takes the final decision on whether to approve the PDO as it is, or subject to amendments.

3 Interaction between offshore petroleum activities and the environment: emissions regulation

The main sources of emissions from offshore oil and gas activities in Norway are related to produced water, use of chemicals, emissions into the air, and mud, cuttings and waste.

3.1 Policy objectives

Because of the importance of the petroleum sector for the whole Norwegian economy and a long tradition of being a front-runner in environmental matters, Norway is applying strict environmental requirements to petroleum activities performed on its territory. Indeed, the petroleum industry on the Norwegian continental shelf has one of the lowest carbon emissions rates per unit produced in the world. Norway's environmental requirements derive from the implementation of international obligations, EU legislation and national rules.

The Norwegian government has adopted a policy goal of zero environmentally harmful discharges from petroleum activities, known as the "zero discharge goal". This goal was adopted in 1997 and further defined in the Report Nr. 28 (2010-2011) to the Storting. In accordance with the zero discharge goal, substances harmful to the environment cannot in principle be discharged into the sea. Furthermore, the objective is to minimise the risk of environmental harm caused by discharge of all sorts of chemical substances into other environments (air, soil). The zero discharge goal applies to all offshore operations, including drilling and well operations, production and pipeline transportation. It has been serving as main policy orientation since its adoption, and it reflected in the legislation.

Among environmental concerns, climate change policy sets a particular framework for the operations by the oil and gas industry, which represent one of the principal sources of greenhouse gas (GHG) emissions in the world. Climate change is a fundamental concern, not only for states subject to international and national commitments, but also for oil and gas companies which are progressively integrating the "carbon risk" into their portfolio. Therefore, the integration of climate considerations is crucial for the future of the petroleum industry. Because Norway is one of the biggest oil and gas exporters in the world, the reduction of GHG emissions from the petroleum sector has great consequences for the reduction of emissions of the country as a whole. Norway has adopted regulations dedicated to the reduction of GHG emissions, and in parti-

cular carbon dioxide, since the beginning of the 1990s.

3.2 The general regulatory framework

3.2.1 Applicable legislation

The main principle is set by the Norwegian Constitution of 1814 (*Grunnlov*) which since 1992 contains an article on environmental protection.[15] After a revision of the Constitution in 2014, a slightly revised version of that provision is now contained in Article 112, which defines the right to a healthy environment for every person. The article also requires that natural resources shall be managed "*on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.*"[16]

The Petroleum Act, Section 10-1, defines a general requirement that petroleum activities shall be conducted in a prudent manner and shall take due account, among other things, of the environment. Further implementing provisions are contained in the Petroleum Regulations.

The main piece of legislation in terms of pollution control is nevertheless the Pollution Control Act. It addresses all types of emissions, into air, water (including sea) or soil, and is therefore applicable to petroleum activities, including where offshore. The Act is based on the principle of prevention and introduces into Norwegian law some central principles of environmental protection, such as the polluter-pays principle, the precautionary principle or the substitution principle. The main principle

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[15] For background information, see H. C. Bugge, *Environmental Law in Norway* (Wolters Kluwer, 2011), p. 31.

[16] Full text of Article 112 of the Norwegian Constitution:

> "Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.
> In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the state shall take measures for the implementation of these principles."

is that planned discharges and emissions are only legal if the operator has applied for and received a permit.

In terms of nature protection, the Nature Diversity Act is also applicable. The Act aims to "*protect biological, geological and landscape diversity and ecological processes through conservation and sustainable use…, now and in the future…*". It defines a series of principles and obligations which are reflected in the different impact assessment procedures referred to above. Those include, among others: management objectives for habitat types and ecosystems (Section 4); knowledge-based decisions (Section 8), the precautionary principle (Section 9), ecosystem approach and cumulative environmental effects (Section 10).

Specific obligations in terms of emissions and discharges to the environment from the Norwegian petroleum activities are provided in the following acts: the CO_2 Tax Act, the Greenhouse Gas Emissions Trading Act.

The regulatory framework for Health Safety and Environment (HSE) also contains provisions relevant to the control of emissions, but focuses on risk and performance obligations of the employers or the operator following a system of internal controls which mirrors obligations under, i.a., the Pollution Control Act.

Norway is bound by its obligations under international and EEA law, both of which contain important provisions in terms of environmental protection. At international level, the following can be mentioned: the UN Law of the Sea Convention, the Convention on Biological Diversity, the UN Framework Convention on Climate Change, the Convention for the Protection of the marine Environment of the North-East Atlantic (OSPAR Convention), and the 1979 Geneva Convention on Long-range Transboundary Air Pollution with its 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone. A large part of the EU legislation in matters of environmental protection has been incorporated into the EEA Agreement (Annex XX to the EEA Agreement) and should therefore be implemented in Norway.

3.2.2 Regulatory instruments

The Norwegian legislation provides for a large set of regulatory instruments for the purposes of emissions control. The regulatory action is mainly based on: regulatory obligations, discharge/emissions permits, compliance monitoring, and reporting obligations. The main instruments are reviewed below. In parallel, the industry has progressively developed *best practice guidelines*, either at national or international level, often in close cooperation with the authorities.

Norway applies a *permitting system* under the conditions set in the Pollution Control Act. The permits are required for the use or release of different substances or gases into the environment. This includes the use – such as injection - and discharge of chemicals, and emissions into the air (from VOC, NOx and CO_2).

The review of adherence to *regulatory obligations* is performed through *compliance monitoring* by the agencies competent in the relevant area (Norwegian Petroleum Directorate or Norwegian Environment Agency).

Another regulatory requirement which plays a central role is the *reporting obligation*. The concerned licensees on the Norwegian continental shelf are required to report all emissions and discharge data into a dedicated database called the "Environment Web", which is a joint database for both the industry (Norwegian Oil and Gas) and for the responsible agencies and directorates. The reporting obligation applies to both planned and approved operational emissions/discharges and also to those which occur accidentally. It applies to all fields with production facilities on the NCS. However, emissions/discharges from the construction and installation phase, maritime support services and helicopter traffic are excluded. The reporting is done on an annual basis. It contributes to the continuous environmental improvement of operations.

In terms of *guidelines*, particular attention should be paid to the *Guidelines for offshore environmental monitoring* which have been elaborated by the former Climate and Pollution Agency (Klif) (merged in 2013 with the Norwegian Environmental Agency) in collaboration with

representatives from the oil and gas industry.[17] The guidelines aim to support companies operating on the NCS in complying with environmental reporting obligations, offering a standardised and comparable reporting frame. Former reporting obligations defined in the Regulations relating to conducting petroleum activities (the Activities Regulations) were moved in 2010 to become part of these guidelines.

The following paragraphs review the main emissions control obligations applicable to the petroleum industry operating on the Norwegian Continental Shelf, classified by type of emissions.

3.3 Emissions to the air

3.3.1 Sources of emissions

Emissions from the offshore oil and gas operations represent an important portion of Norway's total emissions into the air, and consist primarily of gases containing CO_2, NOx, SOx, CH4 and nmVOC. In 2013, about 31% of the country's total NOx emissions were generated by the petroleum sector, which also accounted for 27% of the GHG emissions and about 24% of the nmVOC emissions.[18]

The emissions primarily come from the combustion of natural gas or diesel in turbines, engines and boilers for the purpose of power generation, gas flaring, or the combustion of oil and gas in connection with well testing and well maintenance. Emissions from leaks, gas venting or evaporation from offshore storage and loading and transport of crude oil can also lead to emissions of hydrocarbon gases (CH4 and nmVOC).[19]

3.3.2 Nitrogen oxides (NOx)

In 2013, NOx emissions originated primarily from gas turbines on offshore installations (55.9%) and engines (42.4%), far ahead of flaring (1.3%),

[17] *Guidelines for offshore environmental monitoring – The petroleum sector on the Norwegian Continental Shelf*, nr. TA 2849, 2011.

[18] Source: Environment Web.

[19] For an overview of the emissions sources, see *Facts 2014*, The Norwegian Petroleum Sector, Ministry of Petroleum and Energy, pp.47-51

boilers (0.3%) and well testing (0.063%).[20] For the same year, NOx emissions from Norwegian petroleum operations totalled 51 000 tonnes – almost 30 % of the national NOx emissions - and this has remained relatively stable since the beginning of 2000, although the figure has increased globally since 1991.

Emissions from permanent facilities have decreased during the last few years, while emissions from mobile rigs have increased. This is explained by the fact that mobile facilities are increasingly used to support new developments on the seabed and in deep water.[21]

NOx and CO_2 emissions have relatively similar emission patterns, coming from gas combustion in turbines, gas flaring and diesel combustion on facilities. The level of emissions also depends on low emissions combustion technology and the volume of fuel consumption.

At the international level, NOx emissions are regulated by the 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone,[22] to which Norway is a party. The Protocol sets emission ceilings for four pollutants: sulphur, NOx, VOCs and ammonia. The Protocol sets tight limit values for specific emission sources and requires use of the best available techniques to keep emissions down.

At national level, NOx emissions related to the operation of offshore facilities are regulated by conditions in the PDOs/PIOs. Emission permits pursuant to the Pollution Control Act are also required for NOx emissions.

NOx emissions have been subject to a tax, the NOx tax, since 2007. The purpose of the tax is to pursue a cost-effective reduction of the NOx emissions. Together with other compliance instruments, it contributes to Norway's compliance with the Gothenburg Protocol. The NOx tax covers emissions from energy generation, including from offshore installations. In 2015, the tax rate was NOK 19,19 per kilo of emitted NOx.

A particular form of commitment has been made by Norway's indus-

[20] Source: Environment Web.

[21] *2014 Environmental Report*, The Norwegian Oil and Gas Association.

[22] Protocol to the Convention on Long-range Transboundary Air Pollution (CLRTAP), last revised in 2012.

try associations in the form of an agreement with the government on the reduction of NOx emissions. Some 777 enterprises - including all of the operators on the NCS - have committed themselves for the second agreement period: 2011-2017. Under this agreement, companies have committed to reporting emissions and pay corresponding contribution to a fund called the "NOx Fund", which is managed by the Confederation of Norwegian Enterprise.[23] As a result of this agreement, companies with activities subject to the NOx-tax may choose to contribute to a NOx-fund instead. The NOx-fund was established in 2008. It contributes to the development of cost effective NOx-emissions reduction measures, such as innovative technology solutions. Because they tackle the same sources of pollution, the adoption of these new technologies also contributes directly to the reduction of CO_2 emissions.[24]

3.3.3 Non-methane Volatile Organic Compounds (nmVOCs)

The largest part of nmVOC emissions from offshore oil and gas operations come from storage and loading of oil operations (around 50%). nmVOC emissions have considerably decreased during the last decade, with a reduction by more than 87% in 2013 (32 790 tonnes emitted), compared to 2001 figures. Such a reduction founds primarily finds its origin in the introduction of emission-reduction technologies for storage ships and shuttle tankers. This is notably based on the requirement for using the best available techniques, as provided in the Gothenburg protocol.

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[23] Website of the NOx Fund (in Norwegian only): <https://www.nho.no/Prosjekter-og-programmer/NOx-fondet/>

[24] The biggest reduction in NOx emissions during the first agreement period derived from service ships delivering to the oil and gas sector, followed by fishing vessels and then by merchant shipping in Norway and with services to Europe. The second period involves a higher proportion of LNG projects for cargo carriers, tankers and ferries/passenger ships. As noted by its representatives, the petroleum sector is a huge contributor to the fund, but sees relatively few projects implemented which are relevant for its operations. This is mainly due to the high costs entailed by such projects. For further details, see *2014 Environmental report*, The Norwegian Oil and Gas Association.

3.4 Specifically on greenhouse gases (GHG) emissions and the climate change regime

3.4.1 Sources of GHG emissions

Methance (CH_4) and carbon dioxide (CO_2) account for most of the GHG emissions from the NCS.

Total CH4 emissions are on a constant decrease (204 800 tonnes in 2012, 23 886 tonnes in 2013, SSB). The offshore petroleum sector accounts for around 10% of these emissions.

On the contrary, CO_2 emissions remain relatively unchanged despite the adoption of various policy measures. In 2012, CO_2 represented 84% of the total GHG emissions in Norway (52.8 million tonnes according to SSB), far ahead of CH4 (8%), N20 (6%) and fluorinated gases (2%). Norway's largest source of CO_2 emissions comes from the petroleum activities (around 27%), followed by road transport (22.7%), industrial processes (16.3%) and stationary combustion (15.4%).[25] This large contribution to CO2 emissions from the petroleum sector is also explained by the particular shape of Norway's economy and energy profile, where hydropower accounts for almost all onshore power generation.[26] Any ambitious strategy to reduce national GHG emissions must therefore include the offshore oil and gas industry.

3.4.2 Norwegian climate policy and the petroleum sector[27]

Norway's climate policy is primarily driven by its commitments under the UNFCCC and the EEA-Agreement. Norway ratified the UNFCCC on 9 July 1993 and the Kyoto Protocol on 30 May 2002 and became party

[25] Data by Statistics Norway / Norwegian Environment Agency as reported by Norway in its 2014 National Inventory Report (NIR) to the UNFCCC. See 'Greenhouse Gas Emissions 1990-2012, National Inventory Report', Report M-137 – 2014, Norwegian Environment Agency, Chapter 2.

[26] In 2013, 98 % of the electricity generation is based on renewable energy sources. Source: Ministry of Petroleum and Energy.

[27] This Section builds on the contribution written by the same author than this article to Norway's Chapter in *Energy Law in Europe*, M. Roggenkamp, C. Redgwell, I. del Guayo and A. Rønne (eds.) (OUP, 3rd edition, forthcoming 2015).

to the Protocol when the latter came into force on 16 February 2005. Norway's allotted total annual quota volume (assigned amount) under the Kyoto Protocol's first commitment period (2008-2012) was 1% above its emission level in 1990. Norway's emissions exceeded this allotted volume, so resulting in the purchase of allowances to fulfil the commitment. Meanwhile, the Government has estimated that it will exceed the commitment for 2008-2012 by 6.6 million tonnes annually, due to holding sufficient amount of units in its registry. Norway's commitment under the Kyoto Protocol for the second commitment period (2013-2020) was agreed in December 2012, and states that average annual emissions of GHG gases shall be limited to 84% of the historic emission levels in 1990. It is an ambitious commitment, which probably will require major cuts in the offshore petroleum and transport sectors for the reasons mentioned above. Insufficient emissions cuts will ultimately have to be balanced by the purchase of UN credits, a prospect which is already foreseen in the national state budget (520 million Norwegian kroners are allocated to the purchase of emissions credits in the 2014 national budget).[28]

The objectives and principles of Norwegian climate policy are defined in a 2008 political agreement in Parliament.[29] In 2010, a new strategy document, *Climate Cure 2020*, presented a thorough cross-sector analysis of tools and measures to reduce emissions in Norway. The analysis was used as input for the assessment of policies and measures in a White Paper on Norwegian climate policy in 2012.[30] The Climate Cure document contained a specific report on the petroleum sector, which looked at emissions reduction in three areas: energy efficiency, electrification and carbon capture and storage (CCS).[31]

[28] Amendments to Prop. 1 S (2013-2014), National Budget 2014, Chapter 1481, post 22: purchase of emissions allowances, general scheme (*Prop. 1 S Tillegg 1 (2013–2014), Endring av Prop. 1 S (2013–2014) Statsbudsjettet 2014*), p. 109. Meld. St. 2 (2013-2014). See also: Report to the Parliament, Revised National Budget 2014, of 14 May 2014, Chapter 5, pp. 95 et seq.

[29] Recommendation No. 145 (2007-2008)

[30] Report No. 21 (2011-2012) to Parliament

[31] *Climate Cure 2020, Sector analysis of measures in the petroleum sector* (*Klimakur 2020 – Sektoriell tiltaksanalyse petroleumssektoren*), 15.02.2010. See summary of

In accordance with the broad political climate agreement reached around the 2012 White Paper, the main components of Norway's current climate policy are:

- Norway will fulfil and exceed the Kyoto commitment within the first Kyoto Protocol commitment period by 10%;
- In the period up to 2020, Norway will commit to cutting global emissions of GHG gases by the equivalent to 30% of Norway's emissions in 1990;
- Norway will be carbon neutral in 2050;
- As part of an ambitious global climate agreement where other developed nations also take on ambitious commitments, Norway will adopt a binding goal of carbon neutrality no later than in 2030.

Following a change of government in 2013, new climate goals have been announced in February 2015, ten months ahead of the UNFCCC negotiations in Paris (UNFCCC COP 21/ CMP 11).[32] In concrete terms, the Norwegian government announced the forthcoming publication of a White Paper on a New Norwegian Commitment for the Period After 2020. According to the proposed strategy, Norway would commit to reduce GHG emissions by at least 40% by 2030, compared to the 1990 level. In October 2014, EU heads of state and government adopted a similar goal. Norway would consequently align itself to the EU position. It is envisaged that Norway will take the initiative to enter into a joint agreement with the EU for joint fulfilment of the targets, based on the EU's climate measures. The Norwegian government intends to keep the ambition of exceeding the Kyoto commitment in the period after 2020. The White Paper will then be debated by Parliament and, if adopted, will represent Norway's new climate strategy.

conclusions in *Fact Sheet – Options for reduced greenhouse gas emissions in the petroleum sector*, Climate Cure 2020, 2010.

[32] "A new and more ambitious climate policy for Norway", press release No. 28/2015, Office of the Prime Minister, 4.2.2015. See also, "White Paper on new emissions reduction commitments for 2030 – a joint solution with the EU" (Meld. St. 13 (2014-2015), *Ny utslippsforpliktelse for 2030 – en felles løsning med EU*), 6.4.2015.

While being a major source of air emissions, the Norwegian petroleum industry is a world leader for low GHG emissions per unit produced. However, as recognised by the Petroleum Directorate, there will be no approval for the opening of new areas in northern provinces or closer to the shore without strong environmental and climate commitments.[33]

The Norwegian government has traditionally favoured the use of general mitigation policy tools based on the polluter pays principle. Norwegian climate policy is therefore based on two cross-sector economic instruments: the CO_2 tax (since 1991), and an emissions trading scheme (ETS) (since 2005). Both apply to the petroleum sector.

3.4.3 CO_2 tax

Norway was one of the first countries in the world to introduce a CO_2 tax in 1991. The application of the tax to the petroleum sector is further regulated in Act 21 December 1990 nr. 72, relating to tax on discharge of CO_2 in the petroleum activities on the continental shelf. As with the NOx tax, the CO_2 tax is intended as a cost-effective measure to reduce emissions. It applies both to burnt petroleum and natural gas discharged to air and also to CO_2 separated from petroleum and discharged to air, all emitting from installations used in connection with production or transportation of petroleum (Section 2, CO_2 Tax Act). Some sectors or products benefit from a reduced rate in accordance with the Energy Tax Directive 2003/96/EC, in order not to alter the overall CO_2 pricing in the affected sectors. Meanwhile, based on the 2012 political agreement, the CO_2 tax for petroleum activities has been considerably increased from NOK 200 per tonne of CO_2 to NOK 410 with effect from 1 January 2013.

3.4.4 Emissions Trading Scheme (ETS)

When it comes to carbon emissions, the Norwegian petroleum industry is subject to double regulation since 2008, being subject to both the CO_2 tax and the ETS. After a testing phase from 2005, Norway joined in stages the European Union ETS (EU ETS) and is harmonising its ETS legislation

[33] Strategic Plan for the Norwegian Petroleum Directorate 2010-2014.

with that of the EU on a continuing basis.

The Greenhouse Gas Emission Trading Act (Act No 99 of 17 December 2004) provides for an emissions allowance and trading scheme, incorporating the EU's Emission Trading Directive 2003/87/EC into Norwegian law. The Environment Agency is in charge of supervising the implementation of the emissions reduction measures, and is the reporting authority for the emissions trading scheme. The scheme was established in 2005, and has been amended several times, in particular in order to align the scheme with the EU ETS and the Kyoto Protocol commitment periods. The Act applies at the outset to emissions of climate gases from stationary industrial activity and aviation activity. The more specific activities to which the quota obligation applies are set out in a Regulation to the Act (Regulation 23 December 2004 No. 1851). The Regulation also implements the latest amendments made by Directive 2009/29/EU to Directive 2003/87/EC. Similarly, Norway is implementing EU rules on carbon leakage, both in terms of sector coverage and state aid rules (European Commission Communication on guidelines on certain state aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012, COM(2012) 3230 final), and with minor adaptations. The third ETS period runs from 1 January 2013 until 2020.

The scope of the scheme has been progressively extended from 11% of the total national GHG emissions to 50% as of 2014, covering new gases (nitrous oxide, PFCs) and new sectors (aviation, aluminium production, petrochemical industry, CCS, etc.).

In 2014, more than 80% of domestic GHG emissions were either covered by the emissions trading scheme or were subject to a CO_2 tax or other GHG emissions taxes (such as for hydrofluorocarbons, HFCs, perfluorocarbons and PFCs). There may be situations where the scope of application of the two instruments overlaps, as has been the case in the offshore petroleum sector since 2008, but such overlap can be compensated through a reduced taxation basis dependent on the fuel type and usage.

