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Overview over content

Foreword

This issue contains three theses selected among those written by master students who have graduated over the last couple of years: Wenche Marit Lunde, Mads Schjølberg and Sylvie Allen.

The selection reflects the broad spectrum covered in our LLM programme in Maritime Law and the efforts made by students at the Scandinavian Institute of Maritime Law, University of Oslo.

Trond Solvang

Navigating the Murky Waters of Foreign Maritime Liens:

How effective is a US choice of law clause in a bunker supply contract between the supplier and time charterer for obtaining a necessaries lien?

By Sylvie Allen

Content

1 Introduction

1.1 The research problem and why it is interesting

"Other than the mortgagees, bunker suppliers are perhaps the most frequent and significant ship creditors".[1] The ability to obtain bunkers at any given port is essential for international shipping and it is standard practice to supply on credit.

In the event that the time charterer has ordered bunkers[2] and subsequently becomes insolvent before paying, the supplier[3] may find that they have few options for recovering their loss. Practically speaking, it is unlikely that they will recover payment from the charterer. Moreover, as it is standard for the supply terms to allow the vessel to consume the bunkers within the credit period, there will often be little left of the bunkers for the supplier to retrieve.

The ability to claim a maritime lien[4] against the vessel then becomes particularly pertinent for the supplier. This powerful security right arises by operation of the law, survives a change in the vessel's ownership and is enforced through the arrest of the vessel. Once the vessel is arrested, the court has the power to order a sale of the vessel and distribute the proceeds amongst the creditors. If the supplier manages to secure a lien, they will be given the highest priority as a creditor.[5] This is important because, as ships are often heavily mortgaged, there will be little left of the sale proceeds once the mortgagee is paid. On the other hand, without a lien the supplier is likely to have no remedy.

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1 Buteau (2009) at 4.

2 The time charterer will usually be responsible for the bunkers under the time charterparty. *See for example*: Gentime cl. 13(b) (BIMCO).

3 Note: in this thesis the bunker 'supplier' refers to the party contracting for the sale of bunkers and not the physical supplier.

4 The particular type of maritime lien relevant to this paper is the lien for the provision of necessaries to the vessel (which includes bunkers).

5 Paramount statutory charges such as harbour dues etc. which are expressly given priority over liens will often rank ahead; Davies (2002) footnote 2.

As a starting point, when the vessel is arrested in a jurisdiction other than where the lien 'arose', the arrest jurisdiction will apply its own private international rules to determine whether the supplier is entitled to a lien. As the vessel could be arrested in any port, and where it is arrested may be outside of the control of the supplier, whether the forum is favourable to foreign maritime liens is often a matter of luck. Hence, suppliers will frequently try to reduce the uncertainty of the forum's approach by making their supply terms subject to a law which recognises a lien for necessaries suppliers. In practice, suppliers will often choose US law, as the US is one of the few jurisdictions which provides a necessaries lien.[6] This is notwithstanding that the transaction may have no connection to the US.

However, this is not without its problems. Firstly, it is well-established that a maritime lien cannot be created under contract.[7] It must arise as a matter of the (proper) law. Secondly, even if the supplier and time charterer are able to contractually determine the proper law, if not the availability of a lien directly, the shipowner is not a party to that contract. Thus, if the courts were to accept the choice of law, it would effectively mean that suppliers are able to indirectly contract for a very powerful and secret security in a third party's property. This would not only affect the shipowner, but any other creditor to the ship. As the lien is an unregistered security which survives a change in ownership, neither the shipowner, future buyers, nor the other creditors would be able to assess their security in the vessel.

Recent developments, such as the OW Bunker litigation and the furore surrounding the Australian decision in the *Sam Hawk*, have made it particularly necessary to re-examine the tenuous relationships and terms which underpin bunker transactions.

This thesis is concerned with one aspect which has caused particular concern for suppliers and shipowners; the ability of the supplier to access

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6 Countries which are a party to the 1926 Lien Convention also recognise a lien for necessaries. Due to a limited word count, this thesis will only focus on the US.

7 Note; This is different from an ordinary lien which can be granted by the property owner under a contract.

security in the vessel by way of a US choice of law clause when the time charterer has failed to pay for the bunkers.

To put it more precisely, the research question to be addressed is the following: how effective is a choice of US law in a bunker supply contract between the supplier and time charterer for the supplier's ability to access a maritime lien over the vessel?

In answering this question, this thesis will also step back and consider whether these clauses could be made more effective and evaluate whether necessaries liens in general are the most practicable mechanism for the supplier to secure payment.

1.2 The methodology, structure and scope

As the effectiveness of the US choice of law clause depends on how widely it is accepted, a range of jurisdictions will be considered in addressing this thesis problem. Likewise, an analysis of the courts' approaches will be useful for identifying possible strategies for both the supplier and shipowner to safeguard their security in the vessel. Moreover, it will provide the basis for an overall assessment of the viability of necessaries liens as an internationally recognisable form of security.

As vessels could be arrested within any jurisdiction with a port, this thesis has necessarily been limited to a handful of particularly relevant jurisdictions. Particular attention is paid to the position of the US as it is the subject of this discussion and the approach taken by the courts will influence other jurisdictions' application of US law. The UK position is also relevant due to its controversial stance on foreign maritime liens and its influence over Commonwealth jurisdictions. Likewise, Canada and Australia are interesting as they attempt to move away from the UK position and balance the competing interests. Scandinavia offers a contrasting perspective being traditionally ship-owning and civil law jurisdictions.

Structurally, this thesis is divided into three main parts. The first part; Chapter 2 will introduce the key characteristics of a maritime lien and highlight the differing understandings of liens across the chosen

jurisdictions. This will provide the framework for the discussions in parts two and three.

Part two will analyse the approaches of the chosen jurisdictions to determine the effectiveness of the choice of law clause. Chapter 3 will discuss the US position and Chapter 4 will consider the approaches taken in the UK, Canada, Australia and Scandinavia. For each jurisdiction this thesis will first consider the status of necessaries liens within that forum, followed by an analysis of the forum's treatment of foreign maritime liens including the role of the choice of law clause. The first step is necessary because if the forum will not recognise foreign liens or accept the choice of law, it will assess the claim under its own laws.

Lastly, based on the findings in part two, part three will address practical considerations for the supplier in Chapter 5, as well as possible recommendations for the shipowner in Chapter 6. Chapter 7 will then question whether maritime liens are the most appropriate mechanism for the supplier to secure repayment or, alternatively, whether other common forms of security used in international transactions would be more effective.

2 The Maritime Lien

2.1 Introduction

The maritime lien is a peculiar form of security reserved for admiralty law and has been heavily shaped by the international nature of mercantile trade and the need to protect creditors' rights in constantly moving property. However, the perception and scope of the maritime lien varies quite significantly between jurisdictions and attempts to harmonise these liens on an international level have encountered little success.

2.2 The historical origins of the maritime lien

The maritime lien has its origins in Byzantine-Rhodian customary sea law and the *lex maritima* of medieval Europe.[8] The *Rôles of Oléron* are widely considered one of the earliest and most important codifications of these customary laws.[9] The *Rôles* are thought to have originated on the Island of Oléron in the twelfth century and spread along the western coastal states of Europe, including England and Scotland, and as far North as the Baltic Sea.[10] Of note are also the *Consolato del Mare* from the Western Mediterranean and the *Laws of Visby*, which were first printed in Copenhagen at the beginning of the sixteenth century.[11] Combined, these codifications influenced the drafting of the *Ordonnance de la Marine* of 1681, as well as other commercial codes of European civilian jurisdictions, and were accepted in the common law jurisdiction of England.[12] Therefore, the civil law codification of the ancient customary maritime laws provided the basis for modern Admiralty law, including the concept of the maritime lien.

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8 Tetley (2002) at 440-441.
9 Tetley (1998) at 13.
10 Tetley (2002) at 440-441.
11 Ibid.
12 Ibid at 442.

2.3 The nature of the maritime lien

A discussion on the nature of the maritime lien inevitably necessitates reference to *The Bold Buccleugh*, one of the leading, and most cited, English judgments on the characteristics of a maritime lien. In *The Bold Buccleugh*, Sir John Irvis referred approvingly to the civil law origins of the lien and the US decision of Justice Story in *The Nestor* before summarising the maritime lien as a:

> "claim or privilege [which] travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached".[13]

This was further expanded upon by Lord Justice Scott in *The Tolten*, where he stated that:

> "The essence of the 'privilege' was and still is, whether in Continental or English law, that it comes into existence automatically without any antecedent or formality and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the 'privileged' creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages".[14]

Judge Gorrel Barnes in *The Ripon City* further emphasised the proprietary nature of the *in rem15* remedy by describing it as:

> "a right acquired by one over a thing belonging to another – *a jus in re aliena*."[16]

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13 *The Bold Buccleugh* at 284-285.

14 *The Tolten* at 356.

15 From the Latin; "against the thing", it refers to an action brought directly against the property.

16 *The Ripon City* at 242.

It becomes apparent from these extracts that the maritime lien is a unique form of security over the vessel. It arises at the time the claim comes into existence and follows the vessel, surviving changes of ownership (although not judicial sale), until it is enforced through a proceeding *in rem*. Once completed through an *in rem* action, it will be ranked above most other creditors' claims and ranked against other liens according to the time in which it came into existence.[17]

At first glance, the maritime lien appears rather extraordinary. It does not require possession of the vessel, nor does it require registration or notice to third parties. It cannot be contracted for, but simply arises and follows the ship in secret.[18] Furthermore, it survives a purchase by a bona fide purchaser without notice.

For necessaries liens in particular, these features were historically developed for practical purposes. Due to the impossibility of communicating with the vessel's owner or acquiring financing while at sea, the Master had the authority to issue a lien over the vessel in exchange for the provision of necessaries. The vessel could then avoid being retained in port by the supplier in exchange for the supplier acquiring a prioritised security which followed the vessel wherever it went in the world. This, in turn, facilitated efficient international trade.[19]

However, the necessaries supplier may find that this lien on which they rely only provides cold comfort if it is not enforceable in other jurisdictions. Common law jurisdictions, along with many others[20], do not consider the provision of necessaries warrant a maritime lien over the vessel. Should a lien which arises under one country's laws be enforced in a jurisdiction where the lien is not recognised? How this question is answered depends on whether the maritime lien is considered to be a substantive right or a procedural remedy in the *lex fori21*.

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17 The ranking of liens may also be subject to domestic statutes or judicial practice of the forum.

18 Jackson (2005) at 551, Shipman (1892-1893) at 10.

19 *The Nestor* at [84]-[85].

20 For example, Scandinavia: *c.f.* 4.5

21 From the Latin "law of the forum".

2.4 Substantive right vs. procedural remedy

Whether liens are classified as substantive or procedural by the *lex fori* will affect the courts' process for determining whether a foreign lien can be enforced. If it is classified as procedural, the court does not need to consider whether the lien has arisen under the *lex causae22*. It only needs to determine whether the claim can be enforced under the *lex fori*. Whereas if liens are considered substantive; the court has to find the 'proper law' of the claim and check whether the claimant has a right to a lien under that law. If it would, the court will likely give effect to the lien. Notwithstanding, it will prioritise the claim in accordance with the *lex fori*.

The US courts favour the substantive approach.[23] Whereas, the Privy Council in *The Halcyon Isle* held, by a bare 3:2 majority, that a lien must be procedural as the right is only completed through an *in rem* proceeding. This conclusion led the Court, in accordance with its private international law rules, to apply the *lex fori* to determine whether a lien existed. Under English law, repairs carried out in the US did not grant a recognisable lien over the vessel (despite warranting a lien under US law) and therefore, would rank as a statutory right *in rem24* behind a British registered mortgage when the proceeds of the vessel were divided.[25]

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22 From the Latin "law of the cause" or the 'proper law'; using its private international rules the court will determine which law is the closest and most appropriate for governing the transaction.

23 Tetley (1998) at 40.

24 This statutory right gives the claimant a right to arrest the vessel to recover debt owed by its owner.

25 As mentioned in 1.1, it is particularly important for the supplier to rank above the mortgagee, otherwise there may be little left of the proceeds to satisfy their claim.

The Halcyon Isle has been heavily criticized, with Canada, and most recently Australia deciding not to follow the decision.[26] Nevertheless, *The Halcyon Isle* sheds doubt on Justice Story's confident proclamation that "the maritime law will not suffer the lien to be defeated by the mere departure of the ship from the port with or without the consent of the material-man".[27]

2.5 The personification theory

Even if the court follows the substantive approach, whether it will allow the choice of law in the supply terms to determine the *lex causae* will depend on whether the court strictly adheres to the personification theory.

The personification theory is a legal fiction which personifies the *res* (or the property) so that it may be held directly accountable for damage it causes or debts it accrues independently from that of its owner.[28] The vessel can settle its own debts through a court ordered sale and distribution between the creditors. This has a dual purpose in that it provides an enforceable remedy for claimants who may not have a direct claim against the shipowner,[29] as well as avoiding the impracticalities of finding and serving a distant shipowner.

However, the personification theory has been criticised for only providing an artificial distinction between the liability of the vessel and

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[26] *The Ioannis Daskalelis* (Can), *The Sam Hawk* (Aust). *The Halcyon Isle* has been widely criticised for failing to properly reflect the substantive nature of the lien, which, similar to other inchoate rights, require enforcement by a court. That it requires enforcement, does not mean that it is only a procedural remedy; Jackson (2005) at 481-482. This approach led to the expectations of the mortgagee being preferred over the equally legitimate expectations of the US supplier who had provided necessaries in the US on the assumption that the credit was secured by a lien over the vessel. Tetley (2002) at 16 suggests that this outcome was influenced by thinly veiled favouritism towards the English mortgagee. However, there is support for the *Halcyon Isle* in academic literature, *see* Cohen (1987). Davies (2009) at 142 also arguably indirectly supports the procedural view.

[27] *The Nestor* at [85]. *See also: The Tojo Maru* at 290G-291B where Lord Diplock considered that there was no "maritime law of the world".

[28] "Since the idea that ship can be a defendant in legal proceedings was always a fiction, this should be regarded as a metaphor rather than as a literal statement of the legal position"; Dicey (2012) at 646.

[29] *For example*, liens for salvage, damage or wages.

its owner. Rather, the ability to pursue and arrest the vessel is merely to gain access to the owner behind the vessel, and that it is the owner that will be held liable for the sums owed by way of the sale of their property.[30]Further, the owner will usually have to provide security to have the vessel released from arrest or will settle the claim to avoid the sale of the ship.

The court's position on the personification theory will affect the weight it places on the shipowner's lack of privity to the choice of law. If the court decides that the vessel is responsible, independent of the owner's *in personam31* liability, and there is a presumption that the charterer was contracting on behalf of the vessel, then the court will be more likely to respect the choice of law.[32] The vessel itself will be considered a party to the contract and the court may accept contractual terms agreed to by the parties. On the other hand, if the court rejects the personification theory, the charterer is unable to contractually bind the vessel without the consent of the owner.

2.6 The International framework

The International Maritime Organization sought to harmonise the international approach to maritime liens by drafting the Lien Convention[33], as well as the Arrest Convention[34]. Unfortunately, but perhaps not surprisingly, the Lien Convention has not proved to have been a success. Three versions have been attempted, but only 18 countries have signed the latest version, and this does not include the US or the UK. As so few

30 See *The Indian Endurance (No 2)* where Lord Steyn considered than an *in rem* and *in personam* action were one in the same and the owner was a party to both. Whilst this decision has been heavily criticised, it is not a new theory. Lord Watson in *The Castlegate* considered "every proceeding *in rem* is in substance a proceeding against the owner of the ship" and it has received early academic support in the US; *see* Shipman (1892-1893) at 9.

31 From the Latin; "against the person", it refers to proceedings brought against the person.

32 The US courts have tended to favour the personification theory; Schoenbaum at §14-3.

33 The latest version is 1993.

34 The latest version is 1999. This replaced the 1952 version, which had been a particular success with the UK ratifying it in 1959.

have ratified the Lien Convention and those that have, ratified different versions, the Convention has had the inadvertent effect of creating further discrepancies in the approach to maritime liens.

The Arrest Convention garnered more wide-spread support than the Lien Convention, however, it also fails to address the issue of maritime liens. Instead, it clumps liens and non-liens under the wide umbrella of 'maritime claims', whilst also maintaining that nothing in the convention creates liens beyond the scope of the contracting state's domestic law or the Lien Convention.[35] Furthermore, to add to the confusion, the respective Conventions appear to have been drafted without correlating the two, notwithstanding that the Lien Convention, in theory, should establish the substantive claims upon which arrests or proceedings *in rem* can be made under the Arrest Convention.[36]

2.7 Conclusion

This chapter introduced the core features of a maritime lien and highlighted two unsettled premises; firstly, whether a lien is substantive or procedural, and secondly, the legitimacy of the personification theory. A court's stance on these concepts will influence its approach to the supplier's claim.

Due to the lack of international consensus, it is necessary to consider individual jurisdictions in order to properly test the effectiveness of a choice of law clause as a mechanism for acquiring a lien, as well as to assess the viability of necessaries liens as a cross-border form of security.

[35] Article 9.

[36] Berlingieri (2006) at §99.80 and chapter 3.

3 The Applicability of a US Choice of Law Clause before a US Court

3.1 Introduction

As explained in 1.2, the US is a relevant jurisdiction for this discussion as it is the law which suppliers frequently choose to govern the supply terms. This is because, unlike most other jurisdictions, the US has traditionally protected necessaries suppliers and has codified their right to a lien.

However, US courts are currently divided on the effect of the choice of law clause and whether it removes the need to determine the *lex causae*. Moreover, the Courts are undecided as to whether the statutory right to a lien can be extended extraterritorially on the basis of a US choice of law.

The US position will determine, to a large extent, the overall effectiveness of choice of law clauses as it will influence how other jurisdictions treat a choice of US law. If US courts reject the choice, other jurisdictions, faced with applying US law, are likely to follow suit. For these reasons it is necessary to undertake a thorough analysis on the US position on necessaries liens and their treatment of foreign maritime liens, including US choice of law clauses.

3.2 The status of necessaries claims in the United States

As the US is not a party to the Lien Convention, domestic legislation and judicial precedent govern whether a lien will apply in the US. The primary statute on maritime liens is the Commercial Instruments and Maritime Liens Act ('CIMLA')[37] (formerly known as the Federal Maritime Lien Act). The Federal Maritime Lien Act ('FMLA') was enacted, to a significant extent, in 1910 to protect the interests of American necessaries suppliers.[38] This policy was retained in the 1971 amendments.[39]

[37] 46 U.S.C §§31301-31343

[38] *Dampskibsselskabet* at 273, Taylor (2008-2009) at 338.