Following the latest announcements made by the Norwegian government on its climate policy (February 2015), Norway and the EU may

enter into an agreement for a joint fulfilment of the GHG reduction targets, with the EU ETS as a principal tool. This means, according to the government, that "*Norway would not purchase UN emission reduction credits in order to fulfil the 40 per cent reduction target*." Nevertheless, "*Norway will contribute greatly to reduced emissions in developing countries, for instance through its development aid policies, Norway's International Climate and Forest Initiative and the Green Climate Fund*."[34] As of today, approximately half of the Norwegian emissions are covered by the EU ETS. For those sectors outside the EU ETS, the EU intends to reduce emissions by 30% compared to 2005 as a whole, taking into account national targets. In line with the idea of a joint EU-Norway fulfilment, Norway may take a specific emissions reduction target for the sectors not included in the EU ETS in line with the EU Member States, subject to some flexibility rules which are yet to be determined.

3.4.5 Gas flaring

Flaring is the burning of natural gas that cannot be processed or sold. In 2012, gas flaring and venting accounted for about 10% of CO_2 emissions from the petroleum sector. Emissions from gas flaring are regulated under the Petroleum Act and are subject to emission limits. They are only allowed for safety reasons during operation and in connection with certain operation problems. Gas flaring has actually been prohibited in Norway since the beginning of the production from the NCS in the 1970s, to avoid wasting any source of energy. Environmental considerations backing flaring regulation appeared later. Gas flaring requires the delivery of a permit by the Ministry of Petroleum and Energy, specifying the limited amounts of flared gas allowed. Flaring conditions are also set out in the Plan for Development and Operation and the Plan for Installation and Operation. The CO_2 tax also contributes to the reduction of gas flaring. This restrictive approach to gas flaring regulation has resulted in relatively low levels of flaring on the NCS compared to other countries.

[34] "A new and more ambitious climate policy for Norway", press release No. 28/2015, Office of the Prime Minister, 4.2.2015.

Offshore installations require a large amount of electricity in order to operate. Power generation using natural gas and diesel as fuel is consequently the main source of CO_2 and NOx emissions. The level of these emissions depends mainly on energy consumption by the facilities and the energy efficiency of power generation. Therefore, two other means to reduce emissions from offshore operations comprise the electrification of the platforms and the use of energy efficient technologies for power generation. It should be noted here that some parts of the NCS are maturing, and recovering petroleum resources from the encompassed fields is more energy-intensive, which leads to increased emissions. The use of energy efficient recovery technologies is therefore essential to the reduction of GHG emissions.

3.4.6 Electrification of the NCS – Power from shore

The main idea behind the electrification of oil and gas platforms is to replace the source of power generation for offshore operations. Instead of generating power from fossil fuels on the platform – which has been the traditional way - electricity can be supplied by means of cables connected to, for example, the national grid.

Pursuant to the Petroleum Act, the licensee must provide information on the energy solution proposed for the development of a new field as part of the Plan for Development and Operation and the Plan for Installation and Operation to be submitted to the MPE for approval. The plans must provide a good and efficient energy solution, but electrification is chosen only if it is perceived as a good solution from a technical and financial perspective. Sufficient generation and grid capacities are also essential pre-conditions for approval. In parallel, electrification of platforms raises a series of complex legal issues related to the granting of licenses under both the Petroleum Act and the Energy Act, but also decision-making issues across production licences. The contribution of electrification of platforms to the global reduction of GHG emissions has been much debated in Norway, due to the total environmental benefit of the measure and Norway's participation in the EU ETS.

Electrification of platforms has been discussed as an emissions reduction measure since 1996. Since then, several fields have been powered

with electricity from shore, totally or partially. In its 2012 White Paper on Norwegian climate policy, the government announced increased ambitions as to the use of power from shore as a measure to reduce GHG emissions from the petroleum sector. The same year, almost 50% of the platforms were supplied with electricity coming from shore.[35] Ormen Lange, Troll A, Gjøa and Valhall are already supplied with electricity from land. Some other platforms are only partially powered from shore due to safety and environmental reasons (e.g. Goliat). Electrification has also been approved as a valid supply solution for a series of forthcoming fields: Martin Linge field in the northern North Sea and the Edvard Grieg, Ivar Aasen and Gina Krog fields on the Utsira High. The PDO submitted in 2015 for the giant Sverdrup field also includes the development of power from shore as a supply solution.

3.4.7 Energy efficiency applied to offshore oil and gas activities

As mentioned above, the fact that the certain fields of the NCS are maturing poses some additional challenges in terms of energy use, and consequently, of emissions from the exploitation of the petroleum deposits. The energy solution chosen for the field is addressed in the PDO and must rely on best available technology (BAT) standards. Requirements for energy management solutions are also set by the Norwegian Environmental Agency as part of the emission permits. For example, the introduction of new technologies, such as the use of heat recovery from turbines or combined cycle power solutions, have had direct effects on the reduction of emissions from gas combustion (reduced energy supplies at the facility plant).

3.4.8 Carbon capture and storage (CCS) within the offshore petroleum industry

Petroleum which is recovered from the deposits contains CO_2 to varying degrees. This has both commercial and environmental consequences. For

[35] 2014 Environmental Report, The Norwegian Oil and Gas Association.

example, when the CO_2 concentration in gas is too high for example, it must be reduced in order to meet safety and commercial requirements, before being transported by ships or pipelines and sold. This corresponds to commitments under both transportation and gas sales agreements. This was the starting point for the development of underground storage of CO_2 on the NCS in the 1990s,[36] making Norway a front runner in this area.

CCS technology has been progressively seen as a mitigation solution for CO_2 emissions from power generation onshore but also from the process industry offshore. The latter, as explained above, already had relevant experience with the capturing and storage process. In recent years, Norwegian authorities, and in particular the Norwegian Petroleum Directorate, have been active in mapping potential CO_2 storage sites for further storage of CO_2 produced on the NCS but also potentially imported. These efforts have resulted in the publication of a "CO_2 Atlas" for the Norwegian Continental Shelf.

Finally, the use of CO_2 in connection with enhanced oil or gas recovery (EOR, EGR) is regularly discussed as a means of maximising value from the CO_2 captured.

3.4.9 Reduction of SLCFs and sulphur oxides (SOx)

CH_4 and nmVOC are also classified as Short-lived climate forcers (SLCFs), which have an impact on both the climate and on human health. At international level, the reduction of SLCFs has been discussed under the Climate and Clean Air Act Coalition to Reduce SLCF, the Svalbard Declaration of 2012 for the Nordic countries, the Arctic Council's Tromsø Declaration of 2009 and the revised Gothenburg Protocol of 2012. In Norway, the Norwegian Environment Agency, on behalf of the Ministry of Climate and the Environment, has drafted an action plan to cut SLCFs by 2030. For safety reasons, the oil and gas sector also devotes great attention to emissions of these components.

SOx emissions primarily derive from the combustion of hydrocarbons

[36] Underground storage of CO_2 started in 1996 in geological formations under the seabed from the Spleiner Vest field.

containing sulphur. As Norwegian gas is generally low in sulphur, the major source of SOx emissions on the NCS comes from diesel oil. To limit SOx emissions, low-sulphur diesel oil is accordingly used.

3.5 Emissions to water

Discharges to the sea derive primarily from drilling operations, produced water (and water-based drilling fluids) and used chemicals and cements. Drilling operations result in the discharge of rock drilled from the well, so-called cuttings, and used drilling fluids based on oil, water or chemicals, but with the last of these over a much more limited time period. Drilling fluids have some fundamental functions in extracting petroleum from the ground. There can also be some operational discharges, but they have been decreasing over time.

The government's action in terms of discharges to sea is again based on compliance with international, EEA and national requirements. At international level, discharges to sea are regulated through the Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention). At national level, the objective of zero harmful discharges to sea guides the government's actions. This goal is considered to have been achieved for added chemicals.

The main instruments used to control emissions to sea from petroleum activities are:

- *Regulatory obligations, including prohibition*. In principle, environmentally harmful substances shall not be discharged, regardless of whether they are added or naturally occurring.
- *Discharge permits* are issued pursuant to the Pollution Control Act.
- *Threshold value*. For example, the content of oil in discharged produced water shall not exceed 30 mg oil per litre of water.
- *Environmental monitoring and reporting*. The government has specified criteria in the Activities Regulations and the Guidelines for reporting from offshore petroleum operations. For this purpose, it is a general international practice to distinguish

between four categories of chemical additives: green (have no or very limited environmental impact); yellow (can normally be discharged without specified conditions); red (are environmentally hazardous and should be replaced based on the substitution principle or can be discharged with the permission of the government); black (prohibited for discharge, but can be permitting only in special circumstances related to safety).

- *Collection, treatment, re-injection, etc*. Certain of these discharged substances are considered as hazardous waste and must be handled or treated before any discharge.

3.6 Emissions to the marine environment: soil protection, fauna and flora

In order to assess the effects of petroleum activities on the marine environment, those effects must be measured carefully in time. Therefore, environmental monitoring is a crucial starting point for controlling emissions from oil and gas fields into the marine environment. Much effort is put into the collection of data and the elaboration of verifiable and standardised scientific methods for this purpose, including monitoring obligations for the licensees. Data collection occurs before exploration and production drillings begin, and is made mandatory. The licensees are required to map the potential coral reefs and other valuable ecosystems in the area covered by the licence. Companies also develop their own monitoring programmes or make financial contributions to data collection initiatives focusing on other aspects, such as living marine organisms or seabirds. The data collected is then made available to public authorities and is examined by an independent panel of experts appointed by the Norwegian Environment Agency. Through these different means, seabed sediments have been monitored since the 1970s. The collected data is gathered in the so-called MOD database. The water column is also monitored, but using different methods than for the seabed (such as "effect monitoring").

Offshore installations as the arena for environmental protests

Law of the sea issues

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Content

1 Introduction

This article examines the legal issues pertaining to the exercise of jurisdiction by a coastal State over environmental activists who stage protests against the offshore activities of that State. Such protests are usually performed with the assistance of a ship which brings the activists to the protest's location, in the proximity of the installation or vessel chosen as a target for their action.

Activists often take extreme measures to physically impede offshore operations and to draw the world community's attention to the environmentally harmful activities of the coastal State. They climb onto oil platforms, dive in front of vessels servicing the platforms and otherwise hinder the drilling operations by creating a "human blockade". These so-called "direct actions" performed by Greenpeace have become relatively frequent: the two most recent examples being the actions staged by Greenpeace's ship the *Arctic Sunrise* in the Russian Arctic (September 2013) and off the Canary Islands, Spain (October, 2014).

Coastal States cannot prevent activists from arriving within the proximity of offshore installations to stage direct actions, because ships are able to rely on the freedom of navigation on the high seas to reach the location of the protest. Freedom of navigation through coastal waters can, therefore, be used to perform deliberate acts targeting offshore installations.

The problem is, in itself, not new and can be seen in light of the traditional tension between the coastal State's jurisdiction over its coastal waters, on the one hand, and the freedom of the high seas, on the other hand, enjoyed by all States under the law of the sea and codified in the UN Convention on the Law of the Sea (UNCLOS). It should be noted that, although it is a non-governmental organisation staging such protests, and an oil company that will be prevented from operating the installation as a result of the protest, it is the States that generally have rights and obligations under UNCLOS. A significant difference between direct actions performed onshore and actions against offshore installations is

that the State has full territorial jurisdiction over the former, but a considerably more limited jurisdiction at sea, where the flag State enjoys the freedom of navigation.

The question is whether, and by what measures, coastal States are able to protect their offshore installations against unsafe or otherwise undesirable activities undertaken by foreign vessels, including environmental protests. In principle, UNCLOS provides coastal States with certain rights to this end, including the right to take enforcement measures vis-à-vis foreign vessels in the exclusive economic zone (EEZ) and on the continental shelf. Measures undertaken by some coastal States may, however, go beyond what is permitted under UNCLOS or international law generally, especially if they involve some form of coercion vis-a-vis a foreign ship and its crew.

The incidents examined in this article illustrate the numerous legal issues arising from measures taken by the coastal State's action to prevent or stop direct actions at sea. UNCLOS is the central treaty providing a legal framework for these issues, since it sets out the rights and duties of States in the EEZ and continental shelf, including rights with respect to offshore activities.

This treaty is also very important because it establishes dispute settlement procedures, including compulsory procedures resulting in binding decisions for the States involved. To this author's best knowledge, there have so far been several national litigations over direct actions where law of the sea issues were also touched upon, but only one international dispute where the plaintiff State resorted to such compulsory procedures under UNCLOS (the *Arctic Sunrise*, Netherlands v. Russia). Just weeks after the *Arctic Sunrise* returned from arrest in Russia, and before the case was settled on the merits, it was detained again for a direct action against offshore drilling off the Canary Islands, this time by the Spanish authorities. More direct actions are likely to take place in the future. It is therefore necessary to discuss and clarify the underlying law of the sea issues raised by such direct actions.

Chapter 2 addresses the substantive legal issues, including coastal States' jurisdiction to take enforcement measures against foreign ships

and their crews which participate in direct actions against offshore installations in the EEZ (focusing on the *Arctic Sunrise* incident), and assesses the limits of this jurisdiction in light of the flag State's rights and obligations under the law of the sea.

Chapter 3 discusses legal issues arising under Part XV UNCLOS, which regulates dispute settlement between States on the issues of interpretation and application of UNCLOS and the prescription of provisional (interim) measures. Given the lengthy nature of international disputes, such measures may at times be essential to ensure that the interests of the States involved in the litigation are not irreversibly damaged during the wait for the ruling on the merits.

Chapter 4 contains a summary and conclusions.

2 Can you stop a sunrise? Detention of foreign vessels in the proximity of offshore installations

2.1 Introduction

Most offshore oil extraction activities take place beyond territorial waters, i.e. in the EEZ and on the continental shelf. By contrast to internal waters and territorial sea (the latter subject to the right of innocent passage by foreign ships), coastal States do not have full sovereignty over the EEZ and waters superjacent to the continental shelf. These waters are open to free navigation by all ships and the coastal State's rights are generally confined to exploration and use of natural resources, as provided by UNCLOS.

According to UNCLOS, coastal States may regulate other States' access to natural resources in its EEZ and continental shelf and adopt rules giving effect to international environmental standards, including provi-

sions on penalties for the infringements of these rules.[1]

A range of other violations committed by foreign ships outside territorial waters may also be regulated by States, according to UNCLOS or other rules of international law. It should be noted in this respect that, although UNCLOS contains a comprehensive legal regime for oceans, it does not fully codify international law rules of jurisdiction. Thus, UNCLOS is generally silent on the question of criminal jurisdiction of States over foreign subjects who are involved in the violation of a coastal State's rules applicable to offshore activities.

Exercise by the coastal State of its rights vis-à-vis foreign ships may easily result in conflicts between the coastal State and the flag State if they do not manage to accommodate each other's interests in a mutually satisfactory manner.[2] Such conflicts are likely to arise in cases where the rules of international law do not clearly spell out the scope of the coastal State's jurisdiction to prescribe and enforce rules vis-a-vis foreign subjects, i.e. if such jurisdiction is not expressly covered by UNCLOS or other treaties. Disagreements between States may also arise where the treaty does contain relevant rules but these rules are formulated in general terms, as is the case with Article 60 UNCLOS and other UNCLOS provisions examined in more detail later.

Under international customary law, a State may in general be entitled to apply its national laws extraterritorially to conduct by foreign subjects, in cases where such conduct has some connection with that State. This could be an offence which caused damage to the State's interests or produced some negative consequences on the State's territory.[3] Presumably, this could also include conduct which interfered with the lawful rights of the coastal State to the resources of the EEZ and continental

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1 Articles 60, Article 73 and 217.

2 For a discussion of the legal issues arising from the need to balance the rights of different users see, e.g., Alexander Proels, «The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited", *Ocean Yearbook* 26: 87-112.

3 See generally Michael Akehurst "Jurisdiction in international law". *British Yearbook of International Law* 46 (1972-1973): 145-257, and Cedric Ryngaert. *Jurisdiction in International Law*. Oxford: Oxford University Press, 2008.

shelf or which significantly affected the interests of the coastal State in the EEZ in some other way.

From this perspective, it may be lawful for the coastal State to adopt rules prohibiting environmental activists from performing protest actions against offshore installations to the extent they endanger the interests or rights of the coastal State in the EEZ and continental shelf, but it would be unlawful to prohibit or criminalize all protest actions at sea, irrespective of their impact on the coastal State.

However, disputes between States arise, as a rule, not from the coastal State's legislative action as such, but from the actual enforcement steps undertaken by the coastal State vis-à-vis foreign subjects in order to give effect to such legislation.

In the case of protests near the offshore installations, as further examined here, an infringement of international law may easily occur in cases where the coastal State takes enforcement steps against foreign-flagged ships, since it is the flag State that holds exclusive jurisdiction over its vessels on the high seas. Although the EEZ is not the high seas but a maritime zone subject to a special legal regime laid down in Part V UNCLOS, the freedoms of the high seas still apply there, subject to limitations laid down in UNCLOS. This means, as a general rule, that only the flag State may take enforcement measures against ships which are flying its flag beyond the territorial sea of the coastal State, including the EEZ.[4] Nonetheless, as we shall see below, UNCLOS contains a number of provisions which extend the rights of the coastal State in the EEZ, so that this general principle of the flag State jurisdiction does have certain exceptions.

It should also be noted that for the purposes of the discussion in this article, it is not necessary to make a distinction between the regime of the EEZ, on the one hand, and that of the continental shelf, on the other hand. Rules of jurisdiction will, in general, be governed by the same regime, in cases involving actions against installations on the extended continental shelf (i.e. the shelf stretching beyond the 200-nautical mile

[4] In the territorial sea, the coastal State has a somewhat broader (but also not unlimited) enforcement jurisdiction over foreign ships: cf. Arts 25, 27 and 28.

limit as envisaged in Article 76 UNCLOS).[5]

An on-going case which illustrates the issues above (but which is far from providing clear-cut answers on them) is the *Arctic Sunrise* case. The dispute on its merits raises interesting legal issues on the interpretation of Part V of UNCLOS and coastal States' jurisdiction; in particular, it addresses the coastal State's right to take enforcement measures against foreign-flagged vessels in its EEZ. Section 2.2 below describes the relevant facts and the legal background to the *Arctic Sunrise* case. The case also addresses the question of the applicability of compulsory dispute settlement procedures entailing binding decisions under UNCLOS, as well as the application of provisional measures which are examined in Chapter 3 below.

2.2 The *Arctic Sunrise* dispute: why focus on this case?

2.2.1 An overview of the events

On 18th September 2013, a Greenpeace International vessel, the *Arctic Sunrise,* approached a fixed platform Prirazlomnaya to demonstrate against oil drilling activities in the Arctic. The Prirazlomnaya is situated 60 km offshore in the Russian EEZ in the Arctic Ocean (Pechora Sea). This is an ice-resistant platform and the first one to start offshore production in Russia.[6] The Prirazlomnaya was a natural target for Greenpeace: there were serious doubts as to its compliance with environmental standards and activists claimed

[5] By contrast, it is necessary to make a distinction between the legal regimes governing the EEZ and the continental shelf with respect to jurisdiction over *living* resources of the sea: the coastal State holds rights over living resources in the EEZ (including jurisdiction over infringements of such rights committed by foreign ships) but not in the waters superjacent to the continental shelf extending beyond the EEZ. In the latter case the coastal State only has rights to non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species (Art. 77 UNCLOS).

[6] The Russian Federation has claimed a 200-mile EEZ: Federal Law # 191-Ф3 of 18 November 1998 "On the Exclusive Economic Zone of the Russian Federation". For more information on the Prirazlomnaya see, e.g., Gazprom website http://www.gazprom.com/about/production/projects/deposits/pnm/

that operations at this platform had been launched without the necessary official authorization being in effect.[7]

Five inflatable crafts were launched from the *Arctic Sunrise* which carried activists to the platform. The *Arctic Sunrise* did not cross the border of the three nautical-mile zone established around the platform. [8] Two of the activists climbed up the platform by using ropes. Others remained in the inflatable boats in the proximity of the platform. The two activists who had climbed on the platform, were subsequently taken on board by the Russian coast guard vessel, whereas the others managed to return to the ship under the circumstances described as dramatic by Greenpeace.

In the meantime, the *Arctic Sunrise* received an order to stop and allow boarding by the coast guard and eventually, after some attempts to evade, was forced to stop and was boarded by the Russian authorities (outside the three-mile zone). The boarding of the *Arctic Sunrise* is reported to have taken place on 19th September 2013.

The ship was escorted or towed to the Murmansk harbor in Kola Bay on 20th September where she was detained and searched by the Russian authorities. A district court in Murmansk decided to arrest all crew members (mostly foreigners of different nationalities), the "Arctic 30".[9]

The order for the seizure of the ship was adopted by the district court in Murmansk on the 7th October 2013, whereupon the owner and possessor were prohibited from using or disposing of the ship.

As the *Arctic Sunrise* sails under the flag of the Kingdom of Netherlands, the Netherlands was invited by the Russian authorities to send a representative to attend the search of the ship scheduled for 28th September 2013. By then, the crew members were already being kept in

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7 See the Statement of facts by Greenpeace (dated 19th October 2013), para 9. There are some discrepancies in the presentation and interpretation of the events between different sources which the author does her best to summarise and reconcile. The reader is referred to the extensive case materials, which also include documents of the Russian authorities. Available at www.itlos.org and www.pca-cpa.org (under "Cases").

8 See Section 2.3.2 below for more discussion of this zone.

9 28 protesters and two freelance journalists.

detention in Murmansk pending the judicial proceedings.

Administrative proceedings were instituted by the Russian authorities for violations of national laws applicable in the EEZ. In the ruling of 8th October 2013, an administrative penalty was imposed on the shipmaster for the infringement and for the failure to comply with the coast guard's order to stop and allow an inspection of the ship.

In addition, criminal proceedings were instituted against the shipmaster and the crew on various charges, first for piracy and subsequently for hooliganism.

Immediately after the detention, the Netherlands contacted Russian authorities and requested release of the ship and its crew. Having received no satisfactory response, the Netherlands initiated the proceedings described in the following section.

2.2.2 International proceedings

Russia and the Netherlands ratified UNCLOS and are, accordingly, bound by the UNCLOS provisions on dispute settlement procedures laid down in Part XV thereof.

Both States also adopted declarations concerning the forum for dispute settlement under UNCLOS. The Netherlands accepted the jurisdiction of the International Court of Justice over disputes with those State which were parties to UNCLOS, which adopted the same jurisdiction. When signing UNCLOS in 1982, the (then) Soviet Union declared that the Annex VII tribunal would be the basic means for the settlement of disputes concerning the interpretation or application of the Convention. In addition, the Soviet Union recognized the competence of the International Tribunal for the Law of the Sea (ITLOS), as provided for in Article 292, in matters relating to the prompt release of detained vessels and crews. [10]

The declaration adopted by Russia in 1997 upon the ratification of UNCLOS did not modify the 1982 declaration with respect to jurisdiction. The 1982 declaration is, in any case, irrelevant for disputes between the

[10] Ratification status and full texts of the declarations made by the States parties to UNCLOS are available at www.un.org/depts/los/convention_agreements/convention_overview_convention.htm under "Current status of the Convention".

Netherlands and Russia, as they did not adopt the same procedure. UNCLOS provides that in such cases disputes are to be settled by the tribunal established under Annex VII.

At the international level, two sets of proceedings were instituted in parallel.

First, on 4th October 2013 the Netherlands initiated arbitral proceedings under the procedures envisaged in Part XV UNCLOS. The tribunal's proceedings are ongoing at the time of writing.[11]

Second, on 21st October 2013, the Netherlands instituted proceedings at the ITLOS, seeking an order on provisional measures to have the ship and its crew released from the detention in Russia, since the arbitration tribunal that would be competent to prescribe such measures was not yet established.[12]

The 1997 declaration made by Russia also contained a reservation against application of the compulsory dispute settlement procedures of Section 2, Part XV. As examined in more detail in Chapter 3, Russia invoked this reservation and refused to participate in both proceedings.

The activists remained in detention until the majority were bailed during the proceedings at the ITLOS (and shortly after the Order on the application of preliminary measures was adopted by the ITLOS on 22 November 2013). The activists were allowed to leave the territory of the Russian Federation after being amnestied in December 2013. Criminal proceedings in Russia were closed in October 2014, due to the amnesty. The ship remained in Murmansk harbour and was only released in June 2014, leaving the harbor in August 2014.[13]

The release of the ship and its crew has not fully resolved the dispute,

[11] Case No. 2014-02 *Arctic Sunrise Arbitration (Netherlands v. Russia)*. The arbitral tribunal held its first meeting on 17th March 2014. The current status of these proceedings is available at the website of the Permanent Court of Arbitration http://www.pca-cpa.org.

[12] Case No. 22, *The Arctic Sunrise Case* (Kingdom of the Netherlands v. Russian Federation), ITLOS, Provisional measures, available at www.itlos.org under "Cases".

[13] As reported by SweetCrude Rep. 10/1/14, Interfax Russ.&CIS Mil. Newswire 10/1/14 and Targeted News Serv. (U.S.) 10/1/14 (Westlaw database). The amnesty that included the Arctic 30 was declared by the State Duma in December 2013.

as the Netherlands still seeks a declaratory judgment on the wrongfulness of Russia's conduct, a formal apology, and compensation for financial losses incurred as a result of Russia's sanctions against the *Arctic Sunrise* and the persons on board.

2.2.3 Claims

2.2.3.1 Claims on the merits of the case

In the tribunal set up under Annex VII, the Netherlands requested the following ruling (in this author's summary):[14]

1) to adjudge and declare that, by boarding, investigating, inspecting, arresting and detaining the *Arctic Sunrise* and by initiating judicial proceedings against its crew, the Russian Federation breached its obligations under Articles 58(1), 87(1)(a) UNCLOS and under customary international law, as well as obligations to the Kingdom of Netherlands with regard to the right to liberty and security of the crew under Articles 9 and 12(2) of the 1966 International Covenant on Civil and Political Rights and customary international law;

2) To adjudge and declare that the aforementioned violations constitute internationally wrongful acts entailing the international responsibility of the Russian Federation; and

3) to adjudge and declare that these wrongful acts shall be ceased and the plaintiff State must receive assurances and guarantees of non-repetition as well as receiving full reparation for the injury caused by all these acts.

2.2.3.2 Claims concerning provisional measures (release)

On 21 October 2013, the Netherlands submitted a request for provisional measures to the ITLOS, pending the constitution of an arbitral

[14] The full text of the claim is available at the website of the Permanent Court of Arbitration http://www.pca-cpa.org.

tribunal. The Netherlands argued that the "principal reason for requesting provisional measures is that the Russian Federation's actions constitute internationally wrongful acts having a continuing character. . . and the circumstances of the present case require adoption of provisional measures."

The Netherlands requested a declaration by the ITLOS that:

1) the ITLOS has jurisdiction over the request for provisional measures;

2) the arbitral tribunal to which the dispute is being submitted has *prima facie* jurisdiction; and

3) the claim is supported by fact and law.

4) The Netherlands asked for the following decision by the ITLOS:

5) Enable the *Arctic Sunrise* to be resupplied and leave the Russian Federation;

6) Release the crew members;

7) Suspend all judicial and administrative proceedings and refrain from initiating any further proceedings in connection with the incidents leading to the boarding and detention of the *Arctic Sunrise*; refrain from taking and enforcing any judicial or administrative measures against the vessel, its crew members, its owners and its operators; and

8) Ensure that no other action will be taken which might aggravate or extend the dispute.

2.2.4 The importance of the *Arctic Sunrise* for the law of the sea

The discussion in the following chapters attempts to clarify the law of the sea issues arising in "direct action" cases and highlighted by the dispute in the *Arctic Sunrise* case. Why does this article focus on the *Arctic Sunrise* and what makes it different from other similar

incidents?

It should be pointed out that incidents involving direct actions against offshore installations performed by Greenpeace activists have taken place before, and some of those cases were adjudicated by the national courts of USA, Canada and Norway. Thus, in 1993 the Supreme Court of Norway upheld the lower courts' ruling, whereby the shipmaster and the leader of the direct action were sentenced for infringing the rules on safety zones around oil rigs (*Ross Rig*-case). A similar case was addressed by the Supreme Court of Norway in 2002, when the Court upheld criminal penalties for the direct action against the oil rig Deep Sea Bergen. Shell's activities on the US and Canadian shelves in the Arctic were also targeted by Greenpeace, resulting in judicial proceedings.

The Russian Arctic has been a target for direct actions before the *Arctic Sunrise*, without triggering judicial proceedings at the national or international level (as far as is known to this author). More recently, in October 2014, the same ship, the *Arctic Sunrise*, was detained by the Spanish authorities in a Lanzarote port for a direct action against offshore drilling off the Canary Islands.

All these cases are similar, in that they challenge the powers of the coastal State in the EEZ and question the scope of a coastal State's jurisdiction to take enforcement measures in order to prevent or stop direct actions. However, by contrast to other cases, the *Arctic Sunrise* is being resolved under the UNCLOS dispute settlement mechanism and has, therefore, presented international tribunals with an opportunity to shed light on the interpretation of the relevant UNCLOS provisions.

2.3 Rights and duties of States in the EEZ and waters superjacent to the continental shelf

2.3.1 Overview

For the purposes of this article's discussion, it is necessary to highlight some of the key aspects of States' rights and duties under the law of the sea and to examine relevant legal issues arising from the exercise of such

rights in the EEZ. UNCLOS lays down a number of provisions regulating coastal and other States' rights and duties in the EEZ (Part V) and on the continental shelf (Part VI). Provisions on the high seas laid down in Part VII apply in the EEZ and on the continental shelf, with the limitations following from Parts V and VI of UNCLOS.

UNCLOS' provisions on the scope of the coastal State's jurisdiction in the EEZ, on the one hand, and the flag State's freedom of navigation, on the other hand, are central to this article. It should, however, be kept in mind that the main challenge does not lie in the identification of the respective rights of each State. It is also necessary to strike a balance between these (conflicting) rights, in order to determine whether or not a party to the dispute acted in a way compatible with the law of the sea. This is a complicated exercise, as the discussion below shows.

2.3.2 Coastal State's rights and obligations, including jurisdiction over foreign vessels

In so far as a coastal State's rights and duties are concerned, UNCLOS provides it with sovereign rights for the purposes of exploring and exploiting natural resources of seabed and superjacent waters of the EEZ and the natural resources of the seabed and subsoil of the continental shelf.[15] The coastal State also holds exclusive rights with regard to the establishment and use of artificial islands, installations and structures. Article 60 (examined in more detail below) regulates coastal State jurisdiction in the EEZ, but applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.[16]

Article 60 does not differentiate between fixed and movable (floating) platforms. Provided the mobile rig is fastened to the seabed, nothing precludes it from being considered an "installation" or a "structure" for the purposes of Article 60. The application of this provision to mobile rigs under towage is less clear.[17]

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15 Article 56(1) and Article 77 respectively.

16 Art 80 UNCLOS.

17 See Barbara Kwiatkowska. *The 200 Mile Exclusive Economic Zone in the New Law of*

In the Deep Sea Bergen-case, the Supreme Court of Norway decided that, in that case, Norway possessed sufficient jurisdiction over the rig as the flag State to justify the measures undertaken vis-à-vis the activists. 18 For this reason, the Court did not find it necessary to examine whether the coastal State had any residual jurisdiction over mobile rigs under towage. (If this were the case, the safety zone regime of Article 60(4) would continue to apply. Safety zones are discussed further below.) Still, the Court appears to have accepted that with respect to mobile rigs under towage the coastal State's jurisdiction is determined not on the basis of Article 60, but under Part VII, i.e. as the flag State's jurisdiction on the high seas.

Article 60 only touches very briefly on the scope and contents of coastal State's jurisdiction. Article 60(1) provides that coastal States have the exclusive jurisdiction in their EEZ to construct and regulate the construction, operation and use of various artificial installations. Article 60(2) further provides that coastal States have "*exclusive jurisdiction over* such artificial islands, installations and structures, *including* jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations."(author's emphasis)

The above provisions refer to the "exclusive jurisdiction" of the coastal State, but do not specify the scope and limits of such jurisdiction, other than referring to some examples ("including…"). The wording of Article 60(2) suggests that the list is not exhaustive.[19]

It is logical to assume that the concept of exclusive jurisdiction in Article 60 corresponds with the concept of jurisdiction in international law generally; at least to the extent that other UNCLOS rules do not modify it.

The exclusivity of jurisdiction means that the coastal State may exercise both prescriptive and enforcement jurisdiction over its offshore

the Sea. Martinus Nijhoff Publishers (1989), pp 108-109.

18 On the *Deep Sea Bergen*, see Section 2.6 below.

19 Cf. Article 21(2)(h) on the territorial sea and Article 33 on the contiguous zone which contain exhaustive lists of matters subject to the coastal State's jurisdiction.

installations without having to share with any other States.[20] Jurisdiction of the coastal State over its offshore installations in the EEZ and on the continental shelf stretches, therefore, much farther than its jurisdiction over foreign navigation through its territorial sea, EEZ and waters superjacent to its continental shelf.[21] Still, Article 60 does not afford coastal States unlimited jurisdiction over foreign vessels in the vicinity of installations.

By contrast to some other provisions in UNCLOS regulating coastal State jurisdiction over foreign-flagged ships, Article 60(2) is formulated in rather general terms.[22] Therefore, the spatial (geographic) and the substantive limits of the coastal State jurisdiction over foreign ships and persons in the context of Article 60 are somewhat unclear.

Article 60 contains provisions addressing some of the specific aspects of coastal States' jurisdiction over its platforms. In addition to Article 60(2), providing for some examples of matters under the exclusive jurisdiction of the coastal State, Article 60(4) allows States to establish, "where necessary, reasonable safety zones" around installations in which the coastal State "may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures".

It is perfectly compatible with Article 60 UNCLOS and international law for coastal States to prescribe rules prohibiting conduct by foreign subjects committed *on* such artificial islands, installations and structures. It should, in principle, also permit the regulation and prohibition of conduct aimed against these installations, i.e. applying national rules not only *on* the installations but also in the waters surrounding them.[23]

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20 The wording of Article 60 UNCLOS is more generous in this respect than corresponding provisions in its predecessor, the 1958 Convention on Continental Shelf, which expressly grants "exclusive" rights to natural resources but does not use the same wording with regard to the construction and use of the installations.

21 In the latter cases, foreign-flagged ships are governed either by the exclusive flag State jurisdiction or by the concurrent jurisdiction of the coastal State and the flag State: Cf. Arts 27, 28, 97, 110, 220 and 228.

22 Cf. Arts 21, 73, 211(5) and (6) and 220.

23 Nandan, Satya N. and Shabtai (1993), p. 585. Nandan and Shabtai links this criminal jurisdiction to the SUA Convention with Protocols: see fn. 12 on p. 585. See also Alex Oude Elferink, "The *Arctic Sunrise* Incident: A Multi-faceted Law of the Sea Case

In principle, if construed in light of the international law rules of jurisdiction, Article 60(2) authorises the coastal State to apply its national laws to foreign vessels and persons located in (sailing through) its EEZ, in cases where their conduct may interfere with the coastal State's rights offshore, and cause damage to the coastal State's interests. Such damage is especially likely to occur in the vicinity of the offshore installations. By providing for establishing safety zones around installations, UNCLOS acknowledges that such damage can, in principle, warrant the exercise of jurisdiction by the coastal State vis-à-vis foreign ships.

Although Article 60(4) should not be construed as narrowing down the substantive scope of the exclusive jurisdiction over offshore installations granted to the coastal State in Article 60(2), UNCLOS does not make it clear what measures can be undertaken by the coastal State in the safety zone. Thus, it leaves open the question of whether UNCLOS permits the prohibition of navigation through these zones altogether or instead restricts stopping and anchoring in the safety zones.[24] IMO instruments indicate that the coastal State may impose restrictions on the navigation and other activities in the safety zone and prohibit *inter alia* foreign ships from entering these zones without authorisation.[25] However, the jurisdiction of the coastal State under Article 60(4) is limited to the regulating of *unsafe* conduct, rather than regulating all activities in the safety zone.

Even if the right to prescribe the rules of conduct for foreign ships in the proximity of platforms can be derived from Article 60(2) provisions, the enforcement of such rules by the coastal State vis-à-vis foreign ships

with a Human Rights Dimension", *The International Journal of Marine and Coastal Law* 29 (2014) 244-289, p. 257.

24 See Kwiatkowska (1989), p. 121. See also Nandan and Rosenne (1993), p. 586.

25 IMO Resolution A.671(16) of 19 October 1989 "Safety zones and safety of navigation around offshore installations and structures". The prohibition on ships staying in and sailing through safety zones, with some exceptions not relevant here, is laid down in the Decree of the President of the Russian Federation (2013), cited in the dissenting opinion of Judge Golitsyn in the *Arctic Sunrise*, para. 26, available at www.itlos.org under "Cases". Kwiatkowska (1989) points out at p. 122 that the imprecise wording of UNCLOS resulted in the State, in practice, imposing all kinds of restrictions on navigation in the vicinity of offshore installations.

is more controversial. For example, in the case of protests at sea, the enforcement rights of the coastal State in the vicinity of platforms are under an increasing challenge both from the law of the sea and from a human rights perspectives.

In this author's view, it would not be correct to interpret Article 60(4) as precluding rights of the coastal State to prescribe rules applicable to foreign vessels navigating in the vicinity of the offshore installations on other aspects than safety, simply because Article 60(2) addresses the coastal State's jurisdiction as a whole, in all its dimensions, whereas Article 60(4) addresses *enforcement* in the safety zones. For example, the coastal State may lay down penalties for violations committed against installations from crafts operating from water or prescribe other norms of conduct for foreign ships. However, the supervision of compliance with these rules by the foreign ship may remain the flag State's responsibility. (Whether the coastal State has jurisdiction to *enforce* its laws, vis-à-vis foreign ships and persons within and outside safety zones, is discussed later in this Chapter.)

An express limitation on the prescriptive jurisdiction of the coastal State is laid down in Article 60(5) and relates to the function of the safety zones, as they must be "reasonably related to the nature and function" of the offshore installations. In addition, the breadth of such zones, cannot, as a general rule, be broader than 500 metres. As pointed out earlier, safety zones are relevant for the purposes of enforcement against unsafe conduct, so this provision does not generally affect the prescriptive jurisdiction afforded to the coastal State by Article 60(2) UNCLOS on other matters than the function and breadth of the safety zones.

An example of national rules which are probably incompatible with the requirements of Article 60(5) is found in the Russian provisions applicable to the Arctic waters where the *Arctic Sunrise* episode took place. There, two zones were established around the Prirazlomnaya platform: a safety zone of 500 metres, where all navigation was prohibited, and a three-nautical-mile zone declared to be a dangerous area for navigation (with prior permission required for entry).[26]

[26] The 500-metre zone is envisaged in Article 16 of the Federal Law of 30 November

No exception in the *Arctic Sunrise* case, allowing a broader safety zone, can be derived from the IMO rules or from generally accepted international standards, suggesting that these national rules are contrary to Article 60(4).[27]

Can Russia justify the three-mile zone by referring to Article 234 UNCLOS? Article 234 regulates the protection of ice-covered areas from pollution and can be considered as representing a *lex specialis* rule with respect to the general provisions on the protection of the marine environment on the EEZ and continental shelf.

In ice-covered areas, Article 234 entitles coastal States to regulate and enforce rules applicable to foreign-flagged ships to an extent beyond what is generally permitted under UNCLOS. As a result, in these areas, the coastal State may circumscribe the freedom of navigation around its offshore installations more than is generally permitted under Part V and VII UNCLOS. This provision could, in principle, explain the establishment of the special zones in the Arctic waters, in cases where the coastal State imposes certain restrictions to prevent unsafe accidents with ships in order to protect the marine environment.

Nonetheless, in this author's view, Article 234 may not provide sufficient justification for the establishment of the three-mile zone around the Prirazlomnaya. The three-mile zone in this case is established around the platform and appears to be functionally related to the 500 metre safety zone, and not to the Pechora Sea (or any specific parts of this Sea) generally. In addition, it was established as a zone "dangerous for navigation" and is not (or at least not expressly) aimed at protecting the marine environment of the Pechora Sea. The latter may, however, be justified in light of the Article 234 reference to "exceptional hazards to navigation" due to the ice conditions and the environmental risks this

1995 N 187-ФЗ «On the Continental Shelf of the Russian Federation". The three-mile zone was noted in the Notices to Mariners 6623/11, referred to in the translated ruling of the Russian court and reproduced in the case materials (fn. 7 above).

[27] Article 60(5) allows exceptions "as authorised by generally accepted international standards or as recommended by the [IMO]" but to this author's best knowledge no such rules have been adopted so far adopted by IMO, making this exception unavailable for the Prirazlomnaya.

brings about for shipping.[28] However, the three-mile zone in this case appears to have as its actual purpose extending the 500 metre zone further than permitted under Article 60(4) and (5), so enabling the coastal State to impose limitations on the navigation in it, and not (merely) to reduce the risk of environmental damage in those waters. This zone resembles rather the practice of "designated areas" in the EEZ which is generally considered to be incompatible with UNCLOS.[29]

In light of these considerations, Article 234 UNCLOS is unlikely to trump the provisions of Article 60(5) on the maximum permitted breadth of the safety zone around offshore installations. From the law of the sea perspective, this means that the three-mile zone is not relevant for determining the rights and obligations of the foreign-flagged ships navigating in those waters.

2.3.3 Flag State's rights and obligations

Article 56(2) provides that the coastal State shall have due regard to the rights and duties of other States in the EEZ and shall act in a manner compatible with the provisions of UNCLOS. In this respect, the freedom of navigation is one of the central rights enjoyed by the flag State.

Furthermore, Article 58 regulates the rights and duties of other, non-coastal, States in the EEZ and provides that in this maritime zone all States "enjoy, subject to relevant provisions of UNCLOS, the freedoms referred to in article 87 of navigation […], and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operations of ships […] and compatible with the other provisions of this Convention."

Article 90 UNCLOS defines the right of navigation as the right of every State, whether coastal or land-locked, to sail ships flying its flag on the high seas. If the right to free navigation is defined narrowly as the right to sail and to freely *pass* through the EEZ, it would be questionable whether arriving at a coastal State's EEZ with the purpose of performing

[28] See also Elferink (2014), p. 256.

[29] See Kwiatkowska (1989) at p. 124 et seq.z

an environmental action, and not merely for transiting, would be covered by the right to free navigation on the high seas.

Such an interpretation would not, however, be supported by the general context of UNCLOS. Foreign ships are not, in any case, prohibited from stopping and anchoring in the EEZ, whatever purpose this may have, including environmental protests, provided these vessels do not infringe upon the coastal State's rights in the EEZ. No special permission from the coastal State is required for such stays. By contrast, UNCLOS requires that passage by foreign vessels through the *territorial sea* of a coastal State should be continuous and expeditious, and any stopping and anchoring in the territorial sea is only permitted in so far as it is "incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance (…)".