[39] 1971 U.S.C.C.A.N 1363 at 1365 considered the FMLA would "be of great assistance to American materialmen in collecting amounts owed on necessaries".

Under §31342, a person providing necessaries to a vessel on the order of the owner, or a person authorised by the owner, has a maritime lien on the vessel and may bring an action *in rem* to enforce the lien. The owner, master and any person entrusted with the management of the vessel at the port of supply have presumed authority to procure necessaries for the *vessel*.[40] This means that the personal liability of the owner under the supply transaction is irrelevant. In addition, an officer or agent appointed by the owner, charterer or buyer in possession of the vessel, may also have the necessary authority.[41] There is no duty on the supplier to exercise due care in ascertaining the authority of the person with whom they are contracting.[42] Any provision in the charterparty which specifies that the charterer is not to permit a lien over the vessel will be considered void, unless the supplier had actual knowledge of the provision.[43] US courts have tended not to consider a stamp on the bunker receipt by the Master to be sufficient for establishing the supplier's actual knowledge,[44] therefore, 'actual knowledge' refers to actual *prior* knowledge.

The US differs from the UK in that it does not distinguish between a maritime lien and a statutory right *in rem*. Rather, all maritime claims will be granted lien status. "The existence of the lien and the privilege of resorting to the proceeding in rem are correlative, "where one exists, the other may be taken, and not otherwise.""[45] For instance, contractual claimants may have the benefit of a lien in the US if the contract is subject to admiralty jurisdiction and the claim is a 'maritime claim'.[46] This extends to contracts which are not directly for the benefit of the ship, such as contracts of affreightment and charterparties.[47] This approach has resulted in the US providing a far greater range of maritime liens

40 46 USC §31341(a)(1)-(3)

41 46 USC §31341(a)(4)(A)-(D)

42 1971 U.S.C.C.A.N 1363 at 1365-66, *M/V Freedom*

43 1971 U.S.C.C.A.N 1363, ibid.

44 See *Hebei Prince* at [12] and *M/V Gardenia* at 1510.

45 Herbert (1931) at 122 quoting: *The Rock Island Bridge* at 215.

46 In order to fall within the Admiralty jurisdiction, the claim must arise out of a 'maritime contract'; Shipman (1892-1893) at 13.

47 Russell (1999) §21, at 2-2.

than most other jurisdictions. However, not all maritime liens are treated equally.

The CIMLA defines a small class of 'preferred maritime liens', thereby providing an indication to the courts of the quality of the lien and a basic priority ranking.[48] The provision of necessaries falls within this 'preferred' category if it arose before the filing of a preferred mortgage on a US flagged vessel.[49] This means that it will rank above a US mortgage, if registered after the lien, and a foreign mortgage regardless of when it was registered.[50]It will, however, rank after the traditional liens of salvage, damage and wages.[51]

3.3 The application of US law

3.3.1 Finding the proper law

As previously mentioned[52], the US considers liens to be substantive rights which arise as a matter of law under the *lex causae*. Therefore, before enforcing a foreign maritime lien, a US court will have to first determine whether it exists under the *lex causae*. As the Appeals Circuits are divided as to whether the choice of law replaces the need for determining the *lex causae*, it is necessary to consider the conflict rules both for when there has not been a choice of law and for when there has been a choice of US law.

3.3.1.1 Where there is no choice of law in the contract

In the event that a vessel is arrested in the US and the claimant seeks to enforce a maritime lien over the vessel, the court will apply US conflict rules to determine which law should govern the claim.[53] Whether or not

48 §§31301(5)-(6).

49 Ibid.

50 46 USC §31342 (a)(1), §31301(5)(A), §31301(6), Tetley (1998) at 873-876.

51 Tetley (1998), ibid.

52 *Supra* 2.4

53 Davies (2009) at 1436.

the lien is then enforceable will depend on the *lex fori*.[54] The *lex fori* may allow a lien where the *lex causae* would not and vice versa.

US conflict rules can be divided between the federal and state level. The Restatement (Second) of Conflict of Laws presents a "clarification of conflicts law as it has been or is currently applied under state law".[55] However, the Restatement is intended as a guideline for state courts and does not provide an exhaustive prescription of conflict rules.[56] As maritime law falls within the federal domain[57], in exercising its admiralty jurisdiction the court will look to federal conflict of laws rules as opposed to state rules, such as the Restatement.[58] Notwithstanding, the Supreme Court's decision in *Lauritzen v Larsen* is the seminal authority on conflict of laws analysis at the federal level and takes a similar approach as the Restatement.[59] Hence, "even when sitting in admiralty, U.S federal courts readily apply the provisions of the Restatement (Second) of Conflicts of Laws".[60]

Under both the Restatement and *Lauritzen*, when considering the connecting factors, the Court should take into account all the points of contact between the transaction and the different jurisdictions and "weigh and evaluate them" to determine which law has the "most significant relationship" to the transaction.[61] This may mean that the law of the place of supply will not automatically qualify as the 'proper law' for determining whether a lien exists.[62] The court will then need to determine whether the lien is enforceable in the US, as the *lex fori*. If it is, it will be ranked in

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54 Ibid. at 1442-1445.

55 Anderson (2010-2011) at 50, Restatement (Second) Conflict of Laws (1971).

56 Anderson, ibid.

57 28 U.S.C §1333(1)(2006)

58 Andersen (2010-2011) at 56.

59 Regardless of which test is used, the most important point is that the court carries out separate analysis for the underlying claim and the lien; Davies (2009) at 1451.

60 Andersen (2010-2011) at 66.

61 *Lauritzen* at 582 and Restatement §188.

62 Donovan (2001) at 187. See *M/V Tento* where the connections with the US were considered more influential than the *lex situs*.

accordance with US rules on priorities, regardless of the determination of the *lex causae*.[63]

3.3.1.2 Where there is a choice of US law in the contract

If the parties have chosen US law to govern the contract, the Restatement will aid the court in deciding whether the choice should be upheld.[64] However, the court will first have to determine whether the clause is duly incorporated under the law governing the contract formation. The court will have to find this law using a *Lauritzen*/Restatement analysis as discussed above. If the clause is duly incorporated, the Restatement then provides a two-pronged assessment for determining whether it should be enforced:[65]

1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue unless either:

    a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or

    b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the

63 Tetley (2002) at 22.

64 In addition to the Restatement there is also the Uniform Commercial Code which is considered representative of the federal common law of admiralty and requires stricter standards than the Restatement. However, it does not seem to have been widely applied by the courts to maritime choice of law clauses; *See* Donovan (2001) at 91.

65 Restatement §187

> particular issue and which under the rule of §188 [law of forum], would be the state of the applicable law in the absence of an effective choice of law by the parties.

The Court should consider "the reasonable relationship of the contract to the [chosen state], the substantial contacts of the parties with [chosen state] and considerations of the [forum's] fundamental policy with respect to usury" when assessing whether the choice of law should apply.[66] Notwithstanding, the Courts will usually uphold the parties' choice of law in order to preserve their expectations and provide certainty in international transactions.[67]

Whether a US court should allow a US choice of law clause to replace the *lex causae* when there is no other connection to the US, and when it significantly affects a third party who did not acquiesce to the choice, remains an unsettled issue amongst the Appeals Circuit courts.

3.3.2 The divided appeals circuits

3.3.2.1 The Second Circuit

The decision of the Court of Appeals for the Second Circuit in *Rainbow Line* concerned a maritime lien asserted by the charterer for a breach of the charterparty by the vessel's owner. Whether the charterer was entitled to a lien depended on whether English law, as the law of the flag, applied or whether this was superseded by the choice of US law in the charterparty.

The Court summarily dismissed the charterer's argument that US law should apply as "maritime liens arise separately and independently from the agreement of the parties, and rights of third persons cannot be affected by the intent of the parties to the contract".[68] However, the Court also considered that the law of the flag was not automatically applicable as the governing law and proceeded to undertake a *Lauritzen*

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66 *Mencor Enterprises* at 440.

67 Donovan (2001) at 189, Schoenbaum (2012) at §3-24.

68 At 1026

analysis to determine the "proper law" for deciding whether a maritime lien existed.[69] Both the mortgagee and the shipowner were American corporations and, therefore, the Court concluded that US law was the most appropriate law to apply to the dispute. On this basis, the charterer was granted a lien over the vessel.

Whilst *Rainbow Line* concerned a lien for a charterparty, the central issues are analogous to the focus of this discussion. It is likely that if a US choice of law clause in a bunker contract came before the Second Circuit, the Court would require a more substantial link with the US before allowing such a lien.

3.3.2.2 The Fifth Circuit

The decision of the Fifth Circuit in *Queen of Leman M/V* stands in contrast to the approach taken by the Second Circuit thirty years earlier. As in *Rainbow Line* the *Queen of Leman* did not concern a claim by a bunker supplier, but rather a claim for a lien for unpaid insurance premiums. Nevertheless, the *Queen of Leman* is relevant for the present discussion as insurance premiums are considered necessaries under the CIMLA.

The Court distinguished the reasoning of an earlier judgment of the Fifth Circuit in *Hoegh Shield* on the basis that *Hoegh Shield* had only applied a conflict of laws analysis because there had been no choice of law in the contract.[70] In contrast, the parties in the *Queen of Leman* had chosen English law to govern the contract, subject to the disclaimer that nothing in the contract shall affect the right of the Insurer to take action in any jurisdiction to enforce its right of lien in accordance with the local law.[71] Thus, the Court held that US law applied to the existence of a maritime lien, notwithstanding the effect the application of the choice of law provision would have on third parties, such as the subsequent owners.[72]

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69 At 1026-1027.

70 *Queen of Leman*, at 355.

71 Ibid. at 352.

72 At 355.

A recent judgment from the District Court of the Eastern District of Louisiana[73] applied the principles of the *Queen of Leman* to a dispute involving a Singaporean-based bunker supplier's claim for a lien over a Panamanian flagged vessel for bunkers delivered in Singapore, under a US choice of law clause.[74] Feldman J considered that firstly; the clause was duly incorporated into the contract under Singaporean law, the law governing contract formation, and secondly; that it was irrelevant that the shipowner was not a party to the contract because the lien is an action *in rem* against the vessel and the charterer had presumptive authority to consent to the choice of law on behalf of the vessel.[75] On this basis, the supplier could access a lien under the CIMLA.

3.3.2.3 The Eleventh Circuit

Notably, the Eleventh Circuit denied the extraterritorial application of the CIMLA. In *Trinidad Foundry*, a Trinidadian company repaired a Norwegian-flagged vessel and provided her with necessaries in Trinidad. The owners, who ordered the repairs and supplies, were registered outside the US. The repair contract was subject to English law. The Court upheld the finding of the District Court that they did not have *in rem* jurisdiction because English law applied to the determination of the lien and under English law the supplier only had a procedural right against the vessel, and not a substantive right. As there is no equivalent under US law, the Court held that it did not have jurisdiction to allow an *in rem* action, nor to grant a lien.

In *obiter dicta* the Court also noted that "§31342 does not provide for a maritime lien for goods and services supplied by a foreign plaintiff to a foreign flag vessels in foreign ports."[76]As the parties had not chosen US law, the Court did not need to decide whether this would have allowed for the application of the CIMLA. However, it is arguable that, in light of their apparent rejection of the extraterritorial application of §31342,

[73] Which is bound by precedent of the Court of Appeals of the Fifth Circuit.

[74] *Bulk Juliana*.

[75] *Bulk Juliana* at 11.

[76] At 617.

the Court would consider a choice of US law by itself to be insufficient to trigger the application of the CIMLA.

3.3.2.4 The Ninth Circuit

The Court of Appeal of the Ninth Circuit in *Trans-Tec* held that a US choice of law provision in the bunker supply contract was valid and thus the CIMLA applied, granting the foreign bunker supplier a lien over the vessel. In *Trans-Tec*, the Owner was a Malaysian corporation, the time charterer was a Taiwanese company and the bunker supplier was Singaporean.[77] The bunkers were supplied in Busan, South Korea. The only factors connecting the transaction with the US were the bunker supplier's terms and conditions, which included a US choice of law provision, and the vessel's route between North and South American ports and Asia.

The Court considered that; first, it must determine the law of contract formation[78]; second, it must apply that law to determine whether the US choice of law provision found in the seller's General Terms and Conditions was duly incorporated into the bunker confirmation; and lastly, if the choice of law is applicable, it will apply US law to decide whether the supplier is entitled to a maritime lien.[79]

To find the law governing the formation of the contract, the Court based its analysis on "both the Supreme Court and the Ninth Circuit law".[80] Thus, the Court referred to the principles set out in *Lauritzen*, as well as the Restatement §188, and considered the transaction's points of contact. After weighing the various connections with other jurisdictions, the Court concluded that Malaysian law was the 'proper law' to apply to the formation of the contract, as the owner was a Malaysian corporation and the vessel was Malaysian-flagged.[81] The Court considered that the place of delivery was largely irrelevant.[82]

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77 At 1122

78 *Supra* 3.3.1.2

79 At 1124. *Supra* 3.3.1.1

80 Ibid., *Supra* 3.3.1.1

81 *Trans-Tec*, at 1124-1125.

82 At 1125

The Court then considered whether Malaysian law, which at the admittance of the Court relies heavily on English law, would consider the choice of law clause incorporated into the contract.[83] The Court decided that it would on the basis of tacit acceptance by way of the charterer's conduct.[84]

In considering whether the choice of law should be accepted[85], the Court followed the approach taken in the *Queen of Leman* that "the ship's presence in the jurisdiction represents a substantial contact"[86]and held "that a maritime lien might exist on the vessel under United States law, but would not exist under Malaysian law, was a consequence obviously contemplated by the contracting parties, and because the *Harmony* sailed into a United States port, results in no fundamental unfairness."[87]

In its final stage of analysis, the Court considered the applicability of the CIMLA and concluded that the statute was intended to apply extraterritorially as it did not refer specifically to US suppliers, vessels or ports, and therefore, can be extended to situations where there is no connection with the US.[88] At any rate, the Court considered that the arrest in the US, combined with the vessel's previous visits to US ports, meant there was no issue of extraterritoriality.[89]

In a recent unpublished decision of the Ninth Circuit the Court of Appeals affirmed the application of *Trans-Tec* and held that the bunker supplier had a lien as a result of the choice of US law in the bunker contract. [90] Watford J, whilst concurring as the bench was bound to follow the precedent set by *Trans-Tec*, considered that "*Trans-Tec* was wrongly decided".[91] The Judge came to this conclusion on the basis that the Ninth Circuit should not have applied *Queen of Leman*, as in that

83 Ibid.

84 Ibid.

85 *Supra* 3.3.1.2

86 *Queen of Leman*, at 354 as quoted in *Trans-Tec* at 1126.

87 *Trans-Tec* at 1127.

88 At 1129-1131.

89 At 1132

90 *M/V Trogir.* As an unpublished decision, it is not of precedential authority.

91 Per Watford J at 1.

case the contract was between the claimant and the shipowner. Instead, he reasoned that;

> "the Fifth Circuit's reasoning has no application in a case like *Trans-Tec*, which involved a non-party that neither knew about nor consented to the contractual provision at issue. *Trans-Tec*'s holding is in conflict with what our court had earlier described as "an obvious truism – non-parties cannot be bound by an agreement" *Gulf Trading & Transp. Co v M/V Tento*, 694 F.2d 1191, 1196 n.8 (9th Cir. 1982)."[92]

Judge Watford considered that the Court in both *Trans-Tec* and the present case should apply *Lauritzen* to determine the proper law to apply to the maritime lien.[93]

3.3.2.5 The Fourth Circuit

3.3.2.5.1 Triton Marine

Triton Marine concerned the provision of bunkers in Ukraine by a Panamanian corporation to a Norwegian-owned vessel, bareboat chartered to a Russian company and sub-chartered to a Cayman Islands corporation with its headquarters in Seattle. The vessel was registered in Malta but sailed under a Russian flag under the bareboat charter. The bunker confirmation identified the sub-charterer as the buyer acting "[o]n behalf of the M/V 'Pacific Chukotka' and jointly and severally her Master, Owners, Managing Owners/Operators, Managers, Disponent Owners, Charterers, and Agents"[94]. The confirmation also provided for US law to apply to the agreement. The connecting factors with the US were the sub-charterer's headquarters and the vessel's journeys to the US.

The Court identified two principal issues arising from the proceedings. Firstly, whether the US choice of law clause was enforceable, and secondly, if it was, whether the claimant was entitled to a maritime lien under the

92 Ibid.

93 Per Watford J at 2. *Supra* 3.2.1

94 At 412

CIMLA. The bench considered that in light of the choice of law by the parties, there was no need for a *Lauritzen*/Restatement analysis on the 'proper law'.[95] Therefore, US law applied to determine the existence of a lien. The Court applied the personification theory and rejected the shipowner's argument that they were not a party to the contract, on the basis that the proceedings were *in rem* against the vessel.[96] The Court quoted *Trans-Tec* and stated that it was a "fundamental tenet of maritime law" that the charterer had presumed authority to bind the vessel when ordering necessaries.[97] Therefore, the vessel could be bound by the presumed authority of the charterer "even without [the shipowner's] knowledge or consent".[98] Consequently, the Court did not consider the imposition of a maritime lien to unfairly prejudice the shipowner or other third parties.[99]

The Court further rejected the shipowner's argument that a choice of law clause served to create a lien by contract, instead reasoning that the choice of US law did not grant a lien in itself, but rather the lien arose from the operation of US law.[100]

In deciding whether the CIMLA applied, the Court again followed the reasoning in *Trans-Tec* and held that the CIMLA is not restricted to American suppliers or vessels.[101]Nevertheless, the Fourth Circuit considered that there were no issues of extraterritoriality as the charterer's headquarters in Seattle and the vessel's visits to US port's constituted sufficient connections to warrant the application of US law, including the CIMLA.

95 At 413
96 *Supra* 2.5
97 At 414, referring to *Trans-Tec* at 1127-1128.
98 At 414
99 At 414-416.
100 At 416
101 At 416-417

3.3.2.5.2 Hebei Prince

The recent decision of *Hebei Prince* followed the approach taken by *Trans-Tec* and *Triton Marine* indicating that, without a Supreme Court judgment on the matter, the state of the law is settled in the Fourth Circuit. *Hebei Prince* concerned the delivery of bunkers to a Hong-Kong flagged vessel in the United Arab Emirates upon the order of the time charterer, a Greek corporation. The bunker supplier was a company incorporated in the United Arab Emirates and the vessel's owner was a Chinese company. The only factors connecting the proceedings to the US was a US choice of law clause in the supplier's terms and conditions and the vessel's arrest in Virginia.