The right to free navigation on the high seas is not absolute; it has to be exercised with due regard to the rights of other States, including the coastal State. UNCLOS does not, however, establish any clear hierarchy of rights of the coastal State and other States in the EEZ.[30] Seen from this perspective, it can be argued that the lawful rights of the coastal State do not trump the lawful rights of the flag State in the EEZ. Therefore, even the lawful exercise by the coastal State of its rights in the EEZ does not automatically give a higher priority to these rights than to the right to free navigation, even if the latter right is exercised in such a way as to interfere with the coastal State's offshore operations, assuming that it is still exercised in a way that takes "due regard" to the coastal State.

As mentioned earlier, Article 56 grants the coastal State the sovereign rights to the exploitation of the resources of the EEZ, as well as jurisdiction with respect to the establishment and operation of the installations in the EEZ. Direct actions do not, arguably, have as their purpose the exploitation or the claiming of rights to the resources of this zone; they are rather aimed at changing the manner in which

[30] Except Article 60(7) which does give a higher priority to "recognised sea lanes essential to international navigation" than to the coastal State's rights to establish installations and safety zones around them. See also Kwiatkowska (1989), p. 116.

coastal State exercises its rights.[31]

In this author's view, the requirement to take "due regard" of the rights of other States should be understood as requiring foreign ships sailing in the EEZ to operate in such a way as not to unjustifiably encroach upon the coastal State's rights in the EEZ. It is difficult to see how a mere arrival and peaceful demonstration in the EEZ would encroach upon the coastal State's rights under Part V or VI. Thus, the flag State's right to free navigation ensures a legal basis for the environmental activists to approach the location of the protest in the EEZ and to conduct such a protest without being interdicted by the coastal State.

At the same time, the coastal State's rights in the EEZ may not be rendered entirely irrelevant by an excessive reliance by the flag State on its right to free navigation. Actions which not only impede the exercise of the right to extract natural resources in the EEZ (creating such hindrances is actually one of the principal objectives of direct actions), but which have an effect of stopping offshore operations altogether (or obstructing all navigation) are unlikely to take "due regard" of the rights of the coastal State within the meaning of Part V. This also applies to direct actions which pose an actual or potential risk for the safety of the installation and its operations.

A separate question is whether the coastal State's rights under Part V UNCLOS, where exercised in a way harmful for the environment, should benefit to the full extent from the protection under Part V UNCLOS, i.e. whether the coastal State may invoke the obligation of the flag State to take "due regard" by restricting the right to stage environmental protests which go farther than would be allowed under UNCLOS.

Protection of the marine environment, not only for the sake of the particular States, but for the international community as a whole, is not overlooked by UNCLOS. In particular, Article 56(2) requires that coastal States act "in a manner compatible with the provisions of" UNCLOS,

[31] By contrast to illegal fishing by foreign ships in the EEZ, which have as a purpose the (unlawful) exploitation of the coastal State's resources. Greenpeace may, however, appear to go so far in its protests that it actually attempts to take over this authority from the coastal State.

whereas Article 56(1) grants coastal States jurisdiction with regard to the protection of the marine environment. Article 208 of Part XII imposes an obligation on the coastal States to adopt laws and take other measures to control pollution from their seabed activities.

If the coastal State authorises offshore operations and sets standards for such operations which do not meet the national or, as the case may be, international safety criteria, the exercise of the coastal State's rights may be fully or partly incompatible with the requirements of Part V. It should be pointed out that Article 58(3) requires other States to comply with the laws of the coastal State and other rules of international law in so far as they are *not incompatible* with this Part V. This consequently suggests that the coastal State may not rely on its own laws and regulations, where incompatible with the provisions of Article 56 cited above, in order to argue that the flag State has violated its obligations vis-à-vis the coastal State under Part V.

From this prospective, coastal States may not rely on the provisions of Part V to argue that all aspects of the exploration of natural resources offshore are their exclusive business, which may under no circumstances be the object of any protests. If there are serious concerns about environmental compliance or the consequences of offshore projects, it must be permissible to take steps, also at sea, to protest against such projects in a way that would influence the stakeholders in the offshore projects.

However, direct actions, which have as their direct purpose putting a complete stop to all offshore projects, will not benefit from the arguments above. Pollution is regulated but not prohibited altogether, as it is an inevitable by-product of any human activities, including offshore operations. In so far as the standard-setting for the offshore operations is concerned, all States, including the flag States of Greenpeace ships, are required to cooperate in order to achieve a satisfactory environmental regime at the international level.[32]

[32] Non-governmental organisations do not have such rights under UNCLOS but may contribute in other ways to the standard-setting and environmental monitoring. This is outside the scope of this article.

2.3.4 What about rights not expressly protected by UNCLOS?

The *Arctic Sunrise* and similar incidents show that the flag State may also invoke the rights which are not expressly guaranteed by UNCLOS. The status of such rights within the scope of UNCLOS is, however, unclear.

It would be reasonable for UNCLOS to protect rights which can be derived from the customary law of the sea (to the extent they are not already codified in UNCLOS or do not conflict with it) and the rights laid down in treaties connected to UNCLOS.

It is, however, much less certain that rights, which are not, strictly speaking, of the law-of-the-sea nature, are protected by UNCLOS. For example, in the *Arctic Sunrise* case, the right to freedom of expression and other human rights were invoked by the flag State.

As a starting point, the law of the sea has a neutral relation to human rights. Nothing in the wording of UNCLOS suggests that UNCLOS provisions override such significant human rights as the right to liberty, fair trial and prohibition of inhumane treatment.[33] The coastal State must also respect these rights when it exercises its jurisdiction over foreign subjects in its EEZ and continental shelf. This means, in particular, that enforcement by the coastal State must not be such as to unjustifiably encroach upon these rights: for example, the coastal authorities may not intentionally cause excessive and unnecessary damage to the activists and the ship.

In the example of the *Arctic Sunrise*, it is clear that the activists could not be arrested or prosecuted by the Russian authorities without a proper legal basis in its national law and that Russia could not completely prohibit Greenpeace from performing any kind of protests anywhere in the EEZ. Similarly, a coastal State is not allowed to impose excessively harsh penalties on the activists for infringements of the relevant rules of that coastal State.

[33] UNCLOS even contains some provisions indirectly protecting the crew against excessive and inhumane punishment by the coastal State: see Articles 73 and 230.

It is, in any case, not excluded that the conduct of the coastal State in a particular case may lead to the infringement of *both* UNCLOS and the human rights instruments binding on that State. In practice, parallel application of both regimes may not necessarily bring about any real changes in the legal position of the States.

The problem will, however, arise if human rights are invoked in the course of dispute which is being settled under UNCLOS, and not at a human rights' court. Although human rights may, in principle, be viewed as compatible with UNCLOS, earlier court practice shows that not all human rights instruments will be automatically applicable in a dispute under UNCLOS.[34]

Invocation of human rights in a law of the sea dispute may result in the extension of the obligations on the part of the opponent State beyond what is clearly envisaged by UNCLOS. This would be the case if a flag State could invoke human rights or other rights not expressly envisaged in UNCLOS, in order to have enforcement jurisdiction of the coastal State in the EEZ limited further than is stipulated in the relevant UNCLOS provisions. It is far from certain that States must tolerate unauthorized entries into the safety zone or to put up with the activists attaching themselves to oil platforms in order to hinder their operations solely because, by preventing or interrupting such actions in its capacity as the coastal State under Part V of UNCLOS, the State would violate their freedom of expression or any other rights such as right to liberty, peaceful assembly etc.

Prior to the *Arctic Sunrise*, Greenpeace invoked (without any particular success) human rights violations in other similar cases at the national level such as the *Ross Rig* and the *Deep Sea Bergen* (Norway).[35] In the

[34] The European Court of Human Rights has interpreted UNCLOS in a number of cases; the question here is, however, whether a tribunal acting under UNCLOS will be competent to apply human rights instruments: see Section 3.2 below. Generally on the interrelationship between UNCLOS and human rights see, e.g., Tullio Treves, "Human rights and the law of the sea", *Berkeley Journal of International Law*, Vol 28:1 (2010), pp 1-14.

[35] See also *Shell Offshore Inc v Greenpeace Inc* (709 F.3d 1281) where the US district court examines the freedom of speech claimed by Greenpeace and does not give it as much weight as Shell's arguments based on safety of sea operations.

Deep Sea Bergen, the Supreme Court of Norway ruled that confiscation of Greenpeace boats and the life capsule used in a direct action against a mobile oil rig was necessary to protect lawful activities offshore and to prevent the disorder.[36] This ruling referred to the decision of the European Court of Human Rights in *Drieman and Others v Norway*, in which the applicants complained that, by detaining and prosecuting them for protests against whaling in the Norwegian EEZ, Norway infringed their right to freedom of expression and peaceful assembly.[37]

Although the Court proceeded on the assumption that the interference against the Greenpeace activists did amount to the restriction of these freedoms, it considered that Norway was entitled to invoke the derogation from the freedom of speech envisaged in the European Convention for Human Rights. The Court concluded that the "measures taken against the applicants' conduct in obstructing [lawful – A.P.] whaling could reasonably be viewed as having been taken for the prevention of disorder or crime or for the protection of the rights and freedoms of others."[38]

Moreover, the Court pointed out that the conduct in question in this case did not enjoy the same privileged protection as a political speech or debate on questions of public interests or the peaceful demonstration of opinions.[39] In addition, protest campaigns against whaling have not been generally prohibited in Norway, so that activists could perform their protests in a way which would not impede the exercise of the rights of entities involved in whaling.

It is, of course, not certain that the European Court of Human Rights would apply the derogation to all cases involving environmental protests at sea that go beyond what appears to be allowed by UNCLOS. For example, protests involving entering the safety zone of the rig, but without the boarding or other similar actions directly aimed at impeding offshore operations, may be viewed as acceptable.[40]

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36 Rt-2002-1271 at p. 1279 (available in Norwegian at LOVDATA).

37 *Drieman and Others v Norway* (Application No.33678/96). Application against Norway was declared inadmissible.

38 *Drieman and Others v Norway*, p. 9.

39 *Drieman and Others v Norway*, p. 10.

40 Greenpeace representatives reported that on 17th March 2014 the complaint against

A far more interesting question for this article is how the tribunal acting under Part XV UNCLOS would approach this question.[41]

In principle, certain extensions of States' obligations vis-à-vis each other may be justified by changing circumstances and new challenges which were not fully foreseen at the conclusion of the treaty. Like other international treaties, UNCLOS permits a dynamic interpretation of its provisions. Nevertheless, it may still be problematic to circumscribe the coastal State's jurisdiction so substantially as to overlook or set aside the clear wording of the relevant UNCLOS provisions, in order to ensure an unlimited access to conduct direct actions against offshore activities of the coastal State.

In addition, Article 59 addresses cases where UNCLOS does not attribute rights or jurisdiction to the coastal State or other States in the EEZ and relates generally to conflicts over residual rights in such cases. In light of the functional nature of the EEZ, where conflicts arise on non-economic issues, the formula would tend to favour the interests of other States or of the international community as a whole. However, since the most controversial direct actions do compromise the economic rights of coastal States, Article 59 is not very helpful for the question of how the balance should be struck.[42]

Obviously, UNCLOS does not completely rule out the right to freedom of expression at sea. However, freedom of expression is to be applied in conjunction with the other provisions of UNCLOS, so as not to contravene directly the rights of the coastal State under Part V or VI. It is possible that the exercise of freedom of expression and other rights in the context of a direct action at sea may be more limited than would generally be the case on shore. Application of such limitations in the case of offshore operations, especially in the harsh environment of the Arctic, may, *inter alia,* be justified by the higher safety risks warranting more

the Russian Federation was submitted by the "Arctic 30" to the European Court of Human Rights. The proceedings in this Court are not examined here but may shed more light on the relationship between the law of the sea and freedom of expression. See also Elferink (2014) p. 259 et seq. and p. 271 et seq.

41 See Section 3.2 below.

42 See also Nandan and Rosenne (1993), p. 569.

protection against direct actions than would be the case on shore.[43]

2.4 Enforcement within the safety zones

Discussion in the following sections focuses on the way in which the coastal State may exercise its rights in the EEZ, i.e. how (and whether) actual enforcement may take place vis-à-vis foreign vessels and their crews. As pointed out earlier, the enforcement jurisdiction of the coastal State under the law of the sea does not necessarily coincide with its jurisdiction to prescribe, the former being considerably limited beyond its internal waters and ports. Although it may be logical to assume that the right to prescribe laws applicable extraterritorially should automatically imply the existence of a corresponding right to coerce compliance with such laws, this is not the case in UNCLOS and international law generally.[44]

Since Article 60 provides coastal States with exclusive jurisdiction *over* installations in the EEZ without limiting such jurisdiction in any significant way, enforcement measures undertaken by the coastal State authorities *on* the installation are in line with UNCLOS. In this author's view, it is also perfectly in line with international law to submit that the coastal State has exclusive jurisdiction over persons physically located there or in the immediate proximity thereof under similar circumstances, for example, if they are attached to the installation in "life capsules" or similar equipment. Coastal State authorities are entitled to stop, search and detain such persons, and to institute proceedings against them, where necessary.[45]

The "exclusive" nature of such jurisdiction suggests that, if the offenders are foreigners, the State of their nationality (or the flag State of their ship), would not be entitled to claim that its jurisdiction prevails

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43 See also Elferink (2014) p. 271 et seq.

44 Cf. Arts 27 and 28 UNCLOS on coastal State criminal and civil jurisdiction in the territorial sea and Article 220 on jurisdiction with regard to ship-source pollution.

45 Nandan and Rosenne (1993), p. 585. See also Elferink (2014), p. 257 who refers to the commentary of the International Law Commission on this point in its *Yearbook* (1956).

and that the detaining coastal State was required to obtain its consent before taking the enforcement measures.[46]

It would be logical to assume that the exclusive jurisdiction granted in Article 60(2) also includes the right to transfer such foreign nationals to the coastal State's territory, where the question of further proceedings will be resolved. The coastal State's jurisdiction under international law to institute proceedings and impose penalties for violations against offshore installations is dealt with in more detail in Section 2.6 below.

What about boarding, searching and detention of foreign individuals or crafts located not on the platform but in the waters surrounding the platform?

Article 60(2) can arguably be interpreted as also extending the coastal State's jurisdiction to areas in the immediate proximity of the platform, since this may be necessary to make the exercise of jurisdiction over the platform possible in practice. At the same time, by its wording, Article 60 does not provide the coastal State with a power to enforce any kind of rules relating to the operations of the platforms to an unlimited distance in the EEZ. Firstly, such jurisdiction is limited by Article 60(2) which only gives jurisdiction *over* installations.

Secondly, Article 60(4) provides that the coastal State may, *in* the safety zones, "*take appropriate measures to ensure the safety* both of navigation and of the artificial islands, installations and structures." (author's italics) This provision narrows down the scope of enforcement jurisdiction both with respect to the objective and type of the measures to be undertaken vis-à-vis foreign ships ("appropriate" measures to ensure safety), as well as with respect to the spatial limits for such jurisdiction (in the safety zone, but not beyond).

Article 60(4) does not say expressly what "enforcement" other specific

[46] No problem with competing jurisdiction should arise in a case where the persons involved are the coastal State's own nationals. However, in the *Arctic Sunrise* case, the ITLOS has either missed this point or understood it differently, as the Order requires *all* persons who have been detained to be released from arrest and the territory of the Russian Federation, including the two Russian nationals. See also the dissenting opinion of Judge Golitsyn, criticising the ITLOS on this point, at www.itlos.org under "Cases".

measures which the coastal State may undertake. On a very narrow reading, one can even argue that this provision grants no enforcement rights to the coastal State at all, as the measures are limited to the right to *regulate* navigation and other activities to ensure the safety (i.e. prescriptive jurisdiction), leaving the question of actual compliance to the flag State. Such a reading can find support in the fact that Part V does contain a more detailed provision in Article 73 which sets out enforcement rights by the coastal State, but only in respect of the protection of the living resources of the EEZ, whereas no corresponding provision is included on the infringement of rules applicable to offshore installations.

In addition, a duty is imposed on the flag State to ensure that its ships act in compliance with Article 60, suggesting that the problem of enforcement should be the flag State's concern. Thus, Article 60(6) provides that "[a]ll ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones."

This author argues, however, that Article 60(4) does give the coastal State enforcement rights within the safety zone, as the total absence of any enforcement rights would deprive this provision of any practical effect in cases where the flag State is not able to ensure actual compliance by its ships anywhere they sail (a common problem under the law of the sea).

Such a reading would also result in a limitation of the coastal State's rights in comparison to the rights it holds under customary international law partly codified in UNCLOS, for example, the right to self-defence and the right of hot pursuit.[47] It would not be logical for the States to agree to include a special provision in UNCLOS with a view to circumscribing their rights in the near proximity of the platforms; quite the opposite, the objective of Article 60 is to secure more rights to the coastal State than would normally be the case beyond the territorial sea. Lastly, such a reading is not supported by the actual practice of the coastal States, which do enforce their rules in the safety zone without any sig-

[47] Hot pursuit may be undertaken from the safety zone: see Section 2.5 below.

nificant objections from other States against such measures.[48]

However, any enforcement measures to be undertaken by the coastal State in the safety zone are expressly limited to measures appropriate to ensuring the safety of navigation or installations, i.e. measures aimed at preventing or interrupting unsafe conduct. Safety may include a very broad range of objectives, including the protection of the marine environment and the security of the offshore installations against terrorist or similar attacks, and States should enjoy a certain margin of interpretation in this respect. Still, measures pursuing totally different objectives are not allowed under Article 60, for example, detention of an offender for an earlier crime unrelated to the safety zone regime, or, as a more relevant example, a protest action which involves entering the zone but does not endanger the safety of the offshore operations and of the related activities.[49]

Furthermore, the type of enforcement measure may not be chosen absolutely freely by the coastal State but must be "appropriate" to protect the safety of the installation. Thus, Article 60(4) requires the State to assess the type of measures to be taken on a case-by-case basis, depending on what is necessary (appropriate) in the given situation.

Although in practice the use of force against Greenpeace ships and activists is rather common, such use of force is only acceptable for the purposes of Article 60 (and international law generally), provided it does not go beyond what is "appropriate" in the circumstances.[50]

This means that the type of measure taken must correspond to the risk which the conduct by a ship (or other craft or object) and by persons navigating this ship represents for the safety of the offshore installation.

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48 So far as is known to this author. The *Arctic Sunrise* appears to be an exception in this respect. Scholars also support the view that Article 60(4) does, in general, provide the coastal State with the right to take appropriate enforcement measures in the safety zone. See, e.g., Elferink (2014), p. 257.

49 Or if the coastal state has some other legal basis for enforcement laid down elsewhere in UNCLOS, e.g., Article 110 which is not relevant here.

50 By "use of force" or "coercion" in the context of this article, the author means all measures physically interfering with the navigation of the ship, including forced stopping, boarding, and detention. Cf. the *Arctic Sunrise* detentions in Russia and, more recently, Spain.

Thus, boarding, search or detention of the foreign ship may be appropriate in some cases, whereas in other cases it may be sufficient to communicate the order to leave the safety zone. [51]

If a measure involves the use of force, as it did in the *Arctic Sunrise*, such use must be justified by the risks posed by the direct action and proportionate to such risks.[52] However, the enforcement actions must not, in any event, be of repressive character and must not aim to punish or physically damage the offenders, or to unreasonably hinder navigation in the safety zone.

For the coastal authorities, a correct assessment of the situation may, however, be complicated for many reasons. The intent of those on board a ship approaching the platform may not be all that obvious until it is far too late. The long distance from the shore and harsh weather conditions may complicate the continuous monitoring by the coastal authorities. In practice, the very potential for the situation to become acute is hard to predict.

In the *Arctic Sunrise* case, the ship arrived in the proximity of the safety zone some time before the action actually took place, suggesting that the authorities of the coastal State had some time at their disposal to assess the intentions of the activists. It is also claimed by Greenpeace that the intentions of the ship were clearly communicated to the Russian authorities.[53] If no attempt to climb on the platform had taken place, it would have been possible to argue that the enforcement measures could have been limited to the least intrusive, such as communicating with the ship, warning it not to attempt to undertake any unsafe activities and ordering it to leave the zone, and there would have been no need to detain the activists.[54]

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[51] Cf. Article 220 which sets out very clear limits for what a coastal State may do vis-à-vis foreign vessels engaged in unlawful discharges within each of its maritime zones. Detention under Article 220 would only be possible in cases of major damage. See also Elferink (2014), p. 258.

[52] Stuart Kaye, "International Measures To Protect Oil Platforms, Pipelines, and Submarine Cables from Attack", 31 *Tul. Mar. L.J.* 377 (2006-2007), p. 414.

[53] See Statement of facts by Greenpeace, cited in fn. 7 above.

[54] In the case of the *Arctic Sunrise*, it is, however, unclear whether the picking up the activists from the Prirazlomnaya was initially an act of detention or rescue.

However, the very boarding of the platform by activists who do not aim to do any damage to the platform or those on it may still represent a potential safety risk for the platform, those working on it and for the activists themselves. Therefore, coercive measures aimed at the prevention of such a boarding may also be considered reasonable by the authorities. (In addition, any unauthorised boarding of an offshore installation, even if safe, would, in this author's view, trigger the application of Article 60(2) and thereby justify the detention of individuals by the coastal State.) Although the coastal State enjoys a certain margin of interpretation in this respect, use of coercion must only be applied as a measure of last resort, irrespective of whether it takes place on the platform or in the waters surrounding it.

2.5 Enforcement outside safety zones

The discussion above, mainly based on the analysis of the wording of Article 60(4), suggests that the coastal State is permitted to take certain steps against foreign ships "in" the safety zones, but not outside such zones. In the example of the *Arctic Sunrise*, this would mean that the Russian coastguard could be entitled to board and detain the ship or its crafts within the 500 metre distance off the rig, assuming that these represented a safety risk *and* other, less intrusive, measures were considered insufficient. Russian authorities were also entitled to arrest the activists who actually boarded the rig, by virtue of Article 60(2). But outside the 500–meter radius, they were in principle precluded from any enforcement steps against the *Arctic Sunrise*.[55]

Article 73 confirms that the coastal State may have enforcement jurisdiction over foreign ships in the EEZ with respect to a specific category of rules, namely, those related to the living resources of the EEZ. By

[55] This was supported in the *Arctic Sunrise* case at the ITLOS: see separate opinion by Judges Wolfrum and Kelly, para. 13, at www.itlos.org under "Cases", who agreed that the Russian Federation enjoys enforcement functions in respect of the protection of the platform within the safety zone but not outside the zone, where Greenpeace may invoke freedom of expression. See also Elferink (2014), p. 258.

contrast to Article 60(4), Article 73(1) specifies that the "coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the *living* resources *in the exclusive economic zone*, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."(author's italics).

Thus, Article 73 applies to the EEZ as a whole and provides that the coastal State may take a broad range of enforcement measures vis-à-vis a certain category of infringements in the EEZ. Article 73 supports the view that Part V does not provide a legal basis for the enforcement vis-à-vis foreign vessels in the EEZ, other than in cases expressly envisaged therein, i.e. violations of rules on the living resources of the EEZ. If the intent of the States parties to UNCLOS were to grant the coastal States specific far-reaching enforcement powers vis-à-vis foreign vessels in the EEZ beyond the safety zone in respect to violations of the rules applicable to installations, this would indeed be expressly provided for in the text of UNCLOS. In the absence of an express provision to that end, the freedoms of the high seas should prevail to ensure a proper balance between the coastal State's rights over resources in the EEZ and the rights of other States.

In the broader context of UNCLOS, not only stopping and detention of foreign vessels, but *any* interference by the coastal State with foreign ships, other than that envisaged in the relevant UNCLOS provisions, may arguably be unlawful outside the safety zone. Thus, under Article 220 of Part XII, the coastal State may not even request information from the foreign vessel sailing in the EEZ unless there are clear grounds to believe that a discharge violation has been committed by this vessel. However, it is in any case unlikely that mere requests for information from foreign ships in the EEZ would result in litigation between States, as would be the case with more intrusive measures.

Thus, no other provisions of Part V or VI appear to give the coastal State the right to take enforcement steps outside the safety zone against the vessel involved in a direct action.[56]

[56] It should be pointed out that coastal States may generally detain foreign ships

In exceptional cases, UNCLOS does permit the taking of enforcement steps against foreign ships on the high seas, including the EEZ. Thus, Article 105 permits the seizing of a pirate ship or aircraft. Article 110 lays down rules on the right of visit on the high seas. However, a right of visit in Article 110 does not cover situations with Greenpeace's direct actions. As to the piracy, Article 105 could have resolved the problem of enforcement jurisdiction in the *Arctic Sunrise*-case, since it permits non-flag States to seize pirate ships and arrest persons on board on the high seas. Such a legal basis has in fact been applied to direct actions by national authorities and courts, including the *Arctic Sunrise*. In the latter case, these charges were dropped by the Russian authorities.[57]

The discussion below shows that the coastal State may still have certain enforcement rights outside the safety zone for infringements committed within the safety zone, in cases where such an action is justified by the right to hot pursuit (Article 111). Although the Russian Federation did not make any public statements confirming that the action against the *Arctic Sunrise* was exercised on the basis of Article 111, this may be a plausible explanation for the measures undertaken against the *Arctic Sunrise* beyond the safety zone.[58]

Article 111 allows the coastal State to stop and detain a foreign ship on the basis of a right of hot pursuit, provided a number of conditions for the exercise of this right are met. One of the conditions is that the authorities must have "good reason to believe that the ship has violated the laws and regulations of that State".[59] Taken literally (and in line with practice on hot pursuit generally), it means that hot pursuit may not be undertaken as a preventive measure: the coastal authorities must only

in the ports for violations committed off shore (see also Section 2.6 below). For example, the *Arctic Sunrise* was detained in the Spanish port of Arrecife (Lanzarote) for a protest action conducted at the offshore site. According to Agence France Presse English Wire of 26 November 2014, the bail was requested for the release of the ship and the captain.

57 On *Sea Shepherd* Case in the USA, see, e.g., Whitney Magnuson, "Marine Conservation Campaigners as Pirates: The Consequences of Sea Shepherd" 44 *Envtl. L.* 923 (2014) pp. 923-958.

58 See also Dissenting opinion by Judge Golitsyn at www.itlos.org under "Cases".

59 Article 111(1).

act *after* the infringement has taken place. However, the standard of evidence that the infringement has taken place is relatively low, as it is sufficient to have a "good reason to believe" that a violation has taken place.[60] By contrast to other violations in the EEZ, such as unauthorised fishing, direct actions are intentionally performed in a very obvious way. Therefore, it should not be difficult to realise that the rules applicable to offshore installations are being infringed upon.

Article 111(2) confirms that hot pursuit provisions may, in principle, be relied upon in cases such as the *Arctic Sunrise* and other similar incidents taking place outside the territorial sea. It provides:

"The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones."

Article 111 does not differentiate between violations, leaving it to the coastal State to determine what infringements of the national rules applicable to the EEZ, continental shelf or the safety zone need to be enforced in this way. In practice, fishing violations have been the most typical case, whereas ship-source pollution violations have so far generated no practice known to this author. Apparently, Article 111 catches also direct actions, to the extent they involve conduct violating the coastal State's rules adopted under Article 60.

It should be noted that Article 111(4) specifically envisages that hot pursuit may also be undertaken with respect to a "mother ship", where a violation involves several boats or crafts working together, if at least one of these vessels is within the EEZ or continental shelf (or territorial sea, as the case may be). The pursuing ship must only satisfy itself "by such practicable means as may be available" that the pursued ship or

[60] Cf. Article 220 requiring "clear grounds" to believe a discharge violation has taken place before any enforcement steps can be taken by the coastal State in the territorial sea or beyond. Still, a mere suspicion is not sufficient: *M/V Saiga* (No 2) (Saint Vincent and the Grenadines v Guinea), ITLOS, 1 July 1999, available at www.itlos.org.

craft is located within the "right" zone, i.e. EEZ or continental shelf, before the pursuit begins.

Thus, the fact that the *Arctic Sunrise* was detained outside the safety zone does not, in itself, preclude Russia from relying on Article 111 as a basis for enforcement. The problem may instead lie in the (somewhat unclear) fact that the pursuit of the crafts launched from the ship may have begun after these crafts were already outside the safety zone of the Prirazlomnaya.

In principle, Article 111(4) does not require expressly that a craft, from which a direct action is performed against an installation, is itself physically situated *within the safety zone* when the pursuit begins. According to the wording of this provision, it is enough that either the mother ship or the craft is situated in the EEZ or on the continental shelf, and that a violation of the relevant rules has been committed.

Such an understanding could, however, be implied by the requirement in Article 111 that a violation must have been committed before the pursuit can start. If the particular conduct only amounts to a violation if it is committed *within* the safety zone, and the enforcement of such rules would also only be permitted within the safety zone, as is generally the case with the direct actions against the installations, it would be logical to assume that the pursuit must start while the craft is still within the safety zone. Otherwise, the coastal State's enforcement jurisdiction would extend far beyond what is allowed under Article 60. It is unclear whether coastal States would agree with such a narrowing down of their rights under Article 111, but it can be justified by the contextual interpretation of this provision.[61]

The ruling on the merits by the arbitral tribunal in the case of the *Arctic Sunrise* may explain whether the UNCLOS permits the stopping and detention of a ship outside the safety zone in direct action cases involving violations of the rules applicable within the safety zone, as well

[61] See Section 2.4 above. The commentary to Article 111 does not contain any indications that such a restriction was (or was not) implied in Article 111: see Satya N. Nandan and Shabtai Rosenne (eds). *United Nations Convention on the Law of the Sea. A Commentary*. Volume III. Martinus Nijhoff Publishers, Dodrecht (1995), p. 249 et seq. See, however, Elferink (2014) at pp 258-259 who advocates this understanding.

as in cases where the pursuit was started outside the safety zone.

It should, however, be noted that in cases involving direct actions against oil rigs, it is logical to assume that, in practice, the conduct aimed at violating the rules of the safety zone will require the craft's actual presence in the immediate proximity to the platform. Therefore, even if Article 111 does not require that the pursuit of crafts involved in a direct action starts from within the safety zone, the very fact that the pursuit only starts when the pursued craft is already too far from the platform to be within the safety zone may indicate that the other conditions of Article 111, as examined below, are not met.

Firstly, the pursuit may only begin after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship. It is not specified that this signal must necessarily be given from a vessel which is authorised to exercise the hot pursuit, although some authors interpret this provision as implying such a requirement.[62] In this author's view, it would be reasonable to allow signals also to be given from the installation, if this is more practical.

It is also submitted by some authors that the signal must be given while the pursued ship or its craft is still within the safety zone, a condition which may not have been observed in the *Arctic Sunrise*, given the considerable time which elapsed before the order to stop was given.[63] However, such a requirement is not explicitly envisaged in Article 111.

Secondly, the hot pursuit must not be interrupted. Under the general rule of Article 111(1), the pursuit commenced from the internal waters or territorial sea may be continued on the high seas, if not interrupted. The fact that considerable time may have passed before the pursuit was undertaken, as was the case in the *Arctic Sunrise*, is not, in itself, sufficient to make Article 111 inapplicable. It is necessary to determine whether the underlying events show that the pursuit was in fact interrupted.

By virtue of Article 111(2) cited above, this provision applies *mutatis*

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62 See Kaye (2006-2007) who points out at pp. 406-407 that Article 111(4) is to be read in conjunction with Article 111(6) which applies to ships and aircrafts but not installations.

63 Elferink (2014), p. 275.

mutandis to a pursuit which starts in the EEZ or continental shelf, or from the safety zone, as the case may be. No equivalent requirement appears to have been provided with respect to the pursuit from the safety zone into the EEZ. Thus, as long as the pursuit starts from the EEZ and ends in the EEZ (and not when the pursued vessel is on the high seas), it does not appear to matter for the purposes of Article 111 whether there were any stops on the way.[64]

In the *Arctic Sunrise* case, however, it was submitted by Greenpeace that communication had taken place between the coastguard vessel and *Arctic Sunrise* concerning a voluntary inspection on board the latter (when outside the safety zone but within the EEZ) before more assertive steps were taken by the coastguard to board the ship. This indicates that there were indeed interruptions in the pursuit and in such a case it would be difficult to characterize it as uninterrupted or "hot". Although, as pointed out above, the wording of Article 111 is not conclusive on this, in this author's view, the exceptional character of the coastal State's right to enforcement under Article 111 justifies an approach that favours the flag State.[65]

Lastly, the right of hot pursuit may only be exercised by warships or military aircrafts, or by other ships or aircrafts clearly identifiable as being on governmental service and authorised to that effect.

Article 111 does not specify exactly what measures the coastal State may undertake once it captures the ship. However, Article 111(7) provides that the "release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely …" This provision indicates that the coastal State may detain the ship and its crew, while the flag State has a corresponding right to require the ship to be released. The conditions for requesting the release are found elsewhere in UNCLOS.[66]

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64 Nandan and Rosenne (1995) also link the requirement with the right to continue pursuit outside the territorial sea or, as the case may be, the EEZ: see p. 257.

65 See also Elferink (2014) at p. 275 who considers that the communication between the coastguard and *Arctic Sunrise* indicates that the pursuit was interrupted.

66 See Section 3.4 below.

An older incident illustrating the exercise of hot pursuit in practice is the case of *Ross Rig*. On 26 October 1993, a Greenpeace ship, the M/S *Solo,* approached the safety zone around the oil rig Ross Rig on the Norwegian continental shelf in the Barents Sea. While staying just outside the safety zone, the ship launched 4 inflatable boats with 16 persons on board, which entered the safety zone and approached the rig. Four persons climbed the anchor chain and stayed on the platform for about 2.5 hours.

The police took a decision to detain the ship, the *Solo*, together with the four boats used in the protest action, as well as the shipmaster and the crew. The ship and the crew were subsequently taken to Tromsø, where the ship was searched by the police and passports of the shipmaster and the leader of the action were confiscated. Criminal charges were subsequently brought against them for infringements of Norwegian rules applicable to offshore installations.

The court proceedings concerned the applicability of the enforcement measures under criminal law, namely, the lawfulness of the arrest of the ship and the boats and the confiscation of passports.[67] The appellants argued *inter alia* that the Norwegian authorities could not invoke the right of hot pursuit because the ship was arrested in the international waters outside the safety zone, with boats already taken on board. Therefore, under international law, there was no hot pursuit in the circumstances of this case.[68]

The Appeals Committee of the Norwegian Supreme Court upheld the ruling of the lower courts. The Appeals Committee agreed that the application of the coercive measures of criminal procedural character was not precluded by the fact that the *Solo* was arrested in international waters. Even if the mother ship as such was outside the safety zone when

[67] There was no dispute as to the applicability of the Norwegian criminal law as such in the circumstances of the case. The shipmaster and the leader were prosecuted and a corporate penalty was also imposed on Greenpeace in the criminal proceedings: cf. the *Arctic Sunrise* where the Netherlands do not accept that Russia has criminal jurisdiction.

[68] At the time of the incident and the proceedings, Norway was not party to UNCLOS or its predecessor with the corresponding provision on the hot pursuit, Article 23 on the 1958 Geneva Convention on the High Seas. The provisions on the hot pursuit were, however, considered to be customary international law.

the action was performed, the four boats had to be viewed as a part of the mother ship's equipment. Since the infringement was committed inside the safety zone by the crew of the boats, Norwegian authorities were entitled to pursue the ship in order to apply coercive measures.

As to the factual evidence supporting the applicability of hot pursuit in the *Ross Rig* case, the account of the circumstances surrounding the pursuit and arrest in the rulings is very brief. The ruling records that the inspectors arrived on board the oil rig when the boats were still within the safety zone and some of the inspectors were on board a (governmental) vessel K/V *Andenæs*. The signal appeared to have been given at the ship's arrest, and not prior to that, and there was also no pursuit as such, and not ''hot'' pursuit, in any case. So a number of conditions of hot pursuit were not (proved to be) met.

The Appeals Committee of the Supreme Court considered that the fact that the *Solo* did not actually try to escape, so that the pursuit was not particularly "hot", was not in itself decisive. In this respect, the Court accepted that the police had considered safety aspects when they carried out the pursuit. Other conditions for hot pursuit (remarkably, whether proper notice had been given of the commencement of such pursuit) were not expressly considered in the rulings of the Appeals Committee of the Supreme Court and the lower courts.

Apart from the right of hot pursuit, other justifications for enforcement action to protect oil installations may be available, such as the right to self-defence, and the necessity, but they fall outside the scope of this article.[69]

Lastly, a rhetorical question is whether it is reasonable at all to make the coastal State's jurisdiction to enforce dependent on the location of the potential offender within or outside the safety zone. Such a zonal approach has considerable disadvantages in practice because of the higher risks for all those involved, since action can then only be taken by the coastal authorities in the closest proximity

[69] See, e.g., Kaye (2006-2007) for a discussion of self-defence and necessity as legal bases under international law for the enforcement measures against foreign ships threatening the safety of the offshore installations.

to the platform and after the violation has been committed.

It must, however, be kept in mind that the coastal State's enforcement rights in the EEZ, including the right of hot pursuit, are generally viewed as an exception to the high seas regime and are reserved for special situations warranting exceptional measures. It should generally be the responsibility of the flag State to supervise and ensure compliance by its ships with the rules of the coastal State.

UNCLOS' requirement to take due regard of the coastal State's rights indicates that the flag State should be encouraged (although not positively obliged) to grant consent in cases where timely enforcement by the flag State itself is not possible and the enforcement is likely to exceed Article 60 or Article 111. In cases such as the *Arctic Sunrise*, the coastal State authorities may have had sufficient time to contact the flag State after the direct action was commenced and before they finally took an action vis-à-vis the Greenpeace ship.

2.6 Can the coastal State institute criminal proceedings for direct actions offshore?

The question addressed in this section is whether the coastal State which lawfully detained foreign activists and their ship for a direct action has jurisdiction to institute proceedings and impose penalties for such conduct.[70] The general rule in the law of the sea is that the flag State exercises penal jurisdiction over its ships and their crews.

UNCLOS contains very few provisions expressly regulating non-flag State jurisdiction to institute proceedings to impose penalties. None of these provisions apply directly to infringements of the kind described in this article.[71] Therefore, the question of whether the coastal State may conduct proceedings to impose penalties needs to be examined in light

[70] We assume for the purposes of this discussion that unlawful detention would preclude the jurisdiction to prosecute, cf. Article 16 "Apprehension in Violation of International Law" of the Draft Convention on Jurisdiction with Respect to Crime (American Society of International Law, 1935). This approach is not always followed by the national courts: see, e.g., *US v. Williams* 617 F.2d 1063, 1090 (5th Cir.1980).

[71] E.g., Article 73, 97, 228, 230.

of general rules of international law.

The only provision which sheds some light on the coastal State's jurisdiction to impose penalties is Article 60(2) cited earlier, which grants exclusive jurisdiction to coastal States over offshore installations, without providing for any substantive limitations on such jurisdiction.

In the *Arctic Sunrise*, one of the judges noted in his separate opinion that "criminal investigation and possible prosecution of persons presumed to have violated the laws of a State, in accordance with its procedural and substantive laws, is a normal function of any State and an emanation of its sovereignty, due regard…to the guarantees of the detainee."[72] This position reflects the general view on jurisdiction under international law. However, there may still be a difference between jurisdiction with respect to offences committed on the installations, on the one hand, and in the waters of the EEZ, on the other hand.

It is, in this author's view, fully compatible with the international law in general to attribute penal jurisdiction to coastal States for unlawful conduct undertaken *on* offshore installations. UNCLOS leaves it generally to those States to determine, in their national legislation, the kind of liability – administrative or criminal, or civil - to be applied to violations of the coastal States' rules in the EEZ. The law of the sea does not generally put any limits on the type of sanctions to be applied; the only such limitation relates to the prohibition on applying non-monetary punishment for pollution and fishing violations (without, however, precluding States from applying monetary sanctions following criminal prosecution).[73]

As to the conduct undertaken in the proximity of such installations but not, strictly speaking, *on* them, the analysis would require an assessment of whether there a link exists between the offence and the installations, for example, whether the conduct at sea caused some damage or other negative effects on the installation. One might, however, question whether the objective territorial principle works in the same fashion with

[72] Judge Jesus, para 7(c)(i) of his separate opinion, at www.itlos.org under "Cases". His view on this point is, however, difficult to reconcile with his further argument that all detainees must be released, including those detained for actual boarding of the platform.

[73] Article 230 UNCLOS.

respect to offshore installations which are, after all, not a part of the "territory" of the coastal State. At the same time, precluding the coastal State's jurisdiction to punish any offence committed off the installation would deprive Article 60(2) and 60(4) of any practical meaning. It would be logical to argue that such jurisdiction exists at least with respect to offences threatening the safety of installations.

Article 60(2) may, through the "effects" approach to jurisdiction, give the coastal State jurisdiction over offences committed off the platform, provided they caused negative effects on the coastal State. However, in such cases the effects alleged by the coastal State have to be sufficiently material as to outweigh the concurring jurisdiction of other States. Notably, the flag State (but also the nationality State of the offender) may claim jurisdiction over offences committed in the proximity of installations in the EEZ.

In the *Deep Sea Bergen*, the Supreme Court of Norway examined the application of Article 97 and the general principle of flag State jurisdiction in the criminal proceedings undertaken in respect to a direct action in the Norwegian EEZ.[74] This provision addresses collisions and "any other incident of navigation" concerning a ship on the high seas and assigns penal jurisdiction over the master and the crew to the flag State of the ship (or to the nationality State of these persons).

The direct action in question targeted a mobile rig under towage to a new drilling location by a Norwegian-flagged vessel. The activists approached this towage vessel from the crafts launched from the mother ship, "Greenpeace", and dived in front of it forcing it to slow down and change the direction. Later, more activists arrived and boarded the rig from the crafts launched from "Greenpeace".

The activists and the crafts were subsequently detained by the coastal authorities. Criminal penalties were imposed on some of the activists, while the boats were confiscated. The appeal to the Supreme Court concerned, in particular, the question of whether under the circumstances of the case Norway had criminal jurisdiction under UNCLOS.[75] The

[74] Rt-2002-1271 (text in Norwegian available on LOVDATA).

[75] Norway was already a party to UNCLOS at the time the incident at the Deep Sea

appellants argued that the direct action against the rig under towage was to be viewed as an "incident of navigation" for the purposes of Article 97 which would mean that only the flag State or the nationality State could conduct criminal proceedings.