Similar to *Triton Marine*, the Court considered it unnecessary to undertake a *Lauritzen* analysis of the applicable law in light of the choice of US law[102] and rejected the argument that upholding such a choice was unfair against the vessel owner who was not a party to the contract.[103] Furthermore, in *obiter*, the Court also held that it was unnecessary to decide whether Greek or US law was the law governing the contract formation as both would treat the choice of law as duly incorporated into the contract.[104]

Applying the US choice of law, the Court in turn upheld the application of the CIMLA and held that as the supplier did not have actual knowledge of the charterer's authority to bind the vessel, the supplier was entitled to a maritime lien under §31342.[105]

3.3.3 Discussion

The aim of this discussion is to weigh the respective Circuits' approaches, both in light of the choice of law analysis set out in 3.3.1 and their handling of the issues introduced in Chapter 2. This analysis is useful as it will frame the commercial strategies of suppliers and shipowners

[102] At 514
[103] Ibid.
[104] At 514 and 519.
[105] At 522

and provide guidance for other US Circuits, as well as other jurisdictions faced with a US choice of law clause.

3.3.3.1 The choice of law analysis

Bolstered by the decision of the Fifth Circuit in the *Queen of Leman*, the Fourth and Ninth Circuits placed considerable weight on upholding the commercial expectations of the contracting parties in order to promote certainty and predictability. This led to the courts to accept the choice of law. The extent to which each court tested the appropriateness of the choice under the Restatement §187 varied.[106]

Trans-Tec did not explicitly 'test' the parties' choice. However, it did follow the *Queen of Leman*, which held that "the ship's presence in the jurisdiction represents a substantial contact"[107], suggesting that the Ninth Circuit considered §187(2)(a) to be satisfied nonetheless. It is unclear why the courts accepted the vessel's arrest at a US port to be a sufficiently substantial connection, whilst also considering the place of supply to be merely fortuitous.[108] Arguably, the place of supply has more connection to the transaction than the jurisdiction where the claimant chooses to enforce a claim.

Whereas the Fourth Circuit considered it unnecessary to test the applicability of US law under the Restatement, *Lauritzen* or the UCC and simply upheld the parties' choice.[109] It reasoned that there was no "compelling reason of public policy" to refuse the choice.[110] Thus, *Triton Marine* only briefly considered §187(2)(b) and overlooked (a). Due to the framing of §187, this was open to the bench, as courts can choose to test the choice under §187(2)(a) or the more cursory comity test in (2)(b).

The District Court in *Bulk Juliana* did not disagree with the "compelling argument" that courts should not simply accept the parties' choice of

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106 Supra 3.3.1.2

107 *Queen of Leman* at 354.

108 *M/V Tento* at 1195.

109 Raudebaugh (2009-2010) at 654.

110 *Triton Marine* at 413, referring to *Bremen* at 12-13 and *Lauritzen* at 588-589.

law but test its connection with the US, but nonetheless considered itself bound by the *Queen of Leman* to enforce the parties' choice.[111]

The main benefit of the approach taken by the Fourth, Fifth and Ninth Circuits is that it arguably "provides a functional blueprint" for "complex international maritime contracts" and helps achieve the goal of keeping trade moving.[112]However, the disadvantage is that it forgoes a proper 'quality check' of the choice of law and does not acknowledge the role of the shipowner.

A cursory application of the Restatement §187 may cause comity concerns, as suppliers will be able to easily avail themselves of US law to circumvent the laws of the *lex causae*. Furthermore, the US is at particular risk of usury, being one of the few countries which allow a lien for necessaries. Although §187 allows the courts to give preference to the parties' choice for the sake of certainty, it is arguable this should not be given as much weight when the effect of the choice is to grant security in a third parties' property without their knowledge. Similarly, all three courts relied heavily on the *Queen of Leman*, when they could have, and arguably should have,[113]distinguished it on the basis that the shipowner was a party to the contract in that case, and thus there had been greater reason to uphold the parties' choice.

In contrast, the Second Circuit and the minority judgement in *Trogir* considered the choice of law to be irrelevant because firstly; enforcing it would disadvantage third parties who were not a party to the contract, and secondly; a maritime lien cannot arise out of a contract. Thus, proceeding on the basis that there had been no choice of law, the Second Circuit had to determine the *lex causae* in accordance with the process set out in 3.3.1.1. Both deemed *Lauritzen* as particularly instructive for determining the *lex causae*. This approach is preferable as it provides certainty for the shipowner, who can more easily predict the governing law based on established conflict of laws analysis, than if it is prescribed under a contract to which they are not a party and have no knowledge.

111 At footnote 1.

112 Taylor (2008-2009) at 345.

113 *Trogir,* per Watford J at 1.

3.3.3.2 Contractual privity

In *Trans-Tec*, the owner argued that the clause was not duly incorporated into the contract between the supplier and charterer. However, the Court considered that under the law governing contract formation (Malaysian law), the charterer had tacitly accepted the term. Arguably, in applying Malaysian law – which is based on English law – the court should have instead considered the tacit acceptance of the shipowner, whose security was at stake under the clause.

In *Triton Marine* and *Bulk Juliana* the owners argued that they could not be bound by the choice of law as they were not parties to the bunker contracts. Both courts applied the personification theory[114] to hold that, as the action was *in rem,* the shipowner did not need to be a party to the contract. Acknowledging that the vessel cannot physically contract by itself, the three courts agreed that it is a "fundamental tenet of maritime law" that the charterer has presumed authority to enter into a contract on the ship's behalf.[115]

Whilst this 'tenet' may be correct when applying the CIMLA, *Bulk Juliana* and *Triton Marine* applied this assumption to determine that the vessel was bound by the term *before* having determined that the CIMLA was applicable.[116] The courts should have instead considered whether the vessel (or its owner) was bound by the contract from the view of the law governing the contract formation.[117]

In any event, the issue of contractual privity is arguably peripheral to this discussion considering that maritime liens cannot be created by contract.[118] Some contend that this premise can no longer be supported when the US allows liens for breach of charterparties and the provision of

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114 *Supra* 2.4

115 *Triton Marine* at 414, *Trans-Tec* at 1127-28, *Bulk Juliana* at 11. *Compare: The Yuta Bondarovskaya* at 362-365, where the UK court held that actual authority was "almost inconceivable" and implied was not arguable.

116 *Bulk Juliana* at 11-12, *Triton Marine* at 414.

117 The owner argued this in the *Bulk Juliana* but the Judge quickly dismissed it on the basis that the position of the foreign law had not been sufficiently proven; at 9.

118 *Supra* 2.2

necessaries, where a lien "would not arise without the […] agreement".[119] However, there is a clear difference between liens which are *created* by the contract and would not otherwise apply under the governing law, versus liens which are recognised by the contract as an available remedy under the governing law. For instance, if the vessel was supplied in the US by a US supplier, the choice of law clause would merely reflect that US law governed the transaction as the *lex causae* and the supplier was entitled to a lien under the CIMLA. Whereas, if the vessel is supplied in Singapore and none of the parties are American, the governing law is unlikely to grant a lien to the supplier. Thus, the contract containing the choice of law allows the supplier to access a lien when they otherwise would be prevented from doing so.

On a similar note, *Triton Marine* considered that "the inclusion of this choice-of-law provision, however, did not "create [] by agreement" any such lien; the maritime lien would still have to arise by operation of law".[120] This is true in that the supplier would still have to meet the criteria of the CIMLA. Nevertheless, the effect "is to allow the parties to do indirectly (by choosing the law of the nation that recognizes maritime liens for necessaries) that which they are prohibited from doing directly"[121]. Thus, the "fundamental distinction" that liens arise separately and independently of a contract could be lost if future courts decide to follow the Fourth, Fifth and Ninth Circuits.[122]

In contrast, the Second Circuit firmly upheld this "fundamental distinction" and considered that upholding the choice of law would effectively allow the suppliers to contractually create a maritime lien.

Moreover, both the Second Circuit and Watford J in *Trogir* rejected the notion that the vessel could be bound independently of its owner. Neither referred to the presumption in the CIMLA that the charterer had authority to bind the vessel; suggesting that they did not consider it relevant for establishing contractual privity.

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119 Donovan (2001) at 198.

120 At 416.

121 Davies (2009) at 1457

122 Raudebaugh (2009-2010) at 654.

3.3.3.3 The effect on third parties

It is not uncommon that third parties will be inadvertently affected by a contract and *Triton Marine* and *Trans-Tec* reasoned that as the third party was the shipowner, the burden was not unreasonable.[123] As the owner had a contractual relationship with the charterer and oversight of its vessel, it had access to information on the supplier and location of the bunkering and the vessel's journey to the US. The supply terms can also often be easily found on the supplier's website under their General Terms and Conditions. *Rainbow Line* was thus distinguished on the basis that in that case the third party was further removed from the transaction, and consequently had less access to the terms of the contract. Furthermore, this position echoes the policy behind the 1971 amendments to the FMLA:

> "As a practical matter, the owner can more easily protect himself contractually by bonds or otherwise at the time he charters the vessel, than can the American materialman who furnishes necessaries to a vessel under great economic pressure to put back at sea"[124].

However, Professor Davies argues that distinguishing *Rainbow Line* makes little sense as a "third party is a third party is a third party".[125] The Circuits also did not consider that the shipowner is not the only third party who will be affected by the contract. Mortgagees and other creditors, who have little or no control over the vessel or knowledge of its whereabouts, will also risk having their security relegated.

3.3.3.4 The extraterritorial application of the CIMLA

After having upheld the choice of US law, the Fourth and Ninth Circuits turned to apply the CIMLA. Both considered the lack of explicit reference to US suppliers, vessels or ports was indicative of the provision's extraterritorial applicability. By focusing on the plain meaning of the provision,

123 *Trans-Tec* at 1127, *Triton Marine* at 415.

124 1971 U.S.C.C.A.N 1363 at 1365.

125 Davies (2009) at 1457

the courts side-lined the historical purpose of the CIMLA which was directed at protecting "American materialmen". [126]

The Ninth Circuit dismissed *Trinidad* as "a house of cards that quickly tumbles with even the gentlest examination".[127] This is notwithstanding that the approach taken in *Trinidad* is more consistent with the position of the Supreme Court than *Trans-Tec*. The Supreme Court has held on multiple occasions that US Acts should only have extraterritorial reach if expressly granted such application by Congress.[128] Without such indication, there is a presumption against extraterritoriality.[129]In the context of liens, extraterritorial application is an especially "valid concern" as so few countries recognise a necessaries lien.[130]

3.3.3.5 Conclusion

The reasoning of the Fourth and Ninth Circuits hinges on the personification of the vessel. As discussed at 2.4, this is an unsettled premise which is even harder to apply within the context of a contract. It is evident that a vessel cannot enter into a contract on its own volition. Under US law this is solved by the statutory presumption in the CIMLA that the charterer is the vessel's agent. However, this presumption cannot be extended to determine that the vessel has agreed to the application of US law.

Trinidad and *Rainbow Line* are older judgments than *Trans-Tec* and *Triton Marine* and reflect the 'minority' position in the division between the Circuits.[131] Further, neither judgment had to directly address the issue of whether a necessaries supplier could acquire a lien through the choice of law. Whilst, these decisions have been endorsed recently

126 1971 U.S.C.C.A.N 1363 at 1364.

127 *Trans-Tec* at 1133.

128 C.f. *Morrison* (re. The Securities and Exchange Act) and *Kiobel* (re. The Alien Tort Statute)

129 Smerek and Hamilton (2011) at 21.

130 Taylor (2008-2009) at 344.

131 Davis (2015) at 405. The Second and Eleventh Circuits are a minority both in geographical terms and because they are outnumbered 3:2 by the Fourth, Fifth and Ninth Circuits.

this was only in a minority judgement in an unpublished decision.[132] Notwithstanding, it is submitted that the reasoning of these Circuits and Watford J gives greater consideration to both the unique nature of the lien and the serious consequences of allowing the parties to contract for such privileged security to the detriment of third parties.

By undertaking a *Lauritzen* choice of law analysis, the Second Circuit afforded more weight to "comity concerns" than the Fourth, Fifth and Ninth Circuits which only "make *some* informal reference to U.S points of contact to satisfy any concerns about public policy, unreasonableness and comity"[133]. Moreover, along with Watford J, it distinguished more clearly between the choice of law analysis and the application of the CIMLA. Instead of applying the CIMLA presumption to determine whether the vessel was bound by the choice of law, it used ordinary contract law principles to hold that a third party cannot be bound by a contract. By disregarding the choice of law, both judgments also placed more importance on the core feature of the maritime lien; that it arises as a matter of the (proper) law.

Furthermore, the Eleventh Circuit's approach reflected the underlying purpose of the CIMLA, which was to protect American suppliers. It is a domestic statute which pursues a domestic policy. Thus, there is no reason to extend this protection to foreign suppliers who have no reasonable expectation for such protection when supplying non-US vessels outside of the US.

It is submitted that the combined effect of these 'minority' judgments balances the risks between the shipowner and the bunker supplier and results in a more predictable and commercially-minded outcome.

3.4 Conclusion: Are US choice of law clauses effective before a US court?

The analysis in Chapter 3 has demonstrated that the effectiveness of a US choice of law provision depends entirely on the Circuit which it comes

[132] *Trogir* per Watford J.

[133] Davis (2015) at 431.

before. The outcome of *Trans-Tec* and *Triton Marine* is that a US choice of law clause will automatically apply if the vessel is arrested within the jurisdiction of the Fourth or Ninth Circuit. This is by no means inconsequential as three of the ten largest US ports (by volume of international trade) are situated within these Circuits.[134] Moreover, a further six lie within the scope of the Fifth Circuit, including Houston – the port with the largest volume of international trade in the US.[135]

However, the *Bulk Juliana* was only a District Court decision and the Appeals Circuit could still distinguish *Queen of Leman* on the basis that the shipowner was a party to the choice of law. Furthermore, the position of the Second Circuit is influential as both New York and New Jersey fall within its jurisdictional reach and rank third equal amongst US ports.[136]Based on *Trinidad Foundry*, the Eleventh Circuit is also likely to give little effect to the choice of law clause when there is no other connection with the US. The First and Third Circuits are yet to side with either position.

Without an indication from the United States Supreme Court as to which approach should be favoured, the Circuit Courts of Appeal remain divided, creating uncertainty for both suppliers and shipowners, as well as other jurisdictions faced with a US law provision.[137]

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134 AAPA 2013, Los Angeles, CA (#4), Hampton Roads, VA (#5), Long Beach, CA (#8).

135 Ibid., Houston, TX (#1), New Orleans, LA (#2), Port Arthur, TX (#6), South Louisiana, LA (#7), Corpus Christi, TX (#9), Morgan City, LA (#10)

136 Ibid.

137 The Supreme Court rejected a *certiorari* application by the shipowner in *Trans-Tec*; *Splendid Shipping SDN BHD v Trans-Tec Asia*, 129 S.Ct. 628, 2008 WL 4106794 (Dec.). However, it is hoped that in light of the problems caused by the lack of accord between the Circuits, the Supreme Court may reconsider; Davis (2015).

4 The Applicability of a US Choice of Law Clause in Other Jurisdictions

4.1 Introduction

After having discussed the US position, this chapter will now analyse and compare the approaches of the jurisdictions identified in 1.2. Once again, the courts' appraisal of the competing interests, as well as its position on the personification theory and whether liens are substantive or procedural,[138] will determine whether the choice of law is accepted.

If the choice of law is not accepted, the court will either apply the *lex fori* to assess the claim or conflict rules to try to find the *lex causae*. Thus, it is necessary to consider the status of necessaries liens within each forum.

Even if the courts accept the application of US law, it may be difficult to implement. Firstly, as seen in 3.3.2 and 3.3.3 the US courts are divided in their approach. Secondly, it may not fit within the jurisdiction's admiralty framework. For instance, the jurisdiction may not have the mechanisms for recognising and enforcing a foreign maritime lien. Lastly, there is the question of whether it should be enforced if it disadvantages the shipowner, other creditors and the jurisdiction's own suppliers.

4.2 The United Kingdom

4.2.1 The status of necessaries claims

The United Kingdom, along with most other jurisdictions, does not recognise a maritime lien for the provision of necessaries.[139] Unlike the US, the UK has for the most part limited the availability of liens to the

[138] *Supra* chapter 2.

[139] Jackson (2005) at 261: the Senior Courts Act 1981 (formerly the Supreme Court Act), which provides the courts with admiralty jurisdiction, does not define which claims are worthy of a lien. Instead, this has been left to judicial development.

three traditionally recognised liens; damage, salvage and wages.[140] This is to reflect the special nature of the maritime lien and protect lien holders from unlimited competing claimants, and the shipowner and creditors from losing their security. Thus, the personification theory only applies to the vessel's tortious liability. For contractual claims such as necessaries, the claimant only has a statutory right *in rem* to arrest the vessel.[141] Once an *in rem* writ has been issued the claimant will be granted the status of a secured creditor but their claim will rank lower than a lien-holder.[142]

However, a statutory right *in rem* is merely a procedural right which allows the claimant to pursue the liable party using their property as security.[143] Thus, the supplier can only proceed *in rem* if the person who would be liable *in personam* at the time the claim arises is also the owner or demise charterer when the action is brought.[144] For instance, if the time charterer ordered the bunkers and failed to pay, the necessaries supplier will only be able to arrest the vessel if the charterer has become the owner or demise charterer when the *in rem* action is brought. Ordinary principles of agency are able to overcome this dual-limbed test.[145] Hence, if the bunkers are ordered for the owner by their agent, the *in personam* requirements will be satisfied. However, unlike in the US, there is no presumption that the time charterer is an agent of the shipowner and, thus, there is no need to notify the supplier of the charterer's lack of actual authority. [146] The supplier may even be obliged to take reasonable measures to ascertain whether the agent has the necessary authority.[147]Further, the

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140 Bottomry and Respondentia are still considered to grant a lien, however, due to modern communication and financing, they are now obsolete.