The Supreme Court examined whether Article 97 constituted the appropriate legal basis for determining the allocation of criminal jurisdiction between Norway and the flag State of "Greenpeace" (the Netherlands). The Court interpreted Article 97 as only regulating "incidents" of navigation of the same type as collisions (i.e. unfortunate and non-intentional accidents) and noted that UNCLOS does not contain any other provisions that would deny (or confirm) Norway's jurisdiction over the present case. The Court did not doubt that (under the law of the sea generally) Norway had criminal jurisdiction as a flag State and could apply necessary measures to protect the towage and the rig and to prevent similar actions from taking place in the future. As this was sufficient to deny the appeal, the Court did not examine whether Norway's jurisdiction could be based on the residual competence over the rig under Part V, including Article 60.[76]

The fact that the flag State's jurisdiction prevails over the coastal State's jurisdiction in a given case does not mean that the infringement of the coastal State's laws will not be investigated by the flag State, possibly resulting in some penalties. Under the SUA Treaty and protocols, States have undertaken to adopt national statutes prohibiting and penalising acts against the safety of navigation, including terrorism and piracy, and make these statutes applicable outside territorial waters.[77] This obligation

Bergen rig took place.

[76] A similar argument is now put forward by Greenpeace in the case of the enforcement by the Spanish authorities near the Canary Islands (October 2014), namely that the safety zone regime does not apply to drilling vessels, so that it was therefore entitled to stage a protest at the exploration site and to hinder the drilling vessel (performing generally the same functions as a rig) from arriving at the site.

[77] The Convention on the Suppression of Unlawful Acts against Safety of Navigation, 1988 (SUA Convention) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, and 2005 protocols amending the Convention and the Protocol of 1988. The SUA instruments do not provide a self-standing basis for the enforcement jurisdiction of the coastal State,

is held by States who are parties to SUA, irrespective of the capacity in which they act, be it as a coastal State, flag State, the State of nationality etc. That some of the Greenpeace actions may be considered as terrorist attacks or other offences caught under these instruments is not totally excluded, although it is doubtful that all States would agree to such an approach.[78]

However, the reaction of the flag State may not satisfy the coastal State in whose waters the infringement has taken place. UNCLOS contains no general obligation to criminalise a particular conduct and does not contain any instructions to the flag State as to what penalties are to be imposed. Therefore, in cases where the flag State's jurisdiction prevails over the coastal State's jurisdiction it will be up to the flag State to decide whether, and how, to punish the violations committed in the coastal State's EEZ. Should the flag State decide that the direct action in question did not ultimately amount to an unlawful conduct, no action will accordingly be taken by the flag State. The flag State may also have a different view on the type and level of penalties to be applied to the persons involved in an unlawful direct action than the flag State.

Lastly, the flag State may disregard its obligations vis-à-vis the coastal State and not take any measures to punish the perpetrators or to prevent similar acts from taking place in the future. It should be pointed out in this respect that Parts V – VII of UNCLOS do not contain provisions corresponding to those of Article 228 of Part XII (discharge violations), to provide coastal States with a right to refuse to transfer proceedings to the flag State which "has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels." The coastal State (and the flag State, as the case may be) will, however, be entitled to resort to the dispute settlement procedures under UNCLOS if they consider that the opponent party has violated its obligations under UNCLOS.

which remains under the UNCLOS domain.

78 See Elferink (2014), pp 253-254 (on the *Arctic Sunrise*) and David Mead. *The New Law of Peaceful Protest*. Hart Publishing, 2010, p. 239 et seq (more generally on direct actions as terrorism).

3 Settlement of disputes between States in "direct action" cases

3.1 Introduction

In this chapter the discussion focuses on the question of whether disputes arising from "direct actions" against offshore installations can be settled under the dispute settlement mechanism established in UNCLOS. Settlement of disputes concerning the interpretation and application of UNCLOS between States Parties is regulated in Part XV UNCLOS. Part XV contains *inter alia* Section 2, laying down provisions on compulsory procedures, entailing binding decisions for the Parties.

In practice, international litigation between States in disputes arising from the exercise of jurisdiction by coastal States vis-à-vis foreign ships in the EEZ have not been common (apart from cases involving hot pursuit of fishing vessels).[79] This may be explained by the fact that States prefer other, more discreet and diplomatic ways of achieving a settlement and would only use international litigation as a last resort.

The *Arctic Sunrise* is the only case known to this author where the flag State invoked Section 2 provisions and initiated international litigation against the coastal State for excessive enforcement against a direct action offshore. That is why this chapter refers mainly to this case as an example of the issues pertaining to the application of UNCLOS Part XV provisions to disputes involving enforcement in such cases.

Many of the issues raised in the *Arctic Sunrise* are common for all cases settled under Part XV of UNCLOS, for example, the extent of the duty to attempt to find a pre-trial settlement under Section 1, the scope of opt-outs from dispute settlement rules available to State parties or the scope and conditions of provisional measures. These issues can to some extent be clarified by looking at the earlier practice of the ITLOS, the

[79] See List of Cases on the ITLOS website www.itlos.org.

International Court of Justice and other international tribunals.

However, cases involving allegations of the excessive use of enforcement jurisdiction by the coastal State – or, from the coastal State's perspective, violations of rules applicable to offshore installations and the safety zones by the flag State – also raise a number of *sui generis* issues. For example, the scope of the coastal State's jurisdiction over offshore installations under Article 60, and the applicability of Section 2 to disputes arising from the excessive exercise of such jurisdiction, is not yet fully clarified. It is also uncertain whether human rights, in addition to the traditional right of free navigation, can also be protected under Part XV, and Section 2 thereof.

The international tribunal dealing with the *Arctic Sunrise* may greatly contribute to clarifying the international law on these matters. However, the *Arctic Sunrise* case illustrates that UNCLOS dispute settlement procedures may be important to the States for pragmatic, rather than academic, reasons. For example, under Section 2 of Part XV, the parties have the possibility of requesting the competent tribunal to adopt provisional (interim) measures. Such measures can be very important to protect the rights of the parties in the period before the final ruling is given.

In the *Arctic Sunrise* case, it appears to have been of primary importance for the flag State to achieve the release of the ship and especially of its crew from arrest in the Russian Federation. In similar cases, where enforcement did not include the arrest and pre-trial jailing of the Greenpeace activists (even if it did include detention of the ship and criminal liability for the crew), no action has been undertaken by the flag State under Section 2 provisions.

The important point is that Section 2 procedures are not available unconditionally to any State parties to UNCLOS who are wishing to obtain a binding ruling in any of the kind of disputes arising under UNCLOS. To the contrary, a number of conditions and limitations apply. These will be examined in more detail below.

3.2 Some preliminary remarks on the dispute settlement under UNCLOS

Part XV UNCLOS consists of three sections: Section 1 sets out general provisions, including the obligation to settle disputes by peaceful means, Section 2 contains the list of the international courts which may be selected by the State parties to resolve the disputes under this Section and the rules on compulsory procedures entailing binding decisions; and Section 3 provides for certain limitations and exceptions to the Section 2 procedures.[80]

Article 286 UNCLOS provides that: "[s]ubject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." It is generally sufficient that there has arisen a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (or States, in our case).[81]

The wording of Article 286 suggests that there are three general conditions which must be met for in order for the binding settlement under Section 2 to apply: the dispute must concern the interpretation and application of UNCLOS; the tribunal must have jurisdiction under this section; and the parties must have failed to achieve a solution under the non-binding procedures of Section 1. In addition, the limitations and exceptions set out in Section 3 of Part XV UNCLOS may not apply to the dispute (these are addressed in Section 3.3 below).

The first and second conditions address two distinct, but interrelated, questions of applicable law and jurisdiction.

As a starting point, Article 287(1) UNCLOS provides States with a choice between different international courts which may have jurisdiction

[80] It is worth emphasising that dispute settlement under Section 2 is not only compulsory but also entails a decision binding on the parties.

[81] See, e.g., *Mavrommatis Palestine Concessions* (Greece v. UK), PCIJ, Series A, No. 2, p 11 (1924). See also Nordquist M.H., Nandan S.N. and Rosenne Sh.(eds), *United Nations Convention on the Law of the Sea 1982. A Commentary*. Volume 5. Martinus Nijhoff Publishers, Dodrecht (1989), pp 18-19.

under Section 2, including the ITLOS, the International Court of Justice or arbitration tribunals (under Annex VII or VIII). If the opponent States do not adopt the same dispute settlement procedure, as happened in the *Arctic Sunrise*, the disputes will be submitted to the Annex VII tribunal.[82] In addition, the ITLOS has been given a special right to prescribe provisional measures in cases where the court or tribunal has not yet been agreed upon or put in place by the parties.[83]

Furthermore, it is necessary to examine whether the dispute in question concerns *UNCLOS* at all, since a dispute unrelated to UNCLOS will logically fall outside the dispute settlement procedures of Part XV. The difficulties will arise in disputes raising complex questions which are not clearly limited to the traditional law of the sea issues.

The *Arctic Sunrise* illustrates this problem, as the flag State has invoked not only UNCLOS violations by the coastal State jurisdiction, but also violations of human rights instruments such as 1966 International Covenant on Civil and Political Rights (ICCPR) and customary human rights.

According to Article 288(1), a tribunal shall have jurisdiction over any dispute concerning the interpretation or application of UNCLOS, which is submitted to it in accordance with Part XV. In principle, the disputes do not have to be limited strictly to the provisions of UNCLOS, since the disputes concerning international agreements "related to the purposes of [UNCLOS]" are also subject to Part XV procedures.[84] It should, in principle, be sufficient that such an agreement between the States relates to some aspect of the law of the sea and provides for submission to any tribunal under article 287 UNCLOS.[85] The court or tribunal will decide whether it has jurisdiction over a given dispute.[86]

In light of the above, it can be concluded that the arbitration tribunal dealing with the merits of the *Arctic Sunrise* case will not have jurisdiction

82 Article 287(4) and (5).

83 Article 290(5) is examined in Section 3.4 below.

84 Article 288 (1) and (2).

85 Nordquist et al (1989), pp 47-48. An agreement of this kind is, for example, the SUA convention with protocols (cited in fn. 77 above).

86 Article 288(5).

over aspects of the dispute concerning the interpretation or application of the human rights instruments. To the extent that claims arise directly under other instruments than UNCLOS, the tribunal would not have jurisdiction under Article 288.

Thus, disputes based solely on human rights infringements, including those committed at sea, may not be resolved under the provisions of Part XV. This does not mean that the injured State (or individuals concerned) is deprived of any other international dispute settlement mechanisms which may be available. The point is only that UNCLOS will not be the relevant mechanism for such cases.

However, in the *Arctic Sunrise* case, the dispute on the merits mainly concerns the interpretation and application of UNCLOS. It remains to be seen whether the tribunal will address the merits of the Netherlands' claim concerning infringements of the human rights instruments.

A question arises as to what extent the arbitration tribunal may take account of the human rights in the disputes of the kind which arose in the *Arctic Sunrise*. Article 293(1) of Section 2, dealing with the applicable law, envisages that the tribunal "shall apply [UNCLOS] and other rules of international law *not incompatible* with [it]".

It does not follow clearly from UNCLOS that disputes involving application of the customary law of the sea, or general international law rules related to UNCLOS, but not codified in its provisions, can also be submitted to a settlement under Part XV. In this author's view, this interpretation should not raise any difficulties, as long as the customary rule relied upon by a party to the dispute does not conflict with UNCLOS provisions. It may, however, be of little practical concern for the purposes of Section 2, as only a limited category of disputes can be settled through the procedures laid down therein.[87]

It is more doubtful whether, under Article 293, it would be acceptable to allow an (albeit implied) incorporation into UNCLOS of any other international instrument, not directly mentioned in this provision. Although it may be in line with the dynamic nature of the law of the sea to take account of contemporary challenges to its regime, a line still needs

[87] See Section 3.3 below.

to be drawn between the rules which are related to UNCLOS, on the one hand, and the rules that are irrelevant for the purposes of UNCLOS, on the other hand. The latter may not be considered "applicable law" for the purposes of Article 293 UNCLOS. However, these rules may still be referred to as rules incidental to the interpretation of UNCLOS.[88]

A dispute can only be submitted to the procedures of Section 2 if no settlement has been reached by recourse to conciliation or other procedures laid down in Section 1 of Part XV, i.e. the procedures as agreed upon by the parties (Article 282), an obligation to exchange views (Article 283) and conciliation (Article 284).

Article 281 (reflecting a general rule of international law) provides that the procedures in Part XV only apply where no settlement has been reached by peaceful means chosen by the parties under Article 280 of Section 1. Thus, under Section 1 of Part XV, parties to a dispute are *required* to seek a settlement by peaceful means and to exchange views regarding the settlement before they can proceed to international litigation.[89]

The requirement to resort to Section 1 procedures gives the parties an opportunity to settle their dispute by less drastic means than binding procedures of Section 2. By omitting this step, the parties would not only forego the requirement to seek peaceful settlement of disputes, but would also disregard the principle of the autonomy of the parties which underlies Section 1.[90]

How rigorously does the competent tribunal have to examine whether options of Section 1 have been exhausted by the parties?

In the *Arctic Sunrise*, the ITLOS, acting under Article 290(5), was

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88 See Order No. 3, para 19, in the *Mox Plant* case where the tribunal draws a clear distinction between the jurisdiction and applicable law under Part XV UNCLOS, agreeing with the defendant's argument on this point, although the tribunal does not elaborate on this (cf. Chapter 4 of the UK Counter-Memorial, p. 97 et seq), available at www.pca-cpa.org. See also Elferink (2014), p. 279 (fn. 169) and Irini Papanicolopulu, «International Judges and the Protection of Human Rights at Sea» at p. 538 in N. Boschiero et al. (eds.), *International Courts and the Development of International Law*, T.M.C. ASSER PRESS, The Hague (2013).

89 Article 283(1), cf. Article 281. See also Nordquist et al (1989), p. 38.

90 See also Nordquist et al (1989), p. 38.

only obliged to conduct a *prima facie* examination of this question. The ITLOS was generally satisfied with the exchanges of notes and communications between the parties which had taken place before the submission of the dispute to the tribunal under Section 2.[91]

The dispute was submitted by the plaintiff, the Netherlands, within two weeks after the incident had taken place. Before this submission, the Netherlands sent a formal notice to Russia containing a number of questions to ascertain the factual circumstances of the detention, and attached the request to release the ship and the crew immediately, followed by another notice asking to appoint a reasonable bond for the release and then another notice formally protesting against the detention. The two of the three notices by the Netherlands remained unanswered.

On 1st October 2013, Russia did respond with a statement describing the events and the procedural steps taken with respect to the *Arctic Sunrise* and its crew as well as briefly mentioning the provisions of UNCLOS containing the legal basis for such steps. This statement did not contain any express proposals for solution but was considered by the Netherlands to be sufficient to proceed with the establishment of the arbitration tribunal because the statement showed the "diverging views on the rights and obligations of the Russian Federation as a coastal State in its [EEZ]".[92]

Generally, if the procedure chosen by the parties is no longer likely to lead to a settlement, a party to the dispute may go ahead with the procedures under Section 2.[93] However, it does not appear from these (publicly available) communications between the parties that any further steps were undertaken by either party to settle the dispute under Section 1.

In the *Arctic Sunrise* case, the Netherlands and Russia had not yet chosen any such procedures when the Netherlands submitted the case to Section 2 litigation. According to the publicly available communication between the parties, Russia appeared to suggest resolving the case by

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91 Order, paras 73-76.

92 Note of 3rd October 2013. See communication between the two States contained in the case materials at www.itlos.org or www.pca-cpa.org.

93 Nordquist et al (1989), p. 23 (referring to the *North Continental Shelf* cases).

negotiation, whereas the Netherlands asked for release of the ship and its crew immediately, in exchange for a bond to be determined by Russia. It may, therefore, be questioned whether any real negotiations had taken place at all before the Netherlands submitted the dispute under Section 2 procedures; not least since the release as an interim measure appears to have been unilaterally determined by the flag State.[94]

In Judge Anderson's ad hoc view, expressed in his declaration, the condition was *prima facie* satisfied, as the exchange of notes had taken place between the parties. This was, in his view, sufficient, because "[t]he main purpose underlying article 283 [i.e. obligation to exchange views – A.P.] is to avoid the situation whereby a State is taken completely by surprise by the institution of proceedings against it".[95]

It remains to be seen whether or not the arbitration tribunal set up under Annex VII will concur with the ITLOS's view that this condition was met in the present dispute.[96]

It should also be noted that the objection by a State to the jurisdiction of an international tribunal to hear the case or to other procedural or substantive aspects of the case does not justify a refusal to participate in the proceedings. UNCLOS also provides for safeguards that can be used by the defendant State to ensure that no abuse of the legal process takes place.[97] In the *Arctic Sunrise* case Russia has been extensively criticised for its refusal to participate in the proceedings at the ITLOS and the arbitration tribunal.[98] Non-appearance in itself does not, in any case, preclude the tribunal from giving the ruling on the merits and will only

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94 See the dissenting opinion of the Judge Golitsyn where he criticises the Order on several points, including the one discussed herein.

95 Para 3 of the declaration by ad hoc judge Anderson. See also para 60 of ITLOS Order of 3 December 2001 in Case No. 10 *The Mox Plant Case (Ireland v. United Kingdom)*, Provisional measures, available at www.itlos.org under "Cases".

96 At the time of writing, the arbitration tribunal has only given an award on jurisdiction, deciding that the dispute between the Netherlands and Russia falls under Section 2 procedures. See Award on Jurisdiction of 26 November 2014 in the *Arctic Sunrise Arbitration*, available at www.pca-cpa.org under "Cases".

97 Article 294.

98 See, e.g., separate opinions of Judges Wolfrum and Kelly and Judge Paik, at www.itlos.org under "Cases".

deprive the defendant State of an opportunity to present its views on the dispute, including the points discussed in this section.

3.3 Can "direct action" cases be settled under compulsory dispute settlement procedures?

3.3.1 Overview

Apart from the requirements discussed above, Section 3 of Part XV UNCLOS narrows down the scope of application of Section 2 by limiting the legal issues which fall under the compulsory dispute settlement (Article 297) and envisaging opt-out rules allowing States to adopt reservations (of a limited scope) to the application of Section 2 (Article 298). Thus, not every claim based on the infringement of UNCLOS will benefit from the Section 2 procedures, although dispute settlement rules of Section 1 will still apply.

By contrast to Article 297, which applies automatically, States need to adopt a declaration to give effect to opt-out provisions of Article 298.

The discussion below examines whether the disputes arising from the direct actions against offshore installations fall under Article 297 provisions and, if so, whether States parties to UNCLOS may adopt reservations under Article 298 to preclude settlement of the dispute under Section 2.

3.3.2 What disputes fall under the compulsory dispute settlement mechanism of UNCLOS?

Relevant parts of Article 297 specify that:

1) Disputes concerning the interpretation or application of this Convention *with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention* shall be subject to the procedures provided for in Section 2 in the following cases:
(a) when it is alleged that a coastal State has acted *in contravention of the provisions of this Convention with regard to the freedoms and rights of navigation*, overflight or the laying of submarine cables

> and pipelines, or with regard to other internationally lawful uses of the sea specified in article 58 [rights and duties of other States in EEZ – A.P.]; or
> (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted *in contravention of this Convention or of laws or regulations adopted by the coastal State* in conformity with this Convention and other rules of international law not incompatible with this Convention; or […] (author's italics).

Article 297(2) and 297(3) contain further limitations which apply, respectively, to disputes concerning the interpretation and application of UNCLOS with respect to marine scientific research and fisheries. Although these parts of Article 297 are not directly relevant for this article and are not reproduced here, they should be kept in mind for the purposes of further discussion of the opt-out provisions laid down in Article 298.

Article 297(1)(a) distinguishes between disputes arising from allegations that the coastal State has acted in contravention of the provisions of UNCLOS with regard to the freedoms and rights of navigation etc., or with regard to other internationally lawful uses of the sea specified in Article 58. By virtue of the alternative wording "or", it is sufficient to establish that one of the rights of other States was infringed.

In the *Arctic Sunrise*, the Netherlands relies *inter alia* on Articles 56(2), 58, 87(1)(a), and 110(1) UNCLOS, whereas the Russian position (in the absence of any formal statements on this point in the course of the on-going international litigation) appears to be based on the provisions of Articles 56, 60 and 111 UNCLOS. The two States hold opposing positions on the interpretation and application of the rules governing jurisdiction of the coastal State and the rights of the flag State in the EEZ. The essential difference also lies in the weight attributed by the two parties to the freedom of navigation, on the one hand, and the sovereign rights and jurisdiction of the coastal State over its offshore installations, on the other hand.

Article 297(1)(a) does not expressly mention disputes arising from the exercise by the coastal State of jurisdiction under Article 60. However,

provisions of Article 297 reflect the understanding that a close link exists between the coastal State's sovereign rights and jurisdiction over its EEZ and the flag State's right to freedom of navigation. The interpretation and application of Article 60 is inextricably linked to the provisions on freedom of navigation and other lawful uses of the sea and it would not be logical in the context of UNCLOS as a whole to exclude disputes involving claims based on Article 60 from the scope of Article 297. A disproportionate exercise of any of these rights falls, therefore, under Section 2 procedures.[99]

Article 297(1)(b) grants the coastal State the right to take proceedings against the flag State for violations in its EEZ. A general wording of this paragraph also suggests that rules applicable to the offshore installations in the EEZ and continental shelf are included in this provision. Narrowing down the scope of Article 297(1)(a), in such a way as to preclude bringing corresponding claims on the part of the flag State against the coastal State, would result in a major imbalance in the rights of States under Section 2, a result hardly intended by this provision.