141 UK courts have jurisdiction to hear necessaries claims under s 20(2)(m) Senior Courts Act 1981 (including non-British vessels or non-British owners (s 20(7)(a)), and is not limited to claims arising in the UK (s 20(7)(b)). If the defendant is domiciled in an EU Member State or Convention State, Brussels I Regulation or the Lugano Convention must be satisfied before a UK court has jurisdiction.

142 *The Monica S*

143 White (2014) at 86-87.

144 Senior Courts Act, s 21.

145 Tetley (1998) at 565.

146 Ibid, at 572.

147 *The Tolla* (no duty) vs. *Cann v Roberts* (duty)

bunker supplier has the burden of showing that the agent had authority (either ostensible or actual) to bind the shipowner and/or the vessel.[148]

Therefore, the UK approach to necessaries claims fundamentally differs from the US in that a bunker supplier will not be entitled to a maritime lien but only a lower ranked maritime claim. This means that, firstly; under UK law the right in the *res* does not arise automatically by operation of the law, but is contingent on the supplier arresting the vessel and bringing a claim under the domestic law of the UK. Secondly, in order to attain a statutory right *in rem*, the party liable *in personam* must also be the vessel's owner at the time the *in rem* action in brought, as the function of the *in rem* remedy is only to acquire security for the claim against the ship's owner.

4.2.2 The application of US law

Almost thirty years ago the Privy Council in *The Halcyon Isle* held that a maritime lien is a procedural remedy as opposed to a substantive right and, therefore, whether it could be enforced was a matter for the *lex fori*.[149] This means that a UK court will not look to whether the lien exists under the *lex causae*, but only whether the lien is capable of being enforced in the UK.[150] Despite having been heavily criticised by many legal scholars and other jurisdictions for encouraging forum shopping and destroying the legitimate expectations of American bunker suppliers,[151] the position taken by the Privy Council is not new. [152]Moreover, it is understandable to the extent that it provides a simple solution to a complicated matter and seeks to reduce the availability of maritime liens so as to protect their privileged status and the rights of non-lien creditors. The extensive liens available under US law is driven by a policy to protect US service and supply industries, and this domestic policy should not necessarily affect

148 Tetley (1998) at 565.

149 *Supra* 2.4

150 *Supra* 2.4

151 *Supra* footnote 27.

152 Thomas (1980) at 371-374 predates the *Halcyon Isle* and considered that the general approach by UK courts was to classify the lien as procedural.

the standing of registered international creditors, nor disadvantage service suppliers from other countries.[153] The UK courts have not considered it necessary to overturn *The Halcyon Isle* and it remains 'good law' in the UK.

If the Privy Council previously refused to recognise a lien claimed by a US necessaries supplier for necessaries supplied in the US, UK courts will be especially loath to accept a necessaries lien when the transaction has no connection to the US other than a choice of law clause in a contract to which the vessel's owner is not a party.

In *The Fesco Angara(No 2)*, the bunker supply contract between the English supplier and the Danish charterers was subject to US law. In *obiter*, the Court of Appeal considered that in accordance with "a well established legal framework"[sic], English law applied to the existence of a lien and the UK did not recognise a lien for necessaries.[154] Hence, without an *in personam* connection with the shipowner, the supplier was unable to enforce their claim against the vessel in the UK.

4.3 Canada

4.3.1 The status of necessaries claims

Canada, similar to the US and UK, is not a party to the Lien Convention. The governing law can instead be found across three domestic statutes; the Federal Courts Act (1985), the Canada Shipping Act (1985) and the Marine Liability Act (2001). In accordance with the Federal Courts Act, the Federal Court of Canada has jurisdiction for *in rem* claims.[155]

The maritime law of Canada largely reflects its Common Law background with one notable exception; its approach to liens for necessaries suppliers. In 2009, the Canadian Parliament amended the Marine Liability Act and added section 139, creating a maritime lien for Canadian necessaries suppliers. This was done in an attempt to secure

[153] Cohen (1987) at 154 where the author reasoned that a court applying its own laws should not give a foreign claimant greater standing than it gives to local claimants.

[154] At [38]-[39].

[155] Section 22.

"parity in treatment between the claims of American and Canadian ship suppliers".[156]

Notwithstanding, the new section fell somewhat short of industry expectations, with some lamenting that the change did not do enough to achieve parity with US suppliers.[157]The section restricts the availability of a lien to suppliers "carrying on business in Canada"[158] and supplying "foreign vessels".[159] This appears at odds with the universal application of the Canadian *in rem* jurisdiction in the Federal Courts Act[160]and contrary to the very nature and purpose of a maritime lien, which is to provide security which follows the vessel around the world.[161]

The section has also caused some confusion by removing the requirement for an *in personam* link with the shipowner except for the provision of lighterage and stevedoring services.[162] The Federal Court in *The Nordems163* concluded there was no indication that the section had removed the requirement that "services must have been provided at the request of the owner or person acting on his behalf". Although this makes practical sense, whether this was a correct interpretation of the statute is uncertain given the explicit restriction of an *in personam* link to lighterage and stevedoring.[164]

A more workable solution, which would have avoided the above issues, would have been for the drafters to use the same legal test as for the statutory right *in rem*, but promote the claim to the status of a lien.[165]

As in the US, there is a presumption that the bunkers are ordered on behalf of the vessel and its owner, however, this presumption is more

156 Transport Canada (2005) at 42, as quoted in Myburgh (2010) at 287.
157 Myburgh (2010) at 290.
158 s 139(2)
159 Ibid.
160 s 22(3), *see also*: Myburgh (2010) at 289 and footnote 35.
161 Myburgh (2010) at 289.
162 Shipping Federation of Canada (2009) at 2-3.
163 (2010) at [15]
164 Marine Liability Act, s 139(2.1)
165 Jette (2009) at 7.

easily rebutted under Canadian law.[166] Constructive knowledge that the purchaser of the bunkers did not have authority to bind the vessel is sufficient to override the presumption.[167] Furthermore, the supplier may also have a duty to inquire as to the buyer's authority if circumstances indicate that the buyer is not the vessel's owner.[168]

4.3.2 The application of US law

Canadian courts have continued to follow the decision of the Canadian Supreme Court in *The Ioannis Daskalelis*, despite having been based on the UK decision of *The Colorado* which was overturned by the Privy Council in *The Halcyon Isle*. *The Ioannis Daskalelis* favoured the substantive over the procedural approach. Therefore, under Canadian conflict of laws rules, the court will apply the *lex causae* to establish the existence of a lien and the *lex fori* to determine its ranking.[169] Generally, Canadian courts can defer to the parties choice of law, but absent a choice, the court will weigh the various connecting factors to determine which law has the closest and most substantial connection to the transaction.[170]

In *The Lanner* the majority of the Federal Court of Appeals accepted that the US choice of law clause in the contract between the supplier(s) and the ship's management company applied to the determination of a maritime lien, notwithstanding there otherwise being no connection with the US. Although recognising that maritime liens cannot be created by contract, the Court considered that, in the interests of "certainty and predictability in maritime transactions of a jurisdictionally diverse character", the parties' choice of law should be upheld.[171]However, the Court left room for this to be overridden when the transaction is so strongly connected to a jurisdiction other than that chosen by the parties

166 *The Nordems* (2011) at [18]-[19], *Har Rai* at [3]-[11].
167 *The Nordems* (2011) at [18]-[19].
168 Ibid., at [60], Tetley (1998) at 572.
169 Tetley (1998) at 1280.
170 *M/V Samatan*
171 *The Lanner* at [24].

that it should govern the transaction instead.[172] The Court also left open the question of whether the shipowner had to be a party to the supply contract in order for the choice of law to apply. In the present case the contract was between the supplier and the ship's manager who had been given authority by the owner to enter into contracts for the provision of necessaries on their behalf.[173]

When turning to the application of US law, the Court considered whether a US court would allow a lien when there was no connection to the US other than the choice of law clause. The Court acknowledged that there were differing opinions across the US Appeals Circuit but decided to follow the approach taken by the Ninth Circuit in *Trans-Tec* as it was the latest Appellate decision and shared analogous facts with the case before the Court.[174]

Notably, Justice Pelletier disagreed with the application of US law on the basis that, due to the lack of harmonisation across the Appellate Circuits, there was no such thing as "US law". The Judge reasoned that the "state of the law" depended on "the presence of the arrested vessel in a port within the geographical jurisdiction of one or the other of the circuits of the United State Court of Appeals".[175] This also dictated whether the CIMLA would be granted 'extraterritorial' application.[176] Therefore, as the applicability of foreign law had not been proved, the *lex fori* should apply in accordance with Canadian conflict rules.[177]

Recent decisions of the Federal Courts and the Federal Court of Appeals have indicated that in order for a choice of law in the bunker supply contract to be applicable, the shipowner must have also been a

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172 Ibid., at [26].

173 At [29]

174 At [33]-[47]

175 At [55]

176 At [52].

177 At [57]-[59]. Recently, the place of delivery of the bunkers has been endorsed as an important factor for determining the proper law; see *M/V Samatan* and Buteau (2009) at 11-12.

party to the contract.[178] Justice Nadon in the Federal Court of Appeal stated that;

> "[…] where, as here and in *Imperial Oil*, there is no contract between the shipowners and the supplier of necessaries, and the shipowners have not, by their attitude and conduct, misled the supplier into believing that the purchaser was authorized to act on their behalf, I am inclined to the view that the choice of law provision should not be given any weight."[179]

Therefore, the Canadian courts have stuck with the substantive approach to liens, affording respect to liens which arise legitimately under the *lex causae* and avoiding the disadvantages of the UK position. They have also kept the personification theory within a more reasonable scope than the Fourth and Ninth Circuits in the US and require contractual privity with the shipowner. This approach is preferable to the extent that it balances the interests of the supplier and shipowner.

4.4 Australia

4.4.1 The status of necessaries claims

As a member of the Commonwealth, Australian maritime law has largely followed the approach taken by the UK. Historically, the Colonial Courts of Admiralty Act 1890 (Imp) provided Australian courts with the same admiralty jurisdiction as the High Court in England held in 1890[180] and "was the foundation law for the admiralty law in Australia for almost 90 years".[181] The introduction of the Admiralty Act 1988 (Cth) ('the Act') modernised Australian maritime law but nonetheless kept it firmly rooted in the UK position, having been modeled on the Supreme Court Act 1981

178 *The Nordems* (2011) at [85], *The Nordems* (2010), and *Imperial Oil*.

179 *The Nordems* (2011) at [85].

180 Further developments to the UK admiralty jurisdiction after 1890 were not passed onto Australia.

181 White (2014) at 42.

(UK).[182] Although Australia is not a party to the Lien Conventions, these Conventions along with the 1952 Arrest Convention have "coloured the law relating to admiralty liens" and influenced the Admiralty Act.[183]

In adherence with the nature of the Supreme Court Act, the Act is a jurisdictional and procedural act.[184] It does not codify the liens available in Australia, nor does it provide guidance on the priority of claims.[185] It merely provides the Federal and Supreme Courts with *in rem* jurisdiction for maritime liens and claims.[186]

Section 15 gives a lien-holder the right to proceed *in rem*. 15(2) states that reference to a maritime lien *includes* a reference to salvage, damage done by the ship, wages and master's disbursements. A claim by a necessaries provider falls under the lower ranked category of a maritime claim.[187] This gives the claimant a right under section 17 to proceed *in rem* against the vessel only if the party that would otherwise be liable *in personam* was not only the owner/charterer when the cause of the action arose[188], but also the owner of the vessel when the proceeding is commenced.[189] Therefore, as in the UK, a necessaries supplier will only be able to bring an *in rem* action in Australia if they can also bring an *in personam* claim against the vessel's owner.

4.4.2 The application of US law

In keeping with this tradition, Australia has tended to follow the procedural approach of *The Halcyon Isle* and applied the *lex fori* to determine whether a foreign lien should be recognised.[190] In *The Skulptor Vuchetich*,

182 Ibid.

183 Ibid. at 53.

184 *See* Section 14: claims *in rem* may only be brought under the Admiralty Act.

185 Priorities have not been codified in Australia. However, in accordance with judicial precedent and equity, the courts apply a generally accepted ranking whereby liens are prioritised above mortgages and statutory claims in rem rank after mortgages.

186 Section 10

187 S 4(3)(m)

188 S 17(a)

189 S 17(b)

190 However, prior to the *Sam Hawk*, the Australian position had not received thorough judicial examination; Davies (2002) at 777.

Justice Sheppard felt bound to follow the Privy Council's decision and denied the claimant a lien which had arisen in the US under the FMLA, as it would only qualify as a statutory right *in rem* under Australian law.[191]

The recent decision of *The Sam Hawk* seems to represent a departure from this conservative position and may open the way for the acceptance of foreign maritime liens by Australian courts. *The Sam Hawk* concerned the arrest of a Hong Kong owned and registered vessel in Australia by the Canadian bunker supplier. The time charterer had ordered the bunkers from the supplier in Turkey. The (amended) bunker confirmation was subject to the claimant's General Terms and Conditions. These stipulated that the contract should be construed under Canadian law, but that the seller was entitled to a lien under the law of the United States, wherever the vessel was situated.

The suppliers claimed a lien under section 15 on the basis that the proper law was that of Canada and/or the US, and that the lien was expressly governed by US law which allows a lien for necessaries supply.[192] Further, under US law, there is a rebuttable presumption that the charterer had the authority to purchase bunkers on the credit of the vessel. Alternatively, under Canadian law, it is possible to contractually incorporate a lien of the US. Otherwise the claimant, as a Canadian business, was entitled to a lien under section 139 of the Marine Liability Act 2001 (Canada).

Lastly, and in the alternative, the supplier argued it had a statutory right *in rem* under section 4(3)(m) and section 17 as the charterer entered the supply contract on behalf of the shipowner thereby satisfying the *in personam* requirement.

After considering expert opinions on the state of the law in the US and Canada,[193] McKerracher J concluded that Canadian concepts of agency are tantamount to the Australian position.[194] Thus, the issue of whether the shipowner is a party to the bunker supply contract can be determined with reference to Australian law. His Honour then appeared

191 At 13.

192 *Sam Hawk* at [27]

193 Ibid., at [32]-[64]

194 At [67]

to leave the assessment of agency and the role of the owner and moved straight to 'the jurisdiction issue'.[195]

McKerracher J considered that the interpretation of "lien" under section 15 depended on whether Australian conflict of laws rules would recognise a foreign maritime lien. This hinged on the language of the provision and on whether *The Halcyon Isle* should continue to be followed. The Judge acknowledged that the issue of foreign maritime liens is unsettled in Australia.[196] He relied heavily on the dissenting judgments of Lord Salmon and Lord Scarman in *The Halcyon Isle*, notwithstanding the obvious differences in the two cases.[197] In *The Halcyon Isle*, the claim for a maritime lien was based on repairs furnished in the US and a contract between the repairer and the vessel's owners. The dissenting Law Lords placed emphasis on the fact that the "contract was governed by the lex loci contractus, *as both parties to the contract must have known*" (emphasis added).[198]It is foreseeable that "injustice would prevail" by applying the *lex fori* when both the repairer and the owner had an expectation that US law would apply.[199] This stands in stark contrast to *The Sam Hawk* where there were no points of contact between the transaction and the US, other than a contractual provision to which the owner was not a party.[200]

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195 At [72]

196 Australian Law Reform Commission (1986) at [123]: On the one hand, the Commission considered the minority view in the *Halcyon Isle* to be "more consistent with general conflicts of law principles". However, the Commission also recognized that allowing foreign liens would leave local claimants disadvantaged "even where the foreign law's classification of the claim as a lien is out of line with any international consensus on the scope of liens", suggesting that countries would be able to grant comparatively greater protection to their own industries simply by creating new liens which would then have to be recognised internationally.

197 *Sam Hawk* at [99]-[102]

198 *The Halcyon Isle* at 246.

199 Ibid., at 247.

200 Stewart (2015) at [40].

McKerracher J also considered that as section 15 was non-exhaustive, it could apply to foreign liens as well.[201] This reading was arguably open to the Court given the unsettled approach to the interpretation of section 15.[202]

Further, McKerracher J placed considerable weight on the decision of the Australian High Court in *John Pfeiffer*.[203] Although that decision did not concern admiralty jurisdiction, it reaffirmed the distinction between substantive and procedural matters.[204] Ultimately, he took this decision to indicate that the principles of the majority in *The Halcyon Isle* were no longer in line with Australian jurisprudence.[205]

McKerracher J seemed to simply assume that if *The Halcyon Isle* does not apply; the Court has jurisdiction to hear the claim for a lien under section 15.[206] This implies that he rejected the procedural approach in favour of the substantive, notwithstanding that the Act classifies liens as procedural. In taking the substantive approach, McKerracher J should have established whether the lien arose under the *lex causae*.[207] As this was not attempted, it seems that the choice of US law was accepted as replacing the *lex causae*. However, even if the choice of law was accepted *prima facie*, it should have then been tested under Australian conflict rules to check whether it should be upheld.[208] This would have necessitated looking at, for instance, the role of the shipowner. To make matters more confusing, after having assumed US law applies, Justice McKerracher also concludes that "the resolution of the applicable choice of law rule is

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201 At [103].

202 *Compare*: *Elbe Shipping* per Allsop J at 724: "includes" leaves open the possibility of Australian Courts recognizing other maritime liens, either new liens which develop under Australian law or recognition of foreign liens., *with*: Australian Law Reform Commission (1986) at [121]: the scope of maritime liens should not be extended without international agreement.

203 *Sam Hawk* at [105]-[108]

204 *John Pfeiffer* at [99]: "matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure".

205 This opinion is shared by Davies (2002).

206 Stewart (2015) at [39].

207 *Supra* 2.3

208 Stewart (2015) at [39]

a matter for final hearing".[209] This is notwithstanding that the lien, which apparently qualifies for section 15 and grants the court jurisdiction, would only exist if the choice of law applied.

Similar to the approach taken by the Fourth and Ninth Circuits in the US, *The Sam Hawk* gives little consideration to the position of the shipowner as a non-contracting party.[210] Along with the *Sam Hawk*, those decisions relied heavily on a precedent which should have been distinguished on the basis that it concerned contracts between the shipowner and the supplier. In attempting to move away from *The Halcyon Isle*, *The Sam Hawk* skimmed over the issues introduced in the Introduction and Chapter 2. It would have been preferable for the Court to have followed the Canadian approach which recognises foreign maritime liens which legitimately arise under the *lex causae*, but does not allow suppliers to contractually create a lien without the knowledge of the shipowner.

As *The Sam Hawk* was only a summary judgment, the main outcome of the decision is that it has made Australia more 'arrest friendly'.[211] This does not automatically mean that a foreign maritime lien will be recognised in a proper hearing, especially when it arises from a choice of law clause. Thus, the general excitement that "the Sam Hawk is to be welcomed, both in its advantages to the maritime claimant and its contribution to admiralty jurisprudence"[212]arguably overestimates the utility and reach of the judgment.

The Sam Hawk is currently on appeal with the judgment expected any day. Even if the Appeal Court continues to favour the minority position of *The Halcyon Isle*, it is likely to overturn McKerracher J's judgement on grounds that it did not sufficiently consider the applicable law, or because of the lack of privity between the shipowner and supplier, or the lack of connection with the US. Nevertheless, any attempt by the courts to depart from the majority judgment of *The Halcyon Isle* may be somewhat

209 At [138]-[139].

210 Stewart (2015) at [44].

211 Already there has been an increase in arrests following McKerracher J's judgment, *see* Clyde & Co Insight (2016).

212 Gerrish (2016) at 2.

superficial when the Admiralty Act is so strongly rooted in the English tradition of classifying liens as procedural.

4.5 Scandinavia

4.5.1 The status of necessaries claims

The Scandinavian countries share a long history of maritime cooperation and, as a result, have largely harmonised their maritime laws.[213] Denmark, Sweden and Norway are all parties to the 1993 Lien Convention and their respective maritime codes reflect both the Convention and their shared approach to regulating maritime matters.[214] For ease of reference, this paper will refer to the Norwegian perspective, however, this is largely representative of the state of the law in Sweden and Denmark as well.

The Scandinavian terminology and procedural rules vary from English and American concepts, however, the underlying effect is very similar.[215]The ability of the vessel to act as security for a claim is based on a lien or mortgage, a right of retention or the right to arrest. The concept of the lien may be broken down into the further two categories; an enforcement lien where an enforcement authority deems that the claim can be secured in a specific object such as a ship, and secondly, a maritime lien which has been codified in the Norwegian Maritime Code (the 'Code').[216]

In accordance with section 51(1) of the Code, only claims for wages, port, canal, waterway and pilotage dues, damage to life or property, salvage, wreck removal and general average contributions can give rise to a maritime lien. Therefore, claims based on contract, including the provision of necessaries, are not entitled to lien status in Scandinavia.

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213 Gombrii (1998) at 1352.

214 Falkanger, Bull and Brautaset, (2011) at 125. The Maritime Code(s) were drafted as a common text between the three countries but there are some small discrepancies.

215 Ibid., at 123.

216 Ibid., at 123-124. See also: Section 75(1): The Norwegian Maritime Code will apply to any lien which is relied on before a Norwegian Court.

The owner (or *reder*[217]) is unable to avoid liability from a lien through contract or by delegating their functions to another party.[218] The Code also dictates the priorities of the liens, both with respect to each other and to other claims.[219] As with most other jurisdictions, with the exception of the US, Scandinavia has decided to limit the availability of liens in order to protect viable security in the *res*.

However, a claimant may also arrest the vessel for a 'maritime claim', which are a mixture of liens and claims similar to statutory rights *in rem*.[220] Therefore, a necessaries supplier has a right to arrest the vessel under section 92(2)(k) if the owner of the vessel is also liable *in personam* for the claim.

4.5.2 The application of US law

Similar to the UK, a Norwegian court will only recognise a lien if the claim would also qualify as a lien under Norwegian law.[221]On this basis, a claim for necessaries supplied in the US will not be entitled to lien status in Scandinavia. However, if the state where the vessel is registered would recognise the claim as a lien, then it will be accepted as such in Norway, even if it falls outside of the scope of section 51. Nonetheless, it will rank after all registered encumbrances.[222]

4.6 Conclusion: Are US choice of law clauses effective outside of the US?

US choice of law clauses will have no effect in the UK, nor in Scandinavia, where the parties' choice will be disregarded, as well as the application of foreign law, and the *lex fori* will be applied instead.

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217 The term *Reder* does not have a direct English translation, however, the preface to the Norwegian Maritime Code explains it in the following terms: "The "reder" is the person (or company) that runs the vessel for his or her own account, typically the owner or demise charterer. Time charterers and voyage charterers are not considered "reders"."

218 Section 51(1) and (2)

219 Section 52(1) and (2)

220 Section 92(1)

221 Section 75(1) and Gombrii (1998) at 1352

222 Falkanger, Bull and Brautaset (2011) at 130.

The extent to which the clauses will be accepted in Canada and Australia is less certain. Both have indicated that they are willing to consider foreign law to assess whether a lien applies. However, whether this approach will be upheld in Australia is yet to be seen. Moreover, Canadian courts have indicated that they will only accept the choice of law if the owner is a party to the contract. Therefore, a clause in the contract between the supplier and time charterer is likely to have little effect for determining the *lex causae*.

The Lanner and *The Sam Hawk* also highlighted the difficulties courts may face in trying to implement US law within their own jurisdiction. *The Lanner* was uncertain as to which US Circuit's law should apply, whilst *The Sam Hawk* struggled to apply a substantive approach within a procedurally framed admiralty statute.

The moderate success of the choice of law clause in the US is undermined by their resoundingly negative treatment across other jurisdictions. Combined with the lack of uniform approach to maritime liens in general – it is unlikely that necessaries liens provide sufficiently reliable international security.

Part three will now consider possible ways in which the clauses could be made more effective – as well as counter-methods for the shipowner – before turning to consider in chapter 7 whether there are more appropriate means available to the supplier for securing payment.

5 Practical Considerations for Bunker Suppliers

Based on the analysis in Chapters 3 and 4, if the transaction has no connection with the US, suppliers are more likely to obtain a lien in the US if they choose US law in the bunker supply contract. However, the likelihood of a lien is almost certain if the vessel is arrested within the jurisdictions of the Fourth, Fifth or Ninth Appeal Circuits.

Currently, within these circuits arresting the vessel within the United States is considered a sufficiently proximate relation with the US to justify the application of US law. However, bunker suppliers will have an increased chance of obtaining a lien if there are other factors connecting the transaction with the US, such as one of the parties' having a place of business in the US, the vessel visiting US ports or the formation of the contract in the US.

In light of the lack of consensus amongst the Appeals Circuits, it may be worth specifying under which Circuit the question of a maritime lien should be considered. In *Trans-Tec*, the bunker contract stipulated that:

> "Each transaction shall be governed by the laws of the United States and the State of Florida, without reference to any conflict of laws rules. The laws of the United States shall apply with respect to the existence of a maritime lien, regardless of the country in which seller takes action."[223]

The Court appeared to selectively choose which circuit should represent the "laws of the United States" but another court may choose the approach taken by the Second Circuit. Therefore, it is recommended that the contract is subject to a state which falls within the jurisdictional scope of the Ninth Circuit instead, such as California.

[223] This clause is preferable to that used by World Fuel Services which refers to the "General Maritime Law of the United States" as the terminology has caused some confusion in the courts; *Hebei Prince* and *Bulk Juliana*.

This would also avoid the issue brought forward in *The Lanner* where Pelletier J considered that whether or not a lien was accepted in Canada depended on which US Appeals Circuit governed the applicability of a maritime lien. However, it is unlikely that the court will accept a choice of law to which the owner did not agree. A supplier could explicitly reference the FIMLA in order to bring in the presumptive authority of the charterer to enter into contracts on behalf of the owner and/or the vessel. However, whether this would be successful is uncertain.

Another option for the supplier is to set up a 'place of business' in Canada in order to fall within the scope of the Marine Liability Act (Canada).

Suppliers may also consider not supplying on credit, or if they do; to require a guarantee or deposit from the charterer.

Notwithstanding the suggestions discussed in this chapter, a US choice of law clause only has limited utility as it will not be enforced in most of the jurisdictions considered in this thesis. Moreover, without a choice of US law the supplier is even less likely to acquire a lien. Suppliers would be better served pursuing other means of recovering payment which can be more easily enforced across jurisdictions. These will be further addressed in Chapter 7.

6 Practical Considerations for Shipowners

The discussion at 3.3.3 demonstrated that the easiest way for shipowners to avoid the application of a lien under US law is to overcome the presumption contained in the CIMLA that the charterer has authority to bind the vessel or the owner. This will circumvent a lien in the US and in any jurisdictions which accepts the choice of US law or applies US law as the *lex causae*. As US courts do not consider "no lien" stamps on the bunker receipt as sufficient for overcoming this presumption, the supplier must have notice of the charterer's lack of authority before delivering the bunkers.[224]

The best way for the shipowner to ensure this would be to require the charterer to inform the supplier of the no-lien clause in the charterparty when ordering the bunkers. This can be easily achieved by inserting a clause such as the 2014 BIMCO Bunker Non-Lien Clause for Time Charter Parties. This clause requires the charterer to give prior notice to the supplier, as well as providing the owner with the supplier's details and a copy of the Non-Lien Notice, at the owner's request.[225] If the charterer fails to provide this information, the master can refuse to receive the bunkers on board and the vessel will remain on-hire.[226]The clause also requires the charterer to provide the owner with a confirmation that they have paid for the bunkers.[227]

BIMCO also provides a No-Lien Notice[228]; a standard form notice which can be inserted by the charterer into all correspondence with the supplier.

The shipowner may also include a provision in the charterparty that the charterer only enters into bunker agreements on 2015 BIMCO terms. This standard bunkering contract represents a compromise between

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224 See *Hebei Prince* at [12] and *M/V Gardenia* at 1510.

225 Found at: https://www.bimco.org/Chartering/Clauses_and_Documents/Clauses/Bunker_Non- Lien_Clause_for_Time_Charter_Parties.aspx. At (b)(i)and (ii).

226 (c)

227 (f)

228 BIMCO Special Circular (2014)

suppliers and charterers/owners. Instead of a lien clause in favour of the suppliers, it is subject to the UK Sale of Goods Act[229]and allows the supplier to retain title in the bunkers until paid. However, this is "without prejudice to such rights as the sellers may have under the law of the governing jurisdiction against the buyers or the vessel in the event of non-payment"[230], thereby allowing a lien if it arises under the "governing jurisdiction".[231]

This is preferable as it provides more certainty for the parties and ensures that the lien is relegated to its proper position as arising under the *lex causae* as opposed to arising artificially from a choice of law clause. However, the BIMCO terms will only apply if the seller does not expressly confirm otherwise in the confirmation.

Other options would be to require the charterer to provide a bond, a guarantee from their bank or procure insurance to insulate the shipowner from possible arrests for unpaid bunkers.[232]

Lastly, the owners should choose their charterers carefully and ensure that they are in a position to pay for bunkers. In the current market situation, this may mean entering into shorter term time charterers to enable a continual assessment of the prospects of the charterer's business.

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229 Cl. 25. *See:* BIMCO Terms 2015: Explanatory notes: This was intended to override the decision of the UK Court of Appeal in *The Res Cogitans* which held that the UK Sale of Goods Act did not apply to a bunker contract which contained a credit period, a retention of title clause and an express right to consume the goods during the credit period. This decision has recently been upheld by the Supreme Court; [2016] UKSC 23.

230 Cl. 10(b)

231 It is unclear whether the "governing jurisdiction" refers to the *lex fori* or to the *lex causae*.

232 Davies (2009) at 455.

7 Steering clear of murky waters

The objective of this thesis was first and foremost to determine the effectiveness of a choice of law clause for the supplier's ability to acquire a necessaries lien over the vessel. However, the ancillary purposes were to identify ways in which these clauses could be made more effective, as well as to evaluate whether necessaries lien are a form of security worth pursuing for the supplier.

It is submitted that this thesis has established that; firstly, the use of US choice of law clauses are of limited utility for acquiring a lien, notwithstanding the recommendations in Chapter 5. Secondly, suppliers would be better served steering clear of these murky waters altogether as necessaries liens (when not arising under the proper law) are an inefficient and unreliable form of security.

Chapters 3 and 4 demonstrated that a choice of law clause will only help the supplier if the vessel is arrested within the jurisdiction of the Fourth, Fifth and Ninth Circuits in the US. Otherwise, in most situations courts will either deny a lien on the basis that the supplier is not entitled to one under the *lex fori,*[233] or that the choice is irrelevant because the shipowner is not a party to the contract and a lien does not arise under the *lex causae.*[234]

Throughout this thesis it has become evident that the differing understandings of the maritime lien, as well as the lack of uniformity in enforcement, present substantial hurdles for the effectiveness of the necessaries lien as a form of security. Previously, necessaries liens had an important historical use as the master could not easily contact the shipowner or obtain financing while away from the vessel's home port. Thus, supplies were provided on credit and the only viable security the master could offer in exchange was a lien over the vessel. This kept trade

[233] C.f. The UK and Scandinavia

[234] C.f US Circuits other than the Fourth and Ninth, Canada and likely Australia.

moving by ensuring the vessel did not "rot in ports" awaiting financing from the shipowner on the other side of the world. [235]

However, as with bottomry bonds, developments in communication and financing have removed the practical purpose behind the necessaries lien. Communication is now instantaneous and the shipowner can be easily identified through on-line ship registries. Moreover, the bunker order is usually arranged between the charterer and supplier via email and the master no longer has the responsibility of sourcing supplies at port. There is also no longer the same need for the supplier to provide bunkers on credit or for the vessel to be used as collateral, as these days payment can be secured almost immediately though a bank transfer or a letter of credit[236]from the purchaser's bank. Therefore, it is now commercially practicable for the charterer to be responsible for obtaining credit from their bank and paying for bunkers at delivery.

The obvious advantage of a letter of credit over a necessaries lien is that it ensures almost immediate payment for the supplier. This will relieve the burden of financing lines and insurance premiums currently faced by suppliers supplying on credit.[237] Moreover, and most importantly for this discussion, it removes the uncertainty of whether the supplier's security will be internationally recognised.

It also has the additional benefit of removing the shipowner from the equation and instead moves the risk back to where it should rightfully lie; with the charterer who has purchased the bunkers.

If the charterer's bank refuses to grant credit, the supplier will likely refuse to supply which both protects the shipowner from becoming liable for bunkers received on board and avoids the supplier suffering any loss. This would also put the shipowner on notice as to their charterer's

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235 Hebert (1931) at 124.

236 Under a Letter of Credit, the charterer's bank guarantees that the charterer has available funds to pay for the bunkers and releases the payment to the supplier upon receiving the necessary documentation; e.g. the bunker receipt signed by the master etc.

237 Norton Rose Fulbright Shipping Newsletter (2015): suppliers often provide a 60 day credit period for invoices between US$0.5m-US$1m. The supplier's bank will usually require security in exchange for financing – usually in the form of a charge over the supplier's receivables.

financial situation. Moreover, any delay caused by a refusal to supply should not affect the shipowner as they can stipulate that such situations will remain "on-hire" events under the charterparty.

The potential barrier to discontinuing supply on credit is that it may be difficult to deny purchasers credit in a competitive market when other suppliers are willing to take the risk. However, this is arguably a worthwhile trade-off if it reduces the overall cost of financing, insurance and irrecoverable high-value losses. Moreover, pressure by shipowners on charterers to pay upfront[238] will increase the practicability of Letters of Credit for suppliers.

The supply of necessaries on credit in exchange for a lien over the vessel is an anomaly in international trade and there is no longer the same need for the supplier to operate on such tenuous terms. Necessaries liens are too susceptible to jurisdictional inconsistencies to provide reliable, internationally enforceable security and this thesis has demonstrated that the use of choice of law clauses does little to aid the supplier's position. It is submitted that suppliers would be better served by steering clear of these murky waters and opting for more effective mechanisms specifically designed for modern international transactions.

[238] *Supra* Chapter 6

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Maritime Labour Convention, 2006:

Who is the "shipowner" and what does it mean for the seafarer?

By Wenche M. Lunde

Content

Abbreviations

BIMCO	Baltic and International Maritime Council
C147	Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)
C179	Recruitment and Placement of Seafarers Convention, 1996
C180	Seafarers' Hours of Work and the Manning of Ships Convention, 1996
CBA	Collective Bargaining Agreement
CEACR	Committee of Experts on the Application of Conventions and Recommendations
DMLC	Declaration of Maritime Labour Compliance
DOC	Document of Compliance
GMA	Gibraltar Maritime Administration
ILO	International Labour Organization
IMO	International Maritime Organization
ISM-code	The International Management Code for the Safe Operation of Ships and Pollution Prevention,
ISM-company	The company holding the DOC for ISM
ITF	The International Transport Federation
JMC	Joint Maritime Commission
MARPOL	International Convention for the Prevention of Pollution from Ships
MLC, 2006	Maritime Labour Convention 2006
MLC-shipowner	The shipowner according to MLC, 2006
MN	Marine Notice
MSC	Maritime Safety Committee
P&I	Protection and Indemnity
PSC	Port State Control
RMI	The Republic of the Marshall Islands
RO	Recognized Organization
SEA	Seafarer Employment Agreement

Seaman's Act	the Norwegian Seaman's Act of 30 May 1975 no. 18
Ship Labour Act	Act of 21 June 2013 No. 102 relating to employment protection etc. for employees on board ships
Ship Safety and Security Act	Act of 16 February 2007 No. 9 relating to ship safety and security
SMC	Safety Management Certificate
SMS	Safety Management System
SOLAS	International Convention for the Safety of Life at Sea 1974
TWGMLS	High-level Tripartite Working Group on Maritime Labour Standards
UN	United Nations
UNCLOS	The United Nations Convention on the Law of the Sea
UNCTAD	the United Nations Conference on Trade and Development

1 Introduction

The Maritime Labour Convention, 2006, (MLC, 2006) was adopted 23rd February 2006 by the 94th International Labour Conference (ILC) of the International Labour Organization (ILO). The MLC, 2006 sets out minimum requirements concerning working and living conditions for the world's 1.2 million seafarers and the shipowner has the overall responsibility to ensure that the conditions for seafarers are fulfilled and respected onboard.

The shipowners' responsibility for the crew and their conditions on board vessels is not a new invention introduced by the MLC, 2006. Historically, the shipowner was the owner and the operator of the ship and the employer of its seafarers. Today, the term shipowner is used in a variety of situations as the globalization in the shipping industry has opened for "new" organizational structures. Ship registration practice to a larger degree facilitates "imperfect" transparency and even anonymity of the shipowner, making it difficult for seafarers – and authorities – to reach the shipowner in case of an incident or a breach of right[1].

Seafarers needed a single named person to relate to. In addition, this person should be easily identifiable and be the actual person responsible for fulfilling seafarers rights.