In this author's view, the intention of Article 297 is rather to exclude those disputes regarding the exercise of sovereign rights and jurisdiction by States which do not relate to the exercise of freedom of navigation or to the other rights not expressly included in Article 297's list.

It should also be pointed out that Article 297 does not require the plaintiff State to prove *convincingly* that the defendant State has violated relevant UNCLOS provisions; it is sufficient that "it is alleged" that a State has acted in contravention of these provisions.

Can claims be brought concerning allegations that, by unlawfully restricting the freedom of navigation, the coastal State has also committed human rights violations, as submitted by the Netherlands in the *Arctic Sunrise*? Actions undertaken by the coastal State against environmental protests at sea may very well amount to human rights infringements,

[99] See discussion in Section 2.3 above. See also Tullio Treves, «The jurisdiction of the international tribunal for the law of the sea», in Chandrasekhara Rao and Rahmatullah Khan (eds). *The International Tribunal for the Law of the Sea: Law and Practice*. Kluwer Law International, the Hague (2001), at p.120.

which the State must be responsible for under the relevant international law rules.

The wording of Article 297 UNCLOS does not provide for any extension of the list of the disputes envisaged therein. That is because Article 297 represents a compromise between the States parties to UNCLOS: coastal States accept the compulsory provisions of Section 2 in exchange for excluding certain disputes arising out of the exercise of sovereignty by coastal States from this Section. Article 297 provides safeguards against the abuse of power by coastal States but also against the abuse of legal process by other States.[100] This means that Article 297 should not be construed too broadly, so that claims based on provisions clearly outside this provision do not unjustifiably benefit from Section 2 procedures.

A conclusion that can be drawn from reading Article 297 in the context of Part XV and UNCLOS more generally is that disputes concerning issues which do not have anything to do with the exercise by the coastal State of its sovereign rights or jurisdiction under UNCLOS are not, in any case, caught by Article 297. Thus, in this author's view, the dispute settlement procedures under Section 2 (or indeed Section 1, apart from the peaceful settlement following from customary international law) will not apply to disputes based exclusively or predominantly on allegations of the human rights violations by the coastal State. This conclusion is also in line with the limits placed on the court jurisdiction and applicable law in the dispute settlement procedures of Section 2.

3.3.3 Reservations against the compulsory dispute settlement: the example of the *Arctic Sunrise*

By virtue of the opt-out provisions in Article 298, States may declare that they do not accept Section 2 procedures for disputes generally covered by Article 297, albeit only with respect to certain categories of disputes listed in this provision. For the purposes of this article, the relevant exception is laid down in Article 298(1)(b), which permits States to opt

[100] See Nordquist et al (1989), p. 85 et seq: the history of negotiations of this provision illustrate that such disputes as those concerning the territorial integrity of States were not to be included in the procedures of Section 2.

out from Section 2 with respect to "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3 [i.e. marine scientific research and fisheries – A.P.]".

One of the central points of controversy in the Arctic Sunrise (and the only point on which the defendant actually made a statement to the tribunal) was caused by the reservation by the Russian Federation against Section 2 procedures. The declaration of 12 March 1997 adopted at the ratification of UNCLOS by Russia contains an opt-out clause which inter alia applies to disputes concerning "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".

The Russian Federation argues that the 1997 declaration excludes the present dispute from the dispute settlement procedures of Section 2. The position of the Russian Federation on this question has until now remained unchanged.[101] At the time of writing, the Tribunal set up under Annex VII has ruled that Section 2 applies to the dispute in the Arctic Sunrise and that the 1997 declaration does not exclude this dispute from its jurisdiction, thus confirming the prima facie assessment by the ITLOS.[102]

The wording of the 1997 declaration cited above differs from the wording of the corresponding provisions in Article 298, as the declaration omits the reference to Article 297(2) and (3) included at the end of the relevant sentence in Article 298. Thus the wording of the 1997 declaration appears to extend the scope of reservation beyond what is expressly provided for in Article 298, because it excludes compulsory dispute settlement in all cases "concerning law enforcement activities in regard to exercise of sovereign rights or jurisdiction" under UNCLOS, and not only disputes relating to fisheries or marine scientific research.

It is necessary to examine thoroughly the wording of the relevant UNCLOS provisions as well as the 1997 declaration, in order to establish

[101] According to the *note verbale* of 27 February 2014, in which the Russian Federation confirmed its earlier refusal to accept the arbitration procedure: http://www.pca-cpa.org under "Cases".

[102] Award on Jurisdiction of 26 November 2014 in the *Arctic Sunrise Arbitration* (fn. 11 above).

the scope of the opt–out permitted under Article 298, whether there exists a conflict between Article 298 and the 1997 declaration, whether such conflict can be reconciled, and what the legal implications are if it cannot be reconciled.

The only possible way to reconcile the wording of Article 298(1)(b) with the 1997 declaration is by linking the reference to Article 297(2) and (3) solely to the word "jurisdiction", but not to the "sovereign rights". Under this approach, disputes concerning the exercise of jurisdiction would be limited solely to the fisheries and marine research, whereas all law enforcement activities in the exercise of sovereign rights would be included into the opt-out right. Given that the concepts of sovereign rights and jurisdiction in international law are not identical (albeit related) and could, in principle, be subject to different sets of rules, such a reading may deserve a closer look.

In this author's view, such a reading of Article 298 is not correct. First, disputes concerning law enforcement activities in regard to the exercise of sovereign rights would, on under this approach, enjoy a much broader opt-out rule than the corresponding disputes in regard to the exercise of jurisdiction. Such an interpretation would also result in practically all law enforcement activities related to the exercise of sovereign rights being excluded from Section 2 procedures, a result clearly not intended by UNCLOS Part XV.[103]

Second, such a reading of Article 298 provision is rebutted by the formulation of the respective provision in the Russian version of UNCLOS, relevant in the context of the Arctic Sunrise case.[104] A grammatical inspection of the sentence structure of the Russian Article 298(1)(b) clearly shows that the limitations of Articles 297(2) and (3) apply to disputes with regard to both sovereign rights and jurisdiction (the use of "or" in both English and Russian versions means that it is sufficient

[103] See paras 73-76 of the Award on Jurisdiction in the *Arctic Sunrise Arbitration*, above. See also Natalie Klein. *Dispute Settlement in the UN Convention on the Law of the Sea*. Cambridge University Press, 2005, p. 308.

[104] Russian is one of the authentic languages of UNCLOS (Art. 320). All authentic language versions of UNCLOS are available at http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm .

that either sovereign rights or jurisdiction are exercised). The use of commas in the Russian text of Article 298(1)(b) UNCLOS to single out the part of the sentence "concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" between the words "disputes" and "which" (in plural) shows that all such disputes are to be related to Article 297(2) or 297(3).

Having concluded that Article 298(1)(b) must be read as linking Article 297(2) and (3) to disputes arising from the enforcement of either sovereign rights or jurisdiction, we are then faced with further issues.

First, is the 1997 declaration to be construed, as the Russian Federation submits, as really seeking to exclude a broader range of disputes from Section 2 of Part XV UNCLOS than are permitted under Article 298? Or is the omission of the reference to Article 297 merely incidental and to be ignored?

Second, if the 1997 declaration does intend to broaden the scope of opt-out rule of Article 298, how can such a conflict to be resolved?

A purely literal reading of the 1997 declaration may support the position taken by the Russian Federation on the meaning which it intended to give to this text at the time the declaration was adopted, but this is still not conclusive, because other interpretation factors point in different directions.

By comparison, the 1982 declaration of the Soviet Union did not contain any reference to the "exercise of sovereign rights or jurisdiction" and did not go beyond the wording of the corresponding provision in Article 298(1)(b) UNCLOS. On the one hand, comparison with the 1982 declaration shows that the intent behind the 1997 declaration may have been to broaden the opt-out provision, by covering more types of disputes than before. On the other hand, the 1997 declaration contains an express reference to Article 298 ("in accordance with Article 298"), which supports the interpretation leading to the result compatible with the formulations in Article 298. Seen from this perspective, an omission of a part of Article 298(1)(b) from the 1997 declaration could be merely accidental and unimportant.

The interpretation maintained by the Russian Federation after the

dispute has arisen is in any case not relevant.[105] In addition, given that the declaration is a part of an international treaty, it is not sufficient to rely on the subjective intent of the legislator (which is in any case uncertain), as the interpretation here aims to find out the intention "in the sense of the true meaning of the treaty rather than the intention of the parties distinct from it".[106]

In the Arctic Sunrise, the ITLOS does not shed any light on this question as the Order merely says that the declaration made by the Russian Federation with respect to law enforcement activities under art 298(1)(b) prima facie applies only to disputes excluded from the jurisdiction of a court or tribunal under Article 297(2), (3) UNCLOS. No further reasons are given for this conclusion. [107] As to the previous practice of the parties on the application of UNCLOS (in this case, by Russia), it is non-existent in cases similar to the Arctic Sunrise. However, the arbitration tribunal deals with this question in more detail. [108]

A purely grammatical interpretation of the Russian reservation would lead to results incompatible with the general principles of treaty interpretation in international law, as codified in the 1980 Vienna Convention on the Law of Treaties. Article 31(1) of the Convention provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The treaty would therefore, for the purposes of this provision, also encompass declarations and reservations made by the parties at the time of adoption of the treaty.[109]

A contextual interpretation of UNCLOS provisions would not correspond to the verbatim interpretation/reading of the 1997 declaration,

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[105] Oliver Dörr and Kirsten Schmalenbach (eds). *Vienna Convention on the Law of Treaties: a Commentary.* Heidelberg, Springer, 2012, p. 523.

[106] Dörr and Schmalenbach (2012), pp 522-523.

[107] para 45 of the Order.

[108] Award on Jurisdiction in the *Arctic Sunrise Arbitration* (fn. 102 above), para 69 et seq.

[109] Article 31(2)(b) of the Vienna Convention on the Law of Treaties referring to any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

especially taking into account Articles 309 and 310 UNCLOS, as examined in more detail further below. Such an understanding would also be incompatible with the object and purpose of the dispute settlement provisions in Section 2, which aims to achieve an effective law of the sea dispute resolution between States in exchange for certain limitations on the application of these provisions.

Thus, since no sources point in the opposite direction, the conclusion must be that the interpretation of the 1997 declaration which is compatible with Article 298 is the correct one, and that the declaration does not seek to deviate from Article 298.[110] The arbitration tribunal also did not find it decisive that the wording of the declaration did not "precisely track the language of Article 298(1)(b)" and concluded that the declaration could not create an exclusion than was wider than what is permitted under this provision.[111]

If the opposite were true, and there were a conflict between the 1997 declaration and the rules governing dispute settlement in Section 2 of Part XV UNCLOS, the question would arise as to how to deal with this conflict.

As a starting point, Article 309 UNCLOS does not allow for any reservations or exceptions, unless permitted by other articles of UNCLOS, e.g. Article 298. Opt-out provisions of Article 298 are formulated in considerable detail, suggesting that the interpretation of this provision should not permit deviations beyond its wording.[112]

In addition, Article 310 clarifies that a State may make "declarations or statements, however phrased or named, with a view, inter alia, to the harmonisation of its laws and regulations with the provisions of this Convention". Article 310 does not, however, permit declarations or statements which "purport to exclude or to modify the legal effect of the

[110] For the purposes of the Russian internal law, such conclusion is also likely to be well-founded: see the Federal Law 15.07.1995 N 101-ФЗ "On the International Treaties of the Russian Federation", Arts 25 and 31.

[111] Award on Jurisdiction in the *Arctic Sunrise Arbitration* (fn. 96 above), para. 72.

[112] The tribunal also points out that the 1997 declaration must be interpreted with due regard to the relevant provisions of UNCLOS, Arts 309 and 310: see Award on Jurisdiction in the *Arctic Sunrise Arbitration* (fn. 96 above), para 70.

provisions of this Convention in their application to that State." [113] Although UNCLOS is silent on the legal effect of incompatible reservations, it is reasonable to assume that such reservations are to be considered null.[114]

The absence of any objections to the 1997 declaration at the time of its adoption also cannot be invoked in the case of UNCLOS, since it specifically spells out the restrictions on the reservations which can be made.[115] In this author's view, it would be incompatible with the general principles of the law of treaties, such as pacta sun servanda and good faith, to avoid obligations under UNCLOS in such a way in the present case.

In principle, Articles 309 and 310 do not seek to preclude any other interpretation of Article 298 than a purely textual one. The problem in the case of the Arctic Sunrise is that the defendant's interpretation goes way beyond what the wording of Article 298 permits and excludes virtually all disputes concerning the exercise of the coastal State's enforcement jurisdiction in its EEZ from judicial settlement under Section 2. Such a result is likely to lead to a direct contradiction between the declaration and Articles 309 and 310, because the former would indeed exclude or modify the legal effect of the provisions of this Convention in their application to a State.[116] It would also contradict Russia's own declaration of 1997, where it condemned any unilateral statements by State parties which attempted to exclude or modify the legal effect of UNCLOS provisions.

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[113] See also arguments in paras 43-44 of the Order in the *Arctic Sunrise*-case. See also Article 19 of the Vienna Convention on the Law of Treaties which precludes adopting of reservations which are not provided for in the treaty or which are incompatible with the object and purpose of the treaty.

[114] Dörr and Schmalenbach (2012).

[115] See Article 20(4) of the Vienna Convention which opens for such an argument in principle. No objections known to the author were made to the Russian declaration in question. However, this point was not raised by either party in the *Arctic Sunrise*.

[116] Wolfrum and Kelly, para 10 of their separate opinion (supported in other separate opinions). Dissenting opinions also did not object expressly to the ITLOS majority interpretation of Article 298.

At the same time, even if Section 2 does not apply to a dispute, the parties are still obliged to follow the provisions on peaceful settlement and non-binding decisions in Section 1. However, in the case of the Russian declaration invoked in the *Arctic Sunrise*, the resulting exception from Section 2 settlements would be so broad that it would preclude international litigation with binding outcomes for Russia in the vast category of cases, so that even availability of Section 1 procedures would probably not prevent the effect of excluding or modifying Part XV provisions.

In any case, in the *Arctic Sunrise*, the flag State would not have been satisfied with Section 1 procedures, since they do not envisage the possibility of seeking the provisional measures examined below. [117]

3.4 Release of ships and activists arrested for direct actions offshore

3.4.1 Overview

In any litigation, it may be necessary to ensure that the conduct of the opponent State or other circumstances do not result in an undue deterioration of parties' rights before the final ruling. Thus, in the *Arctic Sunrise*, the flag State considered it necessary to obtain release of the ship and its crew before the dispute was settled, in order to prevent deterioration of the ship's condition and to help free the activists from their arrest in Russia.

As mentioned earlier, the availability of provisional measures that are binding on the parties is one of the advantages of dispute settlement under Section 2. The procedures for the prompt release of vessels and crews are laid down in Article 292 UNCLOS, which deals specifically

[117] In many cases, Section 1 procedures may still be a more effective way of resolving a dispute. This author doubts whether resorting to Section 2 procedures in the *Arctic Sunrise* case has indeed speeded up resolution of the dispute or release of the ship and its crew for the plaintiff State. The ship has been released nearly a year after she was detained and the crew left the territory of the Russian Federation after more than two months under arrest.

with cases of detention of foreign vessels and crews by coastal States. In addition, Article 290 sets out rules on the provisional measures available to the parties to a dispute under Section 2.

The *Arctic Sunrise* case does not, however, involve a request for prompt release submitted under Article 292 UNCLOS, but instead a request for provisional measures under Article 290 (albeit in the shape of the prompt release of the vessel and the crew). Although it would probably have been easier for the Netherlands to rely on Article 292, in this case it was precluded from invoking this provision because Article 292 only applies to detentions for violations of rules on fisheries and ship-source pollution, clearly not the case with Arctic Sunrise.[118]

Earlier practice at the ITLOS on Article 290 did not address situations such as the *Arctic Sunrise*, so this case presented the ITLOS with an opportunity to shed more light on the scope and contents of the provisional measures which may be available in "direct action" cases. In particular, it showed that the release of the ship and its crew may, in principle, be prescribed under Article 290, in cases where Article 292 did not apply.

Article 290 does not specify the type of provisional measures which may be prescribed. At the same time, Article 290 empowers the competent tribunal to prescribe "any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."

Under Article 290(5), the ITLOS holds a corresponding right with respect to the prescription, modification or revocation of such measures in cases where the competent tribunal has not yet been established. This competence of the ITLOS is subject to Article 290(1) constraints on the

[118] More precisely, Article 292 catches cases in which it is alleged that the detaining State has not complied with the UNCLOS provisions for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. Such provisions are envisaged in Article 73 (detention for violations of rules applicable to living resources of EEZ) and Article 226 (discharge violations), excluding therefore detention for violations of other rules such as those relating to off-shore installations.

type and objective of the measures to be prescribed and, in addition, to the conditions laid down in Article 290(5). The ITLOS must examine whether the forthcoming tribunal will *prima facie* have jurisdiction over the dispute and whether the urgency of the situation requires the prescription of provisional measures (i.e. before the competent tribunal is set up).

It should be pointed out that, by contrast to the question of jurisdiction, the ITLOS is not asked to apply a *prima facie* standard when deciding on the type of provisional measures to be prescribed and on the urgency of the situation. The ITLOS must take a stand-alone decision on these matters, examining any requests with the same level of detail as would be applied by the tribunal competent under Article 290(1).[119]

On 22 November 2013, the ITLOS ordered the Russian Federation to immediately release the *Arctic Sunrise* and all persons on board from detention and ensure that both the vessel and the personnel were allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation. The release was to be made conditional upon the posting of a bond or other financial security in the amount of 3,600,000 euros by the Netherlands, in the form of a bank guarantee.

The Order does not fully illuminate the Tribunal's view of the legal questions raised by this case. The discussion below examines in more detail the legal issues arising under Article 290 in the "direct action" cases.

3.4.2 Is release an appropriate provisional measure in "direct action" disputes?

The question in the *Arctic Sunrise* was whether the release of the ship and its crew were entirely covered by Article 290, i.e. that the particular case fell outside Article 292.

Article 290 does not list any specific measures that may be prescribed. As a starting point, Article 290 expressly provides for a possibility of applying "any" provisional measures, on condition that these are appropriate to preserve the rights of the parties.

[119] However, the competent tribunal, once constituted, will be free to modify, revoke or affirm the provisional measures prescribed under Article 290(5).

The existence of a separate provision on prompt release in Article 292 UNCLOS may indicate that tribunals are precluded from granting release in cases other than those falling under this provision. Article 292 aims to give a practical effect to the substantive provisions of UNCLOS protecting foreign vessels and crews against prolonged detentions in the coastal State.[120] Since no substantive right to claim a prompt release is envisaged under Article 60 (by contrast to Article 73 or 226), it may be argued that extending such a right to Article 290 would result in excessive encroachment upon coastal States' jurisdiction in the EEZ.

In this author's view, such *a priori* narrowing down of the measures available under Article 290 is unreasonable in light of its wording, which allows for *any* measures to the extent they are appropriate. The wording of Article 290(1) makes it clear that the appropriateness of measures is to be assessed from the point of view of the parties' rights that need to be preserved.

A sufficient safeguard against an excessive imbalance in favour of the flag State is provided by the requirement that provisional measures are "appropriate" in the circumstances of the case. Thus, the tribunal dealing with this question is under an obligation to examine whether or not the release would be appropriate for preserving the rights of the coastal (detaining) State, or if some other measure should be chosen instead.

In the *Arctic Sunrise*, the outcome of the proceedings at the ITLOS confirms a view, expressed in the academic literature, that the release of the vessel and its crew is not, in principle, precluded in cases where the release is requested as a provisional measure under Article 290 UNCLOS.[121] Moreover, the order for the release of the Greenpeace ship and its crew was conditional on the posting of a bond by the flag State. The decision was, therefore, in principle, the same as it would have been in the prompt release proceedings under Article 292. However, the ITLOS reasoning is so brief that it is impossible to say with any certainty what

[120] Nordquist et al (1989), p. 67. It should, however, be pointed out that the preparatory materials to Article 290 and 292 do not contain any indication that the States' intention was to preclude release under Article 290.

[121] See, e.g., Anne-Katrin Escher, "ITLOS: Release of Vessels and Crews", 3 *Law& Prac. Int'l Cts&Tribunals* 342 (2004) and Elferink (2014), p. 286.

kind of arguments lie behind the Tribunal's choice of the particular provisional measures, other than that the flag State specifically requested the release.

The criterion for "appropriateness" is that the tribunal dealing with the request examines the facts and the substance of the case, thereby going much further than a mere *prima facie* examination, while at the same time not going so far as to consider the case on its merits. Since the provisional measures must, by their nature and purpose, relate to the circumstances peculiar to the case in hand, the tribunal must inevitably consider the substantive issues of the dispute, in order to take measures truly preserving the rights of the parties.[122]

Before deciding what measures would be appropriate to preserve the rights of the parties, it is necessary to determine what rights, and whose rights, are protected by the provisional measures of Article 290.