Regardless of who is the employer, the main responsible person in the MLC, 2006 is the "shipowner". The definition is designed to reflect all possible variations of company structures and operational practices in the industry[2]. It has however been a common understanding in the industry, that the person responsible for fulfilling the MLC, 2006 requirements on a ship, in practice, is the same person being responsible for fulfilling the International Management Code for the Safe Operation of Ships and Pollution Prevention, (ISM-code) requirements on the same ship.

This thesis is concerning the legal definition of the term "shipowner" in the MLC, 2006.

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1 (OECD, Directorate for science og Committee 2003) p.5

2 (Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia- Henry 2011) p.189

The legal definition of the term "shipowner" in MLC, 2006, is almost identical to the legal term "company" in the ISM-code[3].

I will in the following interpret the definition of "shipowner" as it is stated in the MLC, 2006. In doing so, I will look at the actual wording of the definition and the historic use of the term, link it to the preparatory works of the convention and compare it with the responsibilities imposed by the ISM-code. I will further review and present the practical solution for implementation chosen by selected flag states, before I finally discuss how differences in interpretation and implementation can affect the way seafarers' rights are ensured and fulfilled.

[3] (International Maritime Organization 2014) ISM-Code Ch.1/section 1.1.2

2 Ship owning in a historic perspective

2.1 Background and history

The ILO has developed labour standards for seafarers since 1919. However, many of the instruments developed by the ILO were poorly ratified[4], had become outdated and did not have a real impact for seafarers in a global industry.

As economic and social differences in the world became greater, the need for common rules for competition in the industry became increasingly important.

The outdated status of many of the ILO instruments was a major driver for the consolidation and updating of the maritime conventions and recommendations. Many of these instruments had been developed in a different "time", not reflecting the complexity describing international shipping today.

In order to better understand the challenges particularly faced by seafarers, it can be useful to look at history and the development of the ship owning industry, leading up to the current situation.

The first formal recorded source of maritime law in northern Europe is the Rôles of Oléron[5]. Not fully clear as of when, however research shows that they may be stemming from even as early as the 1200 century.[6] The English King Henry VIII shall have published them as "The judgment of the sea, of Masters, of Mariners, and Merchants, and all their doings" in the 16th century and "The Rolls" shall have greatly influenced the English Black Book of the Admiralty[7]".

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4 (International Labour Organization 2001)TWGMLS/2001/10 p. 2 (5)

5 https://en.wikipedia.org/wiki/Rolls_of_Ol%C3%A9ron; last visited 2015-09-06

6 (Michael R Anderson; Deirdre Fitzpatrick 2005) 1.05

7 The Black Book of the Admiralty is a compilation of English admiralty law created over the course of several English monarchs' reigns, including the most important decisions of the High Court of Admiralty; found at https://en.wikipedia.org/wiki/Rolls_of_Ol%C3%A9ron last visited: 2015-10-08.

Anderson/Fitzpatrick[8] has studied the development of seafarer's rights on national and international level, and state, *"no other class of workers in modern society can trace their legal relation to such an interesting and important historical framework"*[9]. Ironically speaking, when nations started to develop rules applying to workers in their own territory in the 19th and 20th century, seafarers were often exempted due to the "special nature" of their work[10].

Historic research of the development of maritime law in the Northern European territory concludes that even though common supranational law like systems – like the Rôles of Oléron existed, the main jurisdiction was conducted by local town courts[11]. Further, this research shows that when looking at Scandinavian shipping in the 12th century, the shipowner organization for a particular ship was often a joint venture, consisting of the skipper (who owned at least part of the ship) and the owners of the cargo. The vessel was handled and operated by the members of the joint venture, and all the members would normally have equal rights and duties onboard, however the skipper would often be the *primus inter pares*.[12]

This way of organizing the shipowner activities however changed in the 13th century, as the increased demand for goods resulted in increased trade and the need for larger ships. Larger ships required more labour force on board. The cargo owners now could afford to pay for the transport of their goods and went ashore. So did the owners of the ship as well, leaving the responsibility for operation of the vessel and the cargo to the skipper who would also be responsible for the crew, that was hired to carry out the required work on board.

As size of ships increased and trade of goods continued to grow, so did the shipboard organization. However, the clear distinction between ship-

8 (Michael R Anderson; Deirdre Fitzpatrick 2005)
9 Ibid 1.08
10 Ibid 1.08
11 (Edda Frankot 2007) p.157
12 Ibid p.158

owners, cargo owners, master and crew resulting from the development during the 13th century is very much the same division of roles as we have seen up to today[13].

2.2 The shipowner

Historically, the owner of the ship – the shipowner – was also the one who manned and operated the ship. The terms "owner" and "shipowner" were used interchangeably, however the intended meaning was the same, and it was referring to one particular natural or legal person.

Rules for classification adopted by the classification societies established in the 18th century are directed towards the "owner"[14]. In the context of marine insurance, the "member" is the person insured, however, the term "member" refers to the "owner, operator or charterer of the entered ship"[15].

Technical conventions of the International Maritime Organization (IMO) have traditionally not defined the term shipowner. However, exemptions to the main rule are:

Convention on Facilitation of International Maritime Traffic, 1965, as amended defines "shipowner" in Section 1A: *"Shipowner. One who owns or operates a ship, whether a person, a corporation or other legal entity, and any person acting on behalf of the owner or operator."*

The Convention on Limitation of Liability for Maritime Claims, 1976 defines shipowner in Article 1 (2) by the following: "*The term "shipowner" shall mean the owner, charterer, manager and operator of a seagoing ship.*"

The United Nations Convention on Conditions for Registration of Ships, 1986, defines "owner and "shipowner" in article 2:

""Owner" or "shipowner" means, unless clearly indicated otherwise, any natural or juridical person recorded in the register of ships of the State of registration as an owner of a ship,"

[13] (Edda Frankot 2007) p.158

[14] DNV GL rules for classification; http://rules.dnvgl.com/docs/pdf/DNVGL/RU-SHIP/2015-10/DNVGL-RU-SHIP-Pt1Ch1.pdf last visited: 2015-10-11

[15] (The Swedish Club 2012) p.27

The definition in the two latter conventions is not relevant as not considering any ship operational aspect.

Only two of the ILO maritime conventions define the term "shipowner":

Recruitment and Placement of Seafarers Convention, 1996 (No. 179), (C179):[16] Article 1 para.1 *(c) the term shipowner means the owner of the ship or any other organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who on assuming such responsibilities has agreed to take over all the attendant duties and responsibilities;*

Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180), (C180):[17] Article 2: *(e) the term shipowner means the owner of the ship or any other organization or person, such as the manager or bareboat charterer, who has assumed the responsibility for the operation of the ship from the shipowner and who on assuming such responsibility has agreed to take over all the attendant duties and responsibilities.*

The only difference between the definitions in C179 and C180 is that C179 also refers to the "agent". Both definitions however establish a clear link between the responsibilities in the convention and the operator of the ship, by introducing the phrase "*or any other organization or person, such as the manager agent or bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner* […]".

It is reasonable to conclude that as long as the shipowner was also operating and manning the ship, there was no need for a specific definition of the shipowner. However, the way shipowners organized their business had changed, and the need for a more structured approach was identified. ILO C179 and C180 addressed this challenge by defining who was responsible.

The changes to the organizational structure in ship owning were mainly a result of the globalization experienced by the shipping industry the past

[16] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12000:0::NO::: last visited: 2015-10-11

[17] ibid

four decades. Shipowners sought alternative ways to finance their business, and the "open registries" facilitated this need by opening up for alternative owner and operational structures. I will cover some examples below.

2.2.1 Registered owner

It is established above that the shipowner may or may not be the owner of the ship.

Mandated by the IMO's Maritime Safety Committee (MSC) Assembly Resolution MSC.160 (78), and based on an agreement with the IMO, IHS Fairplay maintains a register of registered owners and companies for the purpose of improving maritime safety, security and pollution prevention and to prevent maritime fraud. A unique identification number shall be provided for each registered owner, follow that company through its lifecycle, and be inserted on ship certificates under the registered owner.[18] This system was introduced in 2004 and became mandatory in 2009. A similar voluntary system for ships had been adopted in 1987, but was made mandatory through chapter XI of International Convention for the Safety of Life at Sea (SOLAS), 1974 1st January 1996.

It was clear that identification of the ship owner was a challenge also in other areas than seafarers' claiming their rights.

In IMO terminology, the term "registered owner" means the person or entity that is specified on a ship's certificate of registry issued by the Administration[19].

IHS Fairplay describes the "Registered Owner" as follows: *"The legal title of ownership of the vessel that appears on the ship's registration documents. It may be an Owner/Manager or a wholly-owned subsidiary in a larger shipping group; or a bank or one-ship company vehicle set up by the bank; or of course, it may be a "brass-plate" company created on paper to legally own a ship and possibly to limit liability for the "real" owners and/or benefit from off-shore tax laws. It may anyway be a legal-requirement*

[18] (IHS Fairplay u.d.)IMO – Setting industry standards

[19] (International Maritime Organization u.d.) Implementation of IMO Unique Company and Registered Owner Identification

of the flag-state with whom the ship is registered for the legal owner to be a company registered in that country."[20]

From this it can be derived that a "registered owner" can hold many roles. It can be an integrated shipowner with full employment responsibilities for seafarers employed on ships fully owned and managed by the owner. It can be listed on the stock exchange and have many actual owners. The ship may be only an investment object, where the aim is strictly commercial and a practical relation to the actual operation of the ship is normally not present. Or it can be just a "letterbox" company, established only for the purpose of fulfilling formal registration requirements.

2.2.2 Beneficial owner

"Beneficial owner" is another term emerging during the globalization of shipping. From the IHS Fairplay description of the "registered owner" above, we can read that the "registered owner" may have been established to limit the liability for the "real owners".

The International Transport Federation (ITF) states: *"Beneficial owner is the term the ITF uses to describe the entity that the ITF considers to be the "real" owner of a ship. It has effective control over the operation of the ship and benefits from any profits generated by the ship."*[21] When completing Collective Bargaining Agreements (CBA) with a shipowner, the "beneficial owner" is the main addressee of the ITF. The location of the "beneficial owner" will decide where the CBA negotiations will be initiated. The union in the "beneficial owners' country represent the seafarer in the negotiations along with the union from the seafarer´s country. The "beneficial" owner can delegate to others to conclude individual contracts of employment, but the CBA will remain with the "beneficial owner".

[20] (IHS Fairplay u.d.)IMO – Data definitions

[21] (International Transport Workers' Federation u.d.)

Again, referring to the IHS Fairplay descriptions[22], the following is said about the "Group Beneficial Owner":

"This is the parent company of the Registered Owner, or the Disponent Owner if the ship is owned by a bank. It is the controlling interest behind its fleet and the ultimate beneficiary from the ownership. A Group Beneficial Owner may or may not directly own ships itself as a Registered Owner. It may be the Manager of its fleet, which is in turn owned by subsidiary companies. Its ships may also be managed by a 3rd party under contract."

A "beneficial owner" can typically be a company controlling several ships, whereas a shipowner often can be a single purpose company established for the ownership of a single ship.

The "beneficial owner" may be an important link between the seafarer and the employer. However this relationship is not subject to a definition in any international instrument.

2.3 The emerging of the ship manager

In the 1980's a financial crisis hit the shipping industry, leading to shipowners looking for opportunities to save costs and to utilize their spare management capacity. This led to the emerging of the entities we today know as ship managers[23].

The shipowner may choose to outsource the management of a ship to a ship manager. Estimates show that as much as 25% of the world fleet may be under third party management[24].

The ship manger will normally have no real ownership of the vessel but will have entered into an agreement with the shipowner. Ship management will normally be divided in three main functions:

- Commercial management
- Technical management
- Crew management

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22 Supra 20

23 (Michael R Anderson; Deirdre Fitzpatrick 2005) p.30

24 (International Labour Office; Seafarers International Research Centre 2004) p.21

The technical manager and the crew manager may be the same entity and the ship management agreement will state which of the functions are covered.

In the following I will give a brief presentation of the scope considered covered under the different functions.

2.3.1 Commercial management

According to IHS Fairplay, the current IMO definition of a commercial ship manager is:

> *"Shipmanager/Commercial Manager – The company designated by the ship owner or charterer to be responsible for the day to day commercial running of the ship and the best contact for the ship regarding commercial matters. Including post fixture responsibilities, such as laytime, demurrage, insurance and charter clauses. This company may be an owner related company, or a third-party manager, whose purpose is primarily the management of ships for their ship-owning clients."*[25]

The concept of commercial management will normally not be relevant in the discussion regarding seafarers' rights and will accordingly not be covered further in this thesis.

2.3.2 Technical management

Even though third-party ship management had been a specialist business in the United States since the 1950's and in Hong-Kong since the 1970's, it was not until the 1990' it became common for large shipowners to create subsidiaries for the purpose of technical and personnel management[26]. These "self-sufficient" subsidiaries were often wholly owned by the shipowner.

The IMO definition of the technical manager as presented by IHS Fairplay states:

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[25] (IHS Fairplay u.d.)IMO – Data definitions

[26] (International Labour Office; Seafarers International Research Centre 2004) p.19

> *"Technical Manager – The Company designated by the ship owner or operator or ship manager to be specifically responsible for the technical operation and technical superintendancy of a ship. This company may also be responsible for purchases regarding the fleet, such as repairs, spares, re-engining, surveys, dry-docking, etc."*[27]

The IHS Fairplay definition above also makes a reference to the entity responsible for the ISM-code by stating that the technical manager "*in the majority of cases*" will normally also be the company holding the Document of Compliance (DOC),[28] the so called ISM-company. If a technical manager also has the ISM responsibility, this will be subject to requirements under section 3.1 of the ISM-code.

A written agreement between the owner and the technical manager will govern their practical relationship. SHIPMAN 2009 is a model management contract developed by the Baltic and International Maritime Council (BIMCO)[29], commonly used in the industry. As stated in the commentary to the contract:

> *"The revised SHIPMAN can be used as a one-stop shop in respect of most ship management services, including technical and crew management. Both the ISM and ISPS Codes have been defined and, in recognition of the importance of these Codes in the industry, the definition of and reference to the "Company" is one of the cornerstones of the revised SHIPMAN"*[30].

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27 (IHS Fairplay u.d.) Data Definitions

28 ISM code 1.1.5" "Document of Compliance" means a document issued to a Company which complies with the requirements of this Code."

29 *"[…] (BIMCO) is the largest of the international shipping associations representing shipowners […]* https://en.wikipedia.org/wiki/Baltic_and_International_Maritime_Council last visited 2015-10-11

30 https://www.bimco.org/Chartering/Clauses_and_Documents/Documents/Ship_Management/SHIPMAN2009/Explanatory_Notes_SHIPMAN2009.aspx Intro to explanatory note

The SHIPMAN 2009 does not allow the crew manager to take on the role as the ISM Company unless being the technical manager as well[31]. The rationale behind this is that the safety management system (SMS) to a large degree will contain activities related to technical matters – matters which a crew manager alone will not be in the position to operate, nor control.

2.3.3 Crew management

Crew management as a "business concept" became particularly interesting as the globalization led to seafarers being recruited from all over the world – also from regions not traditionally known to the shipowners.

A crew management company may deliver some or all services related to management of crews, like recruiting, placing, training and also paying seafarers wages[32]. It may be part of a fully integrated ship owning company supplying seafarers to "in-house" vessels, or it may be an external company specializing in crewing services to shipowners all over the world. In cases where the crew manager signs the employment agreement, it will get the role as employer as well. Professional ship managers have developed to become the world largest employers of seafarers[33]. The employer role or responsibility has however not been defined by international conventions.

As stated above, the crew manager cannot be the ISM-company unless also being the technical manager for the vessel. This relationship is however not necessary for the crew manager to enter into an employment agreement with a seafarer.

A delegation of the crewing services from the owner will also be subject to written agreement, and if delegated to the technical management it

31 (Phil Andersson 2015) p.107

32 (International Labour Organization 2001) JMC/29/2001/3 p.15

33 (International Labour Office; Seafarers International Research Centre 2004) p.20

may be covered under the management agreement. However if it is a separate delegation, a separate agreement will be necessary.

BIMCO has been concerned about the distribution of responsibility for crew members not employed directly by the shipowner and model agreements and standard clauses for MLC, 2006 responsibility have been developed. The most common agreements are CREWMAN A, which is an "agency" agreement, and CREWMAN B, which is used when the crew-manager is also the employer of the seafarer. The intention was to develop separate clauses to distinguish between the crew manager acting as agent for the shipowner and the crew manager being the employer of the seafarers. It was however concluded that this was superfluous as the "shipowner" – as being the responsible person, would be defined on the certificate.[34]

The MLC-clauses read as follows in both Crewman A and B:

a) *The Crew Managers shall, to the extent of their Crew Management Services, ensure compliance with the MLC, on behalf of the Shipowner, in respect of the Crew supplied by the Crew Managers.*

b) *The Owners shall procure, under Clause 8 (Insurance Policies) or otherwise, insurance cover or financial security to satisfy the Shipowner's financial security obligations under the MLC.*

2.4 Open registries / flags of convenience

Historically, traditional maritime nations would put restrictions on vessels to allow them fly their flags. Requirements could relate to owners' nationality, building sites and requirements for national crew. In exchange, shipowners could for instance get access to trading routes.[35] Traditional maritime nations are still strictly enforcing ship registration requirements, and such nations have been referred to as being "regulatory

[34] (BIMCO u.d.)Recommended Additional MLC 2006 Clauses

[35] (Richard Coles 2002) 1.35

efficient"[36]. Having regulated ship activities for some time they will have developed a broad and mature regulatory structure covering a ship's lifecycle – including legislation for seafarers. In traditional registries, the shipowner (or a representative) will be domiciled in the flag state, and it will be appropriate to refer to a flag's fleet as a national fleet.

Increased regulation is considered a cost driving factor, challenging the competitiveness of ships. The introduction of "open registries" or so called flags of convenience (FOC) in the 1950's, enabled shipowners to register their ships in flag states they did not have a relationship with. The rational was often reduction of operating costs – in particular those relating to taxes and crew manning[37]. A characteristic of an "open register" is that the requirement for a domicile shipowner is not necessarily applied.

"Open registries" have been referred to as being "regulatory inefficient"[38] and have been criticized for not having well-developed legislation covering maritime safety and labour issues. It has also been claimed that the international society by accepting the establishment of the "open registries", has allowed lower safety standards and poorer working and living conditions for seafarers becoming a competitive advantage.

A vessel's flag will state the vessels nationality. The "registered owner" may however have a different nationality than the vessel, and the "beneficial owner's" company may be based in a third country. The result is a fragmented picture and the traditional concept of "national fleets" does not have the same meaning.

"Open registries" are normally run as business models where maximizing profit by increasing revenue and lower cost for ship registration are normal aims[39]. The establishment of complex ship owning structures has been facilitated by the fact that "open registries" to a large degree

[36] (International Labour Office; Seafarers International Research Centre 2004) p.50-52

[37] (R.R. Churchill and A.V. Lowe 1999) p.258

[38] (International Labour Office; Seafarers International Research Centre 2004) p.50

[39] Ibid p.52

allows the identity of the shipowners to remain hidden[40]. This may create obstacles for seafarers when reaching for the shipowner to claim fulfillment of rights.

During the period 1990-2001, the number of vessels registered in open registries increased by 70%[41] and according to the UNCTAD Review of Maritime Transport 2014[42] almost 73 per cent of the world fleet is today foreign flagged.

2.5 The United Nations Convention on the Law of the Sea

"The high seas are open to all States […]" is stated in article 87 of the United Nations Convention on the Law of the Sea (UNCLOS), which sets out the framework rules for the exercise of this important freedom. The UNCLOS however turns to the ratifying countries, placing the responsibility on them implementing national legislation to ensure compliance, and to enforce it towards their national vessels. A ship while on the high seas is under the jurisdiction of the nation to which the ship belongs, hence a ship needs to have a "nationality"[43].

UNCLOS was concluded in 1982 and sets out the principles for ships free access to the high seas. The convention also sets out the rights and responsibilities flag states have towards ships under their flag and it is the main regulation affecting ship registration. The UNCLOS to a large extent codifies international customary law in the maritime area and is ratified by 167 states.

Article 91 concerns the nationality of the ship and states that:

> "*1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right*

40 (OECD, Directorate for science og Committee 2003) p. 5
41 (OECD, Directorate for science og Committee 2003) p. 5
42 (United nations Conferene on trade and development (UNCTAD) 2014) p.38
43 (Richard Coles 2002) p.1

> *to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.*
>
> *2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect."*

Further, Article 94 defines the duties of the flag state. In paragraph 1 it is stated that

> *"1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."*

Article 217 paragraph 1 of the UNCLOS sets out the responsibility of the flag state to ensure that vessel sailing under their flag or registered in the flag state, complies with applicable international rules and regulations[44].

So, the flag administration shall prescribe the registration rules applicable under its flag. Except from the reference to "a genuine link" in article 91, UNCLOS does not provide any clearer directions regarding registration requirements. It has been argued that registration should be limited to vessel's owner being national of the state[45]. However, the most common interpretation is that the link is accepted as being limited to a *"commercial, fee-for-service relationship between the owner and the Flag State"*[46].

Historically, a ship would normally fly the flag of its owners' nationality. The norm today is close to the opposite, as more than 70 % of the world fleet is "foreign" flagged[47].

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44 *"1. States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards […]" found at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm last visited 2015-10-11*

45 (OECD, Directorate for science og Committee 2003) p.6

46 Ibid p.6

47 (United nations Conferene on trade and development (UNCTAD) 2014) p.38

Exercising appropriate control and overview of the ownership structure of the vessels and their owners in its registry is accordingly important in order to support the aim of UNCLOS

It may be difficult for the "open register" flag administration to fulfil its enforcement obligations towards a shipowner, if the company is without any actual assets or personnel within its territory, or when the registered owner in practice can be limited to a mailbox address within the national boundaries of the flag state.

The lack of a direct link between flag state, the vessel and the shipowner may accordingly provide opportunities for the shipowner to hide its identity[48], which makes the challenge even greater.

[48] (OECD, Directorate for science og Committee 2003) p.6

3 International players: ILO and IMO

Being a truly international industry, shipping needs to be governed by international law. The international law will impose duties and set out rights for member states to follow. Upon ratification of the relevant instruments, a member state will develop national legislation to ensure that the duties and rights to have effect on persons and companies within its jurisdiction.

Specialized agencies under the United Nations (UN) are the main shipping regulators. I will look further into their function in the following.

3.1 International Labour Organization

The ILO is the oldest of the specialized UN agencies. It was founded in 1919 – even before the UN itself (1947) and has 185 member states.

The ILO promotes decent work for all categories of workers. However, already from the beginning, seafarer questions have been considered being of a special nature that has particularly occupied the organization and seafarer matters have been treated in special maritime sessions of the International Labour Conference.

A unique feature of the ILO is its tripartite structure bringing workers, employers and governments together to develop labour standards, policies and programs. Workers and employers have equal vote with governments, and implementation of labour standards are encouraged through a social dialogue with the relevant trade unions and employers' organizations. An instrument adopted by the ILO, is accordingly based on a common understanding and agreement between a government and the social partners of the industry.

Between the first session held in 1920 until the 64th session in 1987, 36 conventions and 26 recommendations covering seafarers were adopted[49].

[49] (International Labour Office 1993) Maritime labour Conventions and Recommendations p.2

As a comparison, during the period 1987 – 2004 only 4 more maritime instruments were adopted.

Developed to form the basis for a minimum set of seafarers' rights, many of the instruments were poorly ratified and did not even enter into force. Others went into force with only a very limited number of ratifications.

Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147) (C147) contained the most comprehensive set of minimum requirements of the ILO's maritime conventions. In addition to imposing a duty on member states to define requirements for safety standards, competency and manning, it contained explicit references to other ILO conventions. The most ratified was the Seamen's Articles of Agreement Convention, 1926 (No. 22) with 60 ratifications, and to Food and Catering (Ships' Crews) Convention, 1946 (No. 68) and Accommodation of Crews Convention (Revised), 1949 (No. 92), which both also had relatively high number of ratifications. By referring to these instruments, a member ratifying the C147 was obliged to respect the content of referred conventions.

With its 56 ratification, C147 applied directly to about 45 % of the world tonnage[50]. As containing provisions for port state control (PSC), its practical application was however much higher. It has been argued that the high number of ratifications was due to the PSC enforcement mechanism rather than the wish for contributing to a common minimum for seafarers' rights.[51] However, only a limited number of the provisions contained in C147 were considered specific enough to efficiently facilitate impartial verification by PSC[52].

The globalization in shipping and the accompanying concerns regarding ship registration, fragmented owner structures and the serious influence this had on working and living conditions was highly reflected in a report

[50] (International Labour Organization 2001) JMC/29/2001/3 p.94

[51] Supra 49 p.2

[52] Supra 50 p.94

presented for the 29th session of the Joint Maritime Commission (JMC)[53]. The JMC meeting in December 2001[54] concluded that it was necessary to develop a global labour standard for seafarers that would apply to the entire industry. This could be done by consolidating the existing maritime instruments into one new single framework convention on maritime labour standards.[55]

In their report, the JMC concluded that maritime instruments were outdated and needed an update as working and living conditions for seafarers were substantially changed. Reasons for this were mainly:[56]

- increased number of ship registrations in "open registers" allowed operation under more flexible and less regulated conditions than those under traditional flags
- the "open registers" facilitated ownership and financing models allowing less transparency in the chain of responsibility for the seafarer conditions on board
- Crewing processes had become more complex as crew was increasingly being recruited through "new" establishments like crew managers and labour supplying agencies instead of directly from the shipowner.
- increased recruitment of seafarers from developing countries where limited social rights and protection applied to seafarers and accordingly different regulations and different conditions applied

Another major challenge was the limited enforcement mechanisms within the current instruments.

International law initially binds only ratifying member states, and basic enforcement procedures are aimed at them[57]. A ratifying member

53 The Joint Maritime Commission (JMC) is a bipartite standing body that provides advice to the Governing Body on maritime questions including standard setting for the shipping industry. http://www.ilo.org/global/docs/WCMS_162320/lang--en/index.htm last visited 2015-10-10.

54 (International Labour Organization 2001)JMC/29/2001/3

55 (Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia- Henry 2011) p.48

56 (International Labour Organization u.d.) Briefing slides (MLC, 2006) p.7

57 (Michael R Anderson; Deirdre Fitzpatrick 2005) 3.19

is obliged to report to the ILO on a regular basis regarding steps taken to ensure application of ratified instruments. The reports will be subject to review by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), whose role is to provide an impartial and technical evaluation of member states' implementation. The evaluation will be published in an annual report presenting any observations on implementation, given to a member state. CEACR may also request the member state for more information through a so called "direct request". [58]

Another general mean of enforcement is the complaint procedures available at union level[59], but no efficient enforcement mechanisms were available for seafarers working on ships.

Upon the entry into the 21st century, the industry had available a high number of instruments setting out rights for seafarers, which due to its variable level of application instead of a ensuring a "level playing field", left a fragmented picture of non-binding and non-enforceable instruments, allowing unequal application of seafarers rights.

3.1.1 Maritime Labour Convention 2006

The 29th session of the JMC concluded to consolidate and develop a new framework convention on maritime labour standards[60]. After a negotiation period of more than 5 years, the MLC, 2006 was adopted on the 23rd February 2006, with 314 votes in favor and none against[61].

Protection of the marine environment, safety and security of ships and seafarer competency was already covered by the core IMO conventions SOLAS, International Convention for the Prevention of Pollution from Ships (MARPOL), and International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).

The new consolidated framework convention for working and living conditions for seafarers was designed to complement these 3 conventions,

58 (International Labour Organization u.d.) CEACR

59 Supra 57 p.102

60 (Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia- Henry 2011) p.48-49

61 Ibid p.16

and the MLC, 2006 was to become the 4th pillar of the international maritime regulatory regime. Main aims were a convention which would reach global application, was easy to understand and update and would be uniformly enforced.

Technical IMO conventions like SOLAS and MARPOL do not specifically address responsibilities towards persons. MLC, 2006 however specifies that the shipowner is responsible for ensuring decent working and living conditions for seafarers onboard their vessels and has been widely known as "the seafarers' bill of rights".[62]

The MLC, 2006, updates and consolidates more than 60 maritime instruments, whereof 36 maritime conventions and 1 protocol, and sets out minimum requirements for working and living conditions for seafarers. It includes the core principles from the "old" conventions, however combines and updates them into a new format. Built in flexibility and improvement processes shall ensure that the requirements can more easily be updated to follow future changes in the industry. When a member state ratifies the MLC, 2006, obligations towards any of the instruments updated by the consolidated convention, will cease, gradually phasing the "old" instruments out.

The MLC, 2006 is composed by three different parts; the articles, the regulations and the code. The code is split in part A, including binding requirements, and part B, containing guidance.

The requirements are set forward in 5 different titles:

Title 1: Minimum requirements for seafarers to work on a ship
Title 2: Conditions of employment
Title 3: Accommodation, recreational facilities, food and catering
Title 4: Health protection, medical care, welfare and social protection
Title 5: Compliance and enforcement.

[62] (Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia- Henry 2011) p.17

Article IV, paragraph 5, requires the ratifying member state to implement seafarers' employment and social rights in accordance with the requirements of the MLC, 2006

The enforcement mechanisms are important features of the MLC, 2006:

- Flag state enforcement: Inspection and certification requirements in line with those of the ISM-code and International Ship and Port Facility Security Code. Flag states may authorize the inspection and certification to Recognized Organizations (RO)
- Port state enforcement:
  Port state control under the concept of "no more favorable treatment"
- "Self-enforcement":
  The "on board complaint" procedure introduced under title 5 of the MLC, 2006 providing the seafarer with a right to complain directly to the shipowner, to the flag state and to the port state.

Flag- and port states are required to establish procedures for on-shore handling of any seafarer complaints.

MLC, 2006 Regulation 2.1 para. 1 requires the terms and conditions for employment to be set out or referred to in a clear written legally enforceable agreement, the Seafarer Employment Agreement (SEA). The SEA sets out the seafarers rights and shall be signed by the seafarer and *"the shipowner or a representative of the shipowner (or, where they are not employees, evidence of contractual or similar arrangements)"*[63]. The SEA accordingly "glues" the shipowner and the seafarer together, regardless of who is the formal employer of the seafarer. The SEA has been referred to as the "heart" of the convention as it facilitates a "specification" of the rights provided, making it an essential inspection tool for flag states[64].

[63] (International Labour Organization u.d.) MLC, 2006 A2.1 para. 1a)

[64] (Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia- Henry 2011) p.291

The MLC, 2006 applies to all ships and all seafarers with some exemptions[65]. The aim was to have as broad application as possible and according to article II paragraphs 2-5 it applies to all seafarers and all ships – unless "expressively provided otherwise"[66].

The definition of ship and seafarer and the discussion regarding its application is too broad to be covered by this thesis and is accordingly not discussed any further.

Ships of 500gt and above in international trade are required to document compliance by maintaining a certificate, which validity is subject to periodical inspections. Under the concept of "no more favorable treatment" all ships, regardless of the vessels' flag state having ratified the MLC, 2006 or not, are subject to PSC in a port of a ratifying member, running the risk of detention if serious breach of the minimum standards set out by the convention is discovered[67].

The MLC, 2006 entered into force 20th August 2013, after reaching the required ratification registrations; 30 ratifications by countries representing at least 33 per cent of the world's gross shipping tonnage[68]. It took 6 years to reach the sufficient number of ratifications for the convention to enter into force. This was longer than anticipated, but the "target" was deliberately set very high in order to ensure that the convention – when in force – became a true international instrument providing the "level playing field" needed.

3.2 International Maritime Organization

The IMO is another specialized agency under the UN, and is the international authority setting out global standards for safety, security and environmental performance of international shipping. IMO was

65 Supra 63 article II

66 Ibid Article II para 3 and 5.

67 Ibid Article V, para 7.

68 http://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/lang--en/index.htm (last visited 2015-10-22)

formally established in 1948, and its main role is to develop and maintain a regulatory framework that is universally adopted and implemented in order to ensure a "level playing field" in international shipping.[69]

The IMO has adopted more than 40 conventions and protocols implementing standards for the protection of seafarer conditions. The most important ones in this respect is SOLAS, adopted in 1974 and ratified by 162 parties and STCW with more than 130 parties.

In the original mandate of the IMO the focus was "*[…] technical matters of all kinds affecting shipping engaged in international trade […]70*". In 1997 IMO Resolution A.850 (20) on the human element was adopted. This was later replaced by Resolution A.947 (23) but commonly they were setting out the IMO's vision, principles and goals for the human element, recognizing the importance of the ship's crew in maritime safety[71]. There was a need for increased focus on human activities onboard to improve safe operations of ships and the organization of safety on shore and on ships, as the industry was experiencing a high number of serious maritime accidents related to these factors[72].

The ISM-code is particularly central in this work and will be further addressed below.

3.2.1 International Safety Management Code

Several large marine accidents resulting in loss of life and severe oil pollution had demonstrated the need for more comprehensive legislation covering maritime safety and environmental protection.

The ISM-code was, under the provisions of SOLAS Chapter IX and through Resolution A.741 (18) adopted by the IMO on the 4th November 1993. The objectives of the ISM-code are *"to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular to the marine environment and to property."*

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69 (International Maritime Organization u.d.)Introduction to IMO

70 (Michael R Anderson; Deirdre Fitzpatrick 2005) p.47

71 Ibid p.47

72 (International Maritime Organization u.d.) Human Element

The ISM-code may be applied to all ships at the discretion of the flag state. Ships in international trade are subject to PSC and will, as for MLC, 2006, need a certificate to show compliance with the ISM-code requirements.

The ISM-code directs the responsibility towards the "Company" for fulfilling the objectives of the code through the establishment of a SMS.

The SMS shall amongst others include a safety and environmental protection policy, and instructions and procedures to ensure safe operations of the ships.

In order to fulfil the objectives of the code, the company should address the following in their SMS:

- Safe practices in ship operation and a safe working environment
- Assessment of all identified risks to its ships, personnel and the environment and establishment of appropriate safeguards
- Continuous improvement of safety management skills of personnel ashore and onboard.[73]

Further, there is a general requirement under ISM-Code 1.2 to ensure, through the SMS, compliance with mandatory rules and regulations and applicable codes, guidelines and standards of the industry related to safety including safe working conditions.

The SMS is subject to an annual verification at the "Company's" office premises and once every 2.5 years on board ships operated by the "Company" and to which the ISM-code applies. The purpose of the verification is to assess the effectiveness of the SMS.

The annual verification of the SMS at the Company premises, also verifies that the entity in charge is the "real operator" of the vessels. This is an important premise and a result of the drafters endeavor to *"introduce new levels of transparency and to ensure that the Company is held accountable"*[74] in case of an accident or a breach.

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[73] (International Maritime Organization 2014)ISM-code A1 2 2

[74] (Phil Andersson 2015) p.105-106

4 Who is responsible for seafarers' rights under the MLC, 2006?

When the ILO initiated the work to adopt the MLC, 2006, seafarers had, in addition to a need for uniform rules setting out their rights, a need to know who was responsible for fulfilling their rights. As concluded above, just a reference to the shipowner could no longer be intuitively interpreted and needed more clarity.

Defining the term in a way that the responsibility for seafarers working and living conditions is placed where it can actually be fulfilled was accordingly considered crucial.

I will in the following look into the definition of the "shipowner" as it has been defined in the MLC, 2006 and in the context of the preparatory works. I will compare it to the "company" definition of the ISM-code. I will also look at the concept of "employer" which during the MLC, 2006 negotiations was introduced as a definition, but which did not receive sufficient support and was accordingly not included.

4.1 "Shipowner" in the MLC, 2006

A seafarer is often recruited through one person, having the employment agreement concluded with another, employed on a ship under a foreign flag, which is owned by a third and managed by a fourth. An important aim of the MLC, 2006, is to ensure that the seafarers only have to relate to one single person: the shipowner.

The term "shipowner" for the purpose of the MLC, 2006, is defined in Article II 1(j):

> *(j) shipowner means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in ac-*

> *cordance with this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner.*

As mentioned above, only 2 ILO conventions contained a definition of shipowner; C179 concerning recruitment and placement and C180 concerning hours of work and manning of ships. Both conventions were adopted in 1996.

The MLC, 2006 definition is based on the definition of shipowner in ILO C 179. The definition is also "inspired" by those of "company" in SOLAS chapter IX, regulation 1.2 (the ISM-code), SOLAS IX, regulation IX-2 regulation 1.7 (ISPS-code) and in Regulation I/1, 1.25 of the STCW.[75]

The "shipowner" definition is a "function" of several components, which all needs to be assessed before concluding. At first sight, it does accordingly not seem to fulfil the aim of being easy to understand and referring to one easily identifiable person.