By its express wording, Article 290 protects the respective rights of the parties to the dispute. The "parties" in our case would be the States (parties to UNCLOS). Apparently, the tribunal must consider the rights of both parties, including in cases of default of appearance by either of them. However, by contrast to the proceedings on the merits, the duty to establish that a claim is well founded in law and fact is not expressly provided for in connection with the request for provisional measures.[123]

The rights of States who are not parties to UNCLOS, as well as rights of individuals or organisations such as Greenpeace International in the case of the *Arctic Sunrise*, will not be taken into consideration on a stand-alone basis, since the dispute settlement under Part XV of UNCLOS is only open to such parties where specifically provided for in UNCLOS.[124]

[122] See the Separate opinion of Judge Jesus, para 15. See also *US Diplomatic Staff in Tehran v Iran*, ICJ (1979), *ARA Libertad (Argentina v Ghana)*, ITLOS, Order of 15 December 2012.

[123] See Article 28 of the Statute of the ITLOS and Article 9 of Annex VII.

[124] See Article 291 UNCLOS. The right to intervene is envisaged only for States parties to UNCLOS (Article 31 of Annex VI UNCLOS containing the Statute of the ITLOS). Not even *amicus curiae* submissions by the Greenpeace were permitted by the ITLOS and the Annex VII Tribunal in the *Arctic Sunrise*. See Procedural Order nr. 3 of 8 October 2014 denying Greenpeace's petition to file an *amicus curiae* submission

Although in "direct action" cases it is the flag State and the coastal State which would be the central actors in the dispute, Article 290 does not, in principle, limit the definition of the "parties" to the coastal State and the flag State.[125] Since other States may, in principle, also be affected by the excessive enforcement measures of the coastal State (for example, the nationality State of the crew), there is a possibility that these States will also bring up proceedings under Section 2 and, accordingly, file a request for provisional measures under Article 290.

The wording of Article 290 suggests that it excludes the possibility for the States parties to the dispute to request measures aimed at preserving rights of *third party* States, i.e. States who are *not* parties to the dispute in question. Thus, even if a nationality State (for example) considers that its rights have been compromised by the coastal State action, the flag State may not act on its behalf.

On this basis, it can also be concluded that the rights of individuals, such as crew members, or organisations such as Greenpeace, are not directly protected by the provisional measures prescribed under Article 290. However, some of these rights may still be taken into account by the tribunal in the proceedings on the merits, as the discussion above shows.

Since Article 290 does not contain a list with specific rights, it has to be interpreted to determine what rights are protected under this provision. Reading Article 290 in conjunction with other UNCLOS provisions, it becomes clear that these rights include, at a minimum, the rights expressly granted by the relevant provisions of UNCLOS (or related agreements).

Thus, in the context of the *Arctic Sunrise*, the right of flag States to the freedoms of the high seas is absolutely relevant for the purposes of Article 290. The term "crew" is logically connected to the ship's ability to navigate and consequently to avail itself of the freedom of navigation. It is more doubtful whether activists or other persons on-board who do not perform any navigation-related functions on the ship should be

"addressing the legal issues relating to international human rights law which may arise in the proceeding". Available at www.pca-cpa.org (under "Cases").

[125] No such limitation is envisaged in Article 297 as well.

considered as "crew" for the purposes of this discussion. It can, however, be argued that the right to free navigation should apply to both the ship and its crew, including the captain (a ship as a unit).[126]

As to the rights of the coastal State, these should include the rights granted under Parts V or VI of UNCLOS, such as the right to the resources of the EEZ and continental shelf and the right to exercise jurisdiction in a way compatible with the relevant provisions of UNCLOS. It is reasonable to assume that the rights to detain foreign vessels and to institute penal proceedings are protected under Article 290, to the extent they are compatible with UNCLOS.

The question remains as to whether rights not expressly mentioned in Article 58 and other relevant UNCLOS provisions are included in Article 290; notably, human rights such as freedom of expression or the right to liberty relied upon by the Netherlands in its request for provisional measures in the *Arctic Sunrise*.

A narrow interpretation suggests that only those rights expressly covered by UNCLOS are protected by the provisional measures in Article 290. If read strictly in conjunction with Articles 288 and 293 examined earlier in this Chapter, it may be doubtful whether human rights would be protected under Article 290.

A liberal interpretation of Article 290 may, however, be supported by the need to take account of the developments in the law of the sea and the international law generally. The dynamic nature of the law of the sea needs to be reflected in the interpretation and application of the dispute settlement provisions of Part XV, including Article 290, so that creating an exhaustive list of all the rights to be covered by (or excluded from) Article 290 is unreasonable. In addition, the prescription of the provisional measures under Article 290 does not encroach upon the tribunal's jurisdiction to resolve the case on the merits, but is instead aimed at protecting of the rights of the parties before the ruling on the merits has been issued. Thus, the tribunal does not risk directly exceeding the limits

[126] See para 18 et seq of the separate opinion by Judge Jesus (ITLOS). See also Escher (2004), p. 280, who argues that the term "crew" applies to all members of the crew, irrespective of their position on board.

imposed by UNCLOS with respect to the jurisdiction and the applicable law.

Having determined generally the spectrum of rights relevant in the particular case, the tribunal acting under Article 290 must instead try to achieve a proper *balance* between the respective, and probably conflicting, rights of the parties. The complexity of such an exercise is well illustrated by the case of the *Arctic Sunrise*.

Since parties to a dispute will normally have opposite interests, it is unlikely that a tribunal will be able to tender to both parties' interests to a full extent. Thus, in order to preserve the Netherlands' right to free navigation (including the proper condition of the ship and the crew) and to take account of the relevant human rights, the release of the ship and its crew would appear the most suitable measure. Russia's rights, to the contrary, would be linked to the need to investigate the incident, to punish the offenders and to prevent similar violations from taking place in the future, thus justifying the continued detention of the ship and especially of its crew. The fact that the tribunal places greater weight on the rights of one State does not directly threaten the rights of the opponent State; it is only when placing too much weight on the former that an unfair imbalance may result.

In the *Arctic Sunrise*, the ITLOS did not explain what weight, if any, it assigned to the human rights invoked by the Netherlands.[127]

The ITLOS may also have taken into account the right of the coastal State to investigate the case and to conduct judicial proceedings, including criminal proceedings. This is indicated by the fact that the Netherlands' claim to order Russia to stop all national judicial proceedings (in addition to the release) was not expressly granted by the ITLOS.

Since the Tribunal did not specify its reasons for ignoring this part of the Netherlands' claim, it is unclear what weight it actually attributed to Russia's right to pursue national proceedings against the *Arctic Sunrise* and its crew. Thus, the order to release both the ship and its crew immediately, albeit in exchange for financial security, would weaken the coastal State's opportunity to perform the investigation and finalise

[127] See, however, separate joint opinion of Judges Wolfrum and Kelly, para 13.

proceedings in practice. This is because the release of the detainees may compromise the very purpose of the investigation and criminal proceedings, unless it is certain that the accused would return to the prosecuting State.

Cases such as the *Arctic Sunrise* may involve imprisonment terms which, under the applicable domestic law, may not be convertible into a monetary penalty. Therefore, an early release upon posting of a bond would hinder the carrying out of criminal investigation and prosecution by authorities of the detaining State, unlike Article 292 – cases where only monetary penalties may be imposed by the coastal State anyway (Articles 73 and 230 UNCLOS). [128]

It could be argued that the conditions of release in cases where non-monetary penalties could be applied by the coastal State must ensure that the offenders will return (or will be delivered to) the prosecuting State, insomuch as the international tribunal settling the dispute on the merits decides in favour of the detaining State. The release would then safeguard the rights of both parties; both the coastal State and the flag State, the latter by ensuring that the ship owner, operator, other interested persons and crew do not suffer damages and hardships from prolonged periods of detention pending trial.[129]

In this respect, human rights could provide a useful framework for the balancing exercise without excessively encroaching upon the "traditional" law-of-the-sea rights. Even if the coastal State has the right to conduct the proceedings and impose criminal penalties, the tribunal may still adjust the provisional measure to take into account the human rights of the crew. Although human rights *per se* do not render irrelevant the coastal state's jurisdiction under the law of the sea to conduct judicial proceedings, such rights may justify certain adjustments to the manner in which this jurisdiction is exercised.

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[128] See separate opinion of Judge Jesus. See also dissenting opinion by Judge Kulyk who criticised the prescription of a bond in the form of a bank guarantee to the Annex VII tribunal was criticised as confusing these two separate objectives – to obtain release, on the one hand, and to guarantee the implementation of the future decision of the Annex VII tribunal in the part of possible payment to the Russian Federation.

[129] See dissenting opinion by Judge Kulyk, para 13.

For example, the activists do not necessarily have to be kept in pre-trial detention, but less restrictive measures may be imposed which would secure their appearance before the investigators and the court. Of course, it is not in general excluded that a bond would be sufficient to achieve this end. In the *Arctic Sunrise*, it would, however, be difficult for the flag State to guarantee the return of activists who were nationals of different States, unless they were detained in the Netherlands or their respective States of nationality until the ruling on the merits is issued by the tribunal.[130]

In the case of the *Arctic Sunrise*, this author strongly doubts whether the Russian Federation's right to perform judicial proceedings and to impose penalties should in any case have been assigned more weight than it actually was by the ITLOS. The administrative proceedings were quickly finalised, so the release would not have interfered with them. As to the criminal proceedings, it soon became obvious that the prosecuting State did not actually have a proper legal basis in its national criminal law for prosecution of the violation. In these circumstances, their continued detention in the territory of the Russian Federation would have resulted in an unnecessary hardship for the activists.

Thus, it is highly unlikely that the release compromised the interests of the detaining State in the *Arctic Sunrise*, especially considering that the financial security was in place. It may have been more reasonable to order the flag State to take steps in order to prevent future actions from taking place or to investigate the incident and to take appropriate measures under its national law. [131]

In addition, the tribunal acting under Article 290 should take into

[130] In addition, some other legal mechanisms would be necessary to ensure their transfer back to Russia. This is outside the scope of this discussion.

[131] It was reported by BFM.RU at www.bfm.ru/news/274877 (5th October 2014) that a court in the Netherlands imposed a prohibition on Greenpeace to hinder delivery of Russian oil at the port of Amsterdam. In the USA, *Shell Offshore Inc v Greenpeace Inc* (709 F.3d 1281), the court granted a preliminary injunction prohibiting Greenpeace from disturbing lawful off-shore activities of the company by direct actions. See Elferink (2014) at p. 264 who reports a ruling by the court in the Netherlands temporarily prohibiting Greenpeace from entering the safety zone of the rigs off Greenland (*Capricorn and Others v. Greenpeace International and Others,* 2011).

account that both parties may have a right to compensation from each other for damage arising from the infringement of their rights. As to securing of the coastal State's losses suffered as a result of the direct action, a bond or a financial security in exchange for release of the ship and its crew appears to be a reasonable measure.

As to the possible economic losses of the flag State arising from excessive enforcement by the coastal State (including the damage to the ship due to the extreme detention measures or to poor maintenance, as in the *Arctic Sunrise*), the Order by the ITLOS does not shed light on measures that could secure any such claims by the Netherlands prior to the ruling on the merits, as no particular requests were made by the Netherlands in this respect. An alternative or supplement to the release to mitigate such losses could, for example, be the order to grant the operator of the ship access to the vessel in order to perform necessary preservation and maintenance procedures to ensure operability of the vessel.[132]

3.4.3 The urgency of the situation necessitating the provisional measures

In several cases on provisional measures, the ITLOS examined whether such measures were justified in light of the irreversible and imminent damage to the rights of the parties. A similar requirement has emerged in international jurisprudence generally and focuses on the question of whether the situation is urgent and the rights of the parties to the dispute are under real, if not imminent, risk of suffering prejudice or damage.[133] Although Article 290(5) requires that a situation requires the prescription of provisional measures, no condition of irreversible damage is expressly mentioned therein. Furthermore, the urgency of the situation encouraging

[132] See Opinion by Kulyk, para 11. See also dissenting opinion of Judge Golitsyn where he argues that Russian authorities guaranteed that the *Arctic Sunrise* would not perish and that it would be sufficiently maintained (para 41 of the opinion). See also *M/V Louisa* case (Saint Vincent and the Grenadines v. Kingdom of Spain), available at www.itlos.org, where the ITLOS accepted assurances of the detaining State in this regard.

[133] See dissenting opinion of Judge Kulyk, where he refers to such cases as *Mox Plant* (fn. 88) and *M/V Louisa* (fn. 132).

a party to seek provisional measures is only mentioned in cases where such measures are prescribed by the "temporary" tribunal acting under Article 290(5). By contrast, Article 290(1) does not refer to the urgency as a pre-condition for the prescription of provisional measures.[134]

In the *Arctic Sunrise* case, the Netherlands was particularly concerned with the poor conditions for the ship and its crew, which were likely to bring about irreversible consequences and significant damage. These concerns were apparently taken into consideration by the ITLOS. Although the ITLOS only dedicates a brief examination to the question of "urgency", it does formally take this condition into account.[135]

It is not entirely clear whether a tribunal acting under Article 290 *must* consider such risks, and the ITLOS jurisprudence is, in any case, not completely uniform.[136] In this author's view, the risk of irreversible and imminent damage should be taken into account under the assessment of the "appropriateness" of the measures to be prescribed and of the urgency of the given situation. If no risk of irreparable and imminent damage is actually present in a dispute, it appears unnecessary (and probably harmful for the opponent party's interests) to prescribe provisional measures. On the other hand, if such a risk *is* present, the decision of the tribunal to prescribe such provisional measures as it considers appropriate would both safeguard the rights of the requesting party and contribute to the mitigation of possible liability of the opponent party.

Article 290(5) does not lay down any time framework for the "urgency" of a measure requested, although the two-week period after which the parties may turn to the ITLOS may appear to provide some guidance in this respect. In the *Arctic Sunrise*, however, the ITLOS pointed out that the period *prior* to the establishment of the Annex VII tribunal is "not necessarily determinative for the assessment of the urgency of the situation or the period during which the measures prescribed are applicable"

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134 As to the ITLOS, Article 89(4) of the Rules of ITLOS refers to the "urgency of the situation", whereas Article 89(1) dealing with provisional measures does not. In the jurisprudence of the International Court of Justice, the urgency must normally be shown for the ICJ to apply interim measures under Article 41 of the Statute.

135 See, e.g., paras 78, 85, 87 and 89 of the Order. See also Escher (2004) at p. 360-361.

136 In *Ara Libertad* (fn. 122 above): no express reference to the irreparable damage.

but that it should rather be assessed in light of the period during which the Annex VII tribunal is not yet in position to modify, revoke or affirm those provisional measures.[137] It is, therefore, the timing prospects for the parties to the dispute to have their rights taken care of by the competent tribunal that are important, and not the time which has passed since the dispute has arisen.

4 Conclusions

UNCLOS does not provide for straightforward solutions of all the law of the sea issues arising from environmental protests at sea. Other sources, including court practice, clarify some of the general questions but do not fully explain the special legal issues raised by direct actions against offshore installations. This author concludes with the following observations.

Firstly, the powers of the coastal State to prohibit and prosecute direct actions aimed against its offshore installations are not unlimited or absolute, and environmental activists may generally rely on the freedoms of the high seas to stage protests against offshore activities of the coastal State. Article 60 provides coastal States with jurisdiction over their installations and the right to take reasonable measures to protect the safety of the installations in the safety zone around their coasts.

In practice, coastal States generally consider that Article 60 UNCLOS authorises them to stop, board and detain activists in the safety zone around their installation. The wording of this provision is not, however, conclusive on this point and only authorises States to take reasonable measures against unsafe conduct. The lawfulness of the specific enforcement measures applied by the coastal authorities to stop or prevent the direct action will depend on several circumstances, including the level of risk the particular conduct represents.

In cases where the ship and, as the case may be, its crafts, used to

[137] See para 85 of the Order.

perform the protest action are located outside the safety zones, the right of coastal State to stop, board and detain the ship will be conditional upon the presence of some exceptional legal bases in UNCLOS: notably, the right of hot pursuit. In "direct action" cases, conditions for the exercise of this right laid down in Article 111 may, however, be difficult to comply with in practice.

Secondly, UNCLOS does not expressly regulate the right of coastal States to institute penal proceedings against foreign ships or individuals in this category of cases. Given that flag States have the principal (and on the high seas exclusive) jurisdiction over their ships, it may be more reasonable for coastal States to rely on the flag State taking necessary measures to punish the offenders and ensure future compliance by their ships.

However, in light of the general international law rules of jurisdiction, it is possible to justify the coastal State exercising penal jurisdiction over activists whose conduct has significantly affected the lawful interests of the coastal State. Still, the right of the coastal State to conduct criminal proceedings and impose penalties requires a more nuanced analysis under international law. In this author's view, the fact that the detention at sea was not in compliance with UNCLOS would probably terminate the right of the coastal State to punish the offenders, even if they were actually in this State's custody.

Thirdly, disputes arising from direct actions offshore fall under the UNCLOS dispute settlement mechanisms of Part XV, including Section 2 thereof. This Section envisages compulsory dispute settlement procedures entailing binding decisions and also provides for provisional (interim) measures, such as the release of the ship and its crew.

Several national cases examined in this article addressed the legality of the coastal States' measures against Greenpeace activists from the law of the sea perspective. All these cases (settled in the courts of coastal States) concerned rather assertive actions by the activists, carrying potentially serious risks for all the parties involved. In those circumstances, national courts appeared to give more support to the rights of the coastal State to protect its legitimate interests in the EEZ, than to the freedom

of navigations and other rights invoked by Greenpeace.

The fact that there are few, if any, international litigations between coastal and flag States on disputes arising from the enforcement in the EEZ, may prove the existence of a general consensus on the coastal States' rights to protect their offshore activities against unsafe protest actions. However, the dispute in the *Arctic Sunrise* shows that the perception by coastal and flag States of the above questions may be very different, and even opposite. Nevertheless, States would normally prefer to achieve solutions on controversial issues through diplomatic means, and not through the formal dispute settlement procedures of UNCLOS.

The *Arctic Sunrise* is the only international litigation (known to this author) which has arisen due to a direct action offshore. This case is in many respects similar to the national cases but also differs in one (but significant) respect: the Greenpeace activists of *Arctic Sunrise* were arrested and would probably have had to remain in the pre-trial arrest until the criminal proceedings were finalised and the judgment rendered. Obviously, the flag State's concerns (probably justified) for the activists risking prolonged detention terms in the Russian prison was the actual pragmatic reason for the flag State to resort to the international dispute settlement in this case.

What lessons for the application of UNCLOS to direct actions performed by Greenpeace offshore can be learned from the *Arctic Sunrise*?

Resolution of disputes resulting from direct actions offshore may only be achieved by the States balancing their rights and obligations in the EEZ and on the continental shelf. From this perspective, the *Arctic Sunrise* dispute may have signaled that, contrary to the spirit and the express wording of UNCLOS, States have actually become less interested in compromises and consider it more effective to unilaterally claim their rights under the law of the sea. The refusal of the defendant, the Russian Federation, to participate in the proceedings at both tribunals is not legally (or otherwise) plausible and does not, in any case, put a stop to the proceedings. The position of the plaintiff on the substantive issues of the law of the sea appears to overlook the possibility that some of the defendant's arguments (albeit not formally presented to the tribunal)

may be well-founded in UNCLOS.

The ITLOS Order in the *Arctic Sunrise* case on the release of the ship and its crew contributes very little to the clarification of Article 290 and other relevant provisions of UNCLOS concerning dispute settlement procedures. This is partly due to the limited scope of the ITLOS competence, which largely only required *prima facie* assessment of the jurisdiction of a tribunal under Part XV over this dispute, and partly due to the laconic reasoning in the Order, even with respect to Article 290. The default of appearance by the defendant probably deprived the Tribunal of a full and comprehensive overview of the legal arguments in the case. This weakness is unfortunately little helped by the more detailed legal analysis of the relevant issues in the separate opinions of the individual judges participating in this case at the ITLOS.

The case on its merits is not yet finalised at the time of writing. It remains to be seen how the tribunal established under Annex VI UNCLOS will decide the case on its merits. It is uncertain whether the termination of the criminal proceedings in Russia due to the amnesty will have any practical impact on the final outcome of the case.

There is a considerable potential for the further clarification of the important substantive rules of UNCLOS, especially the scope and interrelationship between the rights and duties of States in the EEZ, the freedom of navigation and human rights. It is, however, far from certain that the tribunal will undertake to examine claims based on the violations of human rights on their merits, because these may fall outside its competence.

The States which may be most considerably affected by the outcome of the proceedings on the substantive issues of the *Arctic Sunrise* case, are the coastal States active in the exploitation and extraction of the natural resources of the EEZ and continental shelf. These States are unlikely to accept that they may not stop and detain Greenpeace activists in cases such as the *Arctic Sunrise*. Coastal States are unlikely to comply with the interpretation given to the relevant UNCLOS provisions by the tribunal if it is perceived as favouring the flag State and assigning too much weight to the freedom of navigation and, as the case may be, to

human rights. In this event, the ruling on the merits of the *Arctic Sunrise* case risks becoming no more than a random example of how UNCLOS can be applied to direct actions offshore.

At the same time, giving a green light to the excessive use of coercion and prosecution of environmental activists for direct actions offshore, in cases where the legality of the coastal State's measures is doubtful, may easily be perceived as an unfair favouring of the coastal States active in the offshore business to the detriment of the environment and the international community as a whole. That would also be a step in the wrong direction.

It is, therefore, important for the development of the law of the sea in this field that the ruling on the merits of the *Arctic Sunrise* is sufficiently nuanced in its examination of the legality of the detention of *Arctic Sunrise* and also with respect to the right of the coastal State to conduct criminal investigation and to impose penalties for this type of conduct. It will also be important for the tribunal to illuminate the weight, if any, which it gives to human rights in its assessment of the freedom of navigation in the EEZ.

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