To determine who the "shipowner" is, we accordingly have to analyze the meaning of every component of the definition. For the sake of order: the bold in the following is mine.

1) "***shipowner*** *means the* ***owner of the ship***"

The starting point is the owner of the ship and that is clearly stated in the definition. Regardless of the many roles and many entities referred to as shipowner in my discussions above, this part of the definition refers to the person owning the ship and the person which traditionally has been understood as the shipowner. The person in question should be understood as the "registered owner" and refers to a natural or a legal person stated on the registration papers under the ship registry in question.

The registered owner might or might not be the employer of the seafarer.

[75] (Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia- Henry 2011) p.189

So far, the definition is accordingly not introducing any new steps forward towards a clearer identification.

2) "***or*** *another organization or person,* ***such as*** *the manager, agent or bareboat charterer,* ***who has assumed the responsibility*** *for the* ***operation*** *of the ship from the owner*"

The second part of the "function" reflects the "modern" organizational structure in shipping and opens up for the shipowner to delegate his responsibility to others. As discussed above, the operation of the ship is often delegated to a ship manager or a bareboat charterer. The wording "*such as*" is followed by exampled alternatives, but the examples provided should not be understood as an exhaustive list. Again, back to the important aim of ensuring necessary flexibility, it would not be appropriate – or even possible – to make a complete list of possible alternatives, however the above is presenting the most common ones. However, that should not be necessary, as this part of the sentence cannot be read alone.

This part of the function contains two components, tied together with a comma. The exampled alternatives are accordingly only available if the last part of the phrase "***who has assumed the responsibility for the operation of the ship from the owner***" is simultaneously applicable. In order to make use of this part, the "registered owner" must have initiated delegation of the ship operation. The wording *"operation of the ship"* is a central issue and should be understood as operation related to MLC, 2006, and not the commercial operation of the ship. So, if the "registered owner" of the ship is not operating the vessel himself, this part of the definition is pointing at the entity that is operating the vessel on his behalf.

However, *"assumed"* the responsibility is not sufficient in this respect, and in case of a delegation, the third part of the phrase must be taken into account.

3) *"****and who,*** *on assuming such responsibility,* ***has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention,***"

The third part of the phrase states that the responsibility cannot be delegated unless the operator has agreed to receive it. The responsibility in question covers that which is imposed on shipowners under the MLC, 2006.

There is no procedure set out in the convention to demonstrate the acceptance of such responsibility. Although not explicitly said, it must be construed to mean that this requires a written agreement. In practice, the acceptance would be expected to be reflected in a management agreement.

The intention of the wording must be understood as preventing the owner from passing on responsibility to the ship manager without the ship manager actively accepting it.

BIMCO has solved this by developing MLC clauses to be inserted as appropriate into the SHIPMAN 2009 management agreements which I discussed under chapter 2.3.2 above, and the first two clauses read as follows:

> *"(a) Subject to Clause 3 (Authority of the Managers), the Managers shall, to the extent of their Management Services, assume the Shipowner's duties and responsibilities imposed by the MLC for the Vessel, on behalf of the Shipowner.*
>
> *(b) The Owners shall ensure compliance with the MLC in respect of any crew members supplied by them or on their behalf. "*[76]

4) *"**regardless** of **whether any other organization or persons fulfil certain of the duties or responsibilities** on behalf of the shipowner."*

The last part of the definition again reflects the complexity, where having several persons involved in fulfilling the responsibilities imposed on the shipowner. In practice, it is common to delegate or separate crewing from the technical management of the ship. Such delegation is acknowledged by the convention, but the fact that the crew manager may be the delegated employer of the seafarer does not automatically mean that the crew

[76] (BIMCO u.d.) Recommended Additional MLC 2006 Clauses

manager can be considered being the shipowner. BIMCO's MLC clause b) above addresses the case where the owner provides the crew.

Based on the discussion above, it should be concluded that definition facilitates two main scenarios: the registered owner of the ship is the "shipowner" under MLC, 2006 (MLC-shipowner), unless operation of the ship has been delegated to a ship manager through a contractual agreement. The owner or the delegated ship manager can further delegate certain functions to a third party – for instance the employer role – however this will not shift the overall responsibility imposed on the MLC-shipowner under MLC, 2006.

4.1.1 Background for the definition of "shipowner" in MLC, 2006

The High-level Tripartite Working Group on Maritime Labour Standards (TWGMLS) met for the first time in Geneva in December 2001[77]. The aim was to reach tri-partite consensus for the development of the new international instrument[78].

A paper discussing definitions in current international instruments was presented at the 2nd meeting in 2002[79]. One reason for this was concern raised by a Government representative that various maritime instruments contained contradicting definitions, and this should be avoided in the new instrument[80].

As mentioned above, a few international instruments defined the term "shipowner" and a definition based on those in C179, C180 and the ISM-code was proposed at the 3rd meeting in 2003[81].

At the Preparatory Technical Maritime Conference in 2004, the International Labour Office presented the following accompanying commentary to the proposed definition of "shipowner": "*The definition reflects the principle that shipowners are the responsible employers under the Convention*

[77] (Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia- Henry 2011) p.49
[78] (International Labour Organization 2001) TWGMLS/2001/10
[79] (International Labour Organization 2002) TWGMLS/2002/3
[80] (International Labour Organisation 2002) STWGMLS/2002/2 p. 3
[81] (International Labour Organization 2003) TWGMLS/2003/10

with respect to all seafarers on board their ships, without prejudice to the right of the shipowner to recover the costs involved from others who may also have responsibility for the employment of a particular seafarer. […][82]*".*

The term was not discussed in detail, which could indicate that the definition and the underlying understanding presented in the commentary were not considered controversial.

At the final conference in 2006, several Governments (incl. Norway and UK) proposed to delete the term "agent" from the definition. The rationale was to ensure consistency with the ISM-code definition. Further, it was proposed to add the phrase *"irrespective of any subcontracting to other organizations or persons to perform certain duties and responsibilities on his or her behalf".* The latter part of the proposal was emphasizing the need to identify the responsible party under the convention, and to make it clear that shipowners could not delegate themselves away from such responsibility. The proposal was not accepted, however it was sent to redrafting with a common understanding of the basic aim. The term "agent" was retained, while wording was added to express that the ultimate responsibility of the shipowner could not be avoided by any type of subcontracting[83].

As stated by McConnell/Devlin/Doumbia-Henry: "*[…] despite some debate over wording, the forgoing indicates there was a clear tripartite consensus on the idea that shipowners should be the central point for responsibility, irrespective of individual contractual arrangements.*" [84]

As discussed above, the management agreements will regulate any second- and third party delegations. A seafarer can however not make use of such an agreement. For the seafarer, the employer will be the person signing the SEA. The SEA shall state the name and address of the "ship-

[82] (International Labour Organization 2004) PTMC/04/2

[83] (International Labour Organization 2006) Report of the Committee of the Whole p. 8/20 (126)

[84] (Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia- Henry 2011) p.190

owner"[85], and the main responsibility will rest with the MLC-shipowner – whose name will appear on the "ticket to trade": the MLC certificate.

4.2 "Company" in the ISM-code

It has been established above that the definition of "shipowner" under MLC, 2006, was also based on the definition of "company" under the ISM-code.

The responsible entity for implementation of the ISM code is the "Company" (ISM-company) as defined in section 1.1.2:

> *""Company" means the Owner of the ship or any other organization or person such as the Manager, or the Bareboat Charterer, who has assumed the responsibility for operation of the ship from the Shipowner and who on assuming such responsibility has agreed to take over all the duties and responsibility imposed by the Code."*

As for the MLC-shipowner, the definition points at the owner of the vessel as the responsible person, unless the owner has delegated the responsibility to another organization. This "other organization" must then agree to take over the responsibility.

Unlike the MLC, 2006, the ISM-code contains functionality to reflect and to formalize the delegation of the operational responsibility. A shipowner must, upon delegation of the ISM responsibility, report the delegation to the flag state administration according to ISM-code section 3.1. The report shall contain the full name and other relevant details of the delegated organization. If so, the delegated person's name and address will be stated on the Safety Management Certificate (SMC) – not the shipowner.

As mentioned above, the ISM-company and its operated vessels are subject to certification. While the vessels are audited every 2,5 years, an annual audit by the flag state/RO delegated for the purpose, needs to

[85] MLC, 2006 Standard A.2.1 para 4: […] *Seafarers' employment agreements shall in all cases contain the following particulars: […](b) the shipowner's name and address;[…]"*

be conducted at the ISM-company premises in order for the company DOC – and for the vessels SMC to remain valid.

4.2.1 Background for the definition of ISM "company"

Transparency in the operation of ships was a central issue prior to the development of the ISM-code as well. Experience had shown that the need for clarity to ensure the identity of the responsible person in case of a marine casualty. A ship registered as owned by a "one vessel company" registered in an "open registry" would be able to escape debts, claims or prosecutions towards the ship, by vessel owners shutting down the office and taking the vessel out of business. The liability would then end with the "one vessel company".

The challenge was already addressed in IMO Resolution A.441 (XI) adopted on 15 November 1979 concerning *"Control by the flag state over the owner of a ship"*. A.441 (XI) is referring to the fact that the registered owner may delegate functions regarding the operation of the ship and is addressing the challenges sometimes met when trying to identify such a delegated person or entity. The resolution encourages flag states to "take necessary steps" to ensure that such delegated entity can be identified and is available for contact.

The predecessor of the ISM-code was the *"IMO guidelines on the management for safe operation of ships and for pollution prevention"* adopted as an annex to Resolution A.647 (16) on 19 October 1989. A reference to A.441 (XI) was maintained in these guidelines.

An illustrative example describing the challenge of "modern" ship owning times is presented in the "ERIKA" case[86]. The main question was who could be held responsible for the disaster caused by the vessel breaking in two. The 23-year old vessel had a long history with various classifications

[86] (Desislava Nikolaeva Dimitrova 201) p.21: *"A recent example is the Erika case in which a large area of the French coast was polluted after the breaking up of the ship in the Bay of Biscay on 12 December 1999. The sinking of Erika involved the spillage of more than 10.000 tonnes of heavy fuel oil[….].*

societies, names and flag state registrations. The registered owner of the vessel was a conglomerate consisting of 12 different offshore companies, while the vessel was managed by a different entity which again had chartered the vessel out to a third one. The real owner of the vessel was well hidden, as the vessel was registered under an open registry which allowed anonymity[87]. It was accordingly very difficult for the court to identify the owner of the vessel. The case was solved by the fact that the real owner voluntarily revealed his identity and was together with the vessel manager ordered to pay maximum penalty[88].

In addition to the "ISM section 3.1 reporting" of delegated unit, another safeguard has been adopted, and that is the IMO ship identification scheme, introduced in 1987 through Resolution A.600 (15) and mandatory in 1996. The scheme requires ships to be registered with a unique identification number, which will remain throughout the vessels lifecycle[89].

In 2004, a similar system for the registered owner and the Company was introduced through Resolution MSC.160 (78). The system became mandatory through a SOLAS amendment under chapter XI-1 reg. 3-1, which entered into force 1st January 2009.

The IMO identification system is operated by IHS Fairplay and the numbers are publically available on the IHS Fairplay website[90].

4.3 The employers role

It has been established above that the MLC, 2006 accepts that seafarers are employed by another entity than the "shipowner". In spite of the employer's important role, the term is not defined in the convention.

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87 (OECD, Directorate for science og Committee 2003) p.29: *"The identity of the beneficial owners of an International Trading Company may remain confidential if they incorporate the company through the services of a licensed nominee company. Confidentiality is maintained as long as the company and its beneficial owners are not involved in any money laundering activity"*

88 Ibid p.21

89 IMO Resolution A.600 (15)

90 http://www.ihsfairplay.com/IMO/imo.html last visited:2015-09-26

At the 3rd meeting of the TWGMLS, the seafarer group proposed to define the term "employer"[91]. The proposal was supported by the shipowners group, and who also reiterated it at the 3rd meeting of the sub group of the TWGMLS. It was then proposed that the "shipowner" definition should also include the term "employer"[92]. Concern was raised by the seafarer group in relation to employers not situated in the flag state, referring to UNCLOS and the flag states enforcement responsibility[93]. Agreement was however reached for not including a specific definition of the "employer" but rather to define it as needed in the specific circumstances.

The last "component" of the "shipowner" definition in MLC, 2006 potentially points at the employer. The phrase "*regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner*" admits that certain tasks can be subcontracted, and the employer role is considered one such task. It does however not mean that the responsibility for the entire convention shifts. This fact is reflected in Standard A2.5 paragraph 4 regarding repatriation: *"National laws and regulations shall not prejudice any right of the shipowner to recover the cost of repatriation under third-party contractual arrangements."*

As stated by McConnell/Devlin/Doumbia-Henry: *"[…] However, it seems unlikely that shipowners would consider it advisable to give carte blanche to outside employers to represent them in this way or that an employer would accept all of these responsibilities […]94."*

Thus, if the shipowner and the employer are different entities, the shipowner or the entity he has delegated the responsibility to will retain responsibility for the obligations under MLC while the employer must fulfill his contractual obligations towards the seafarer.

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91 (International Labour Organization 2003)TWGMLS/2003/10 p.9(52)

92 (International Labour Organization 2003)STWGMLS/2003/8 p.9(53)

93 (International Labour Organization 2003)TWGMLS/2003/10 p.9(58)

94 (Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia- Henry 2011) p.290

4.4 Similarities and differences between MLC, 2006 and the ISM-code

The MLC, 2006 includes both labour rights and employment conditions, in addition to extensive requirements relating to the working environment on board. Furthermore, the MLC, 2006 also prescribes the technical requirements relating to construction of seafarer accommodation. One could accordingly also argue that it is a labour convention, maritime convention and a technical instrument as well.

Phil Anderson claims, that about one third of the MLC, 2006 is related to the ISM-code purpose of "safety at sea, prevention of human injury or to loss of life"[95].

This is supported by the United Kingdom Maritime Coastguard Agency (MCA) who has estimated the overlap to be about 25%[96].

Both of them have compared the content of the MLC, 2006 with that of the ISM-code and at a paramount level, it is evident that at least the following parts of the MLC, 2006 are also covered by the ISM-code:

- Title 1; minimum requirements for seafarers to work on a ship: minimum age, medical certification, training and qualification
- Title 2; Conditions of employment:
  hours of work and hours of rest, manning levels,
- Title 4; Health protection, medical care, welfare and social security protection
  Medical care and health and safety protection and accident prevention.

Furthermore, as concerning title 3, safety issues related to accommodation, food and catering are subject under the ISM-code and to some extent sub-contracting of crewing could be considered.

On the contrary, what is also quite clear is that "labour issues" like SEA, wages, entitlement to leave, repatriation and social security, are

[95] (Phil Andersson 2015) p.214

[96] (Jennifer Lavelle 2014) p.227

typical examples of employer responsibilities, which do not have corresponding parts in the ISM-code[97]. However, that is not preventing them from being relevant when considering a ship's operation.

No explicit link to the ISM-code is found in the MLC definition but the two definitions are to a large extent using the same wording. Two central parts of the wording in the MLC definition are *"who has assumed the responsibility for the operation of the ship from the Shipowner"* and *"has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention"*. The comparable phrases in the ISM-code definition are "*who has assumed the responsibility for operation of the ship from the Shipowner"* and *"has agreed to take over all the duties and responsibility imposed by the Code."* The material difference is that it is pointing at different sets of requirements.

It has further been established above that all components of the definition must be considered before the "shipowner" can be determined. If this prevails, then the operator of the vessel needs to agree to take on the responsibility imposed by the MLC, 2006.

However, does this mean that the ship operator actually can reject the MLC responsibility an accordingly "avoid" becoming the MLC-shipowner while still having responsibility for ISM?

On one hand, there is substantive overlap between the two instruments, and due to this interrelation, it is tempting to state that "the one can't live without the other". If so, the wording "has agreed" is just a formality because being the operator of the vessel also includes being the MLC shipowner, regardless of any active acceptance.

On the other hand, if the wording "has agreed" means that the operator has a choice, then the result will be a different MLC-shipowner in case the ISM-company disagrees. Given that the overlap in requirements will still prevail, the result must be that there are two entities with a shared responsibility. Shared responsibility can easily lead to pulverized responsibility and this is something the MLC, 2006 was developed to prevent.

[97] (Jennifer Lavelle 2014) table 10.5

It is a common understanding in the shipping industry that the MLC "shipowner" is the same entity as the ISM-company. Presented below are a couple of examples:

The International Association of Classification Societies' recommendation number 129 concerning *"Guidance on DMLC Part II review, inspection and certification under the Maritime Labour Convention, 2006"* repeats the definition in Article II 1(j) and in section 1.5 it states: *"This definition is taken to mean that the shipowner is the same entity as the Company as defined in the ISM Code, unless specified otherwise by the flag Administration."*

As also discussed above, BIMCO has, in order to reflect the new responsibility imposed on ship managers, drawn up MLC clauses which can be added to the management agreements as appropriate.

The certification schemes for MLC, 2006 and ISM-code are based on the same principles. Both instruments sets out a 5 year certificate cycle. Under MLC, 2006, only the vessel is subject to certification. The ISM-code however also requires the ISM-company to be certified.

Looking at the ISM-code and the MLC, 2006 in conjunction, provides a broader picture of the condition of the ship. The differences should be considered as supplementing issues rather than opposing requirements, and from a practical point of view, the benefits combining them surpass those separating them.

As a preliminary conclusion, it appears by the definitions, that the MLC-shipowner and the ISM-company is the same person. In the below, I will review some cases of actual implementation to see if it returns the same result.

5 Implementation of the MLC, 2006

In order for an international convention to have effect for a member's citizens, it needs to be ratified and implemented into national legislation. Until the convention has been implemented under the laws and regulations of the member concerned, the MLC 2006 will not directly apply to shipowners, ships and seafarers.

The MLC, 2006 sets out minimum standards for implementation by a ratifying member.

According to Article IV, paragraph 5, of the MLC, 2006[98], implementation may be achieved through various means, unless specifically referring to laws and regulations in the convention text. Such means may in addition to national laws or regulations, be collective bargaining agreements, or other measures or practice.

In practice, this means that each member state is provided with a great deal of flexibility in how to achieve the aim of the convention. Recalling that previous maritime instruments were poorly ratified, flexibility in implementation was important to allow for a high number of ratifications.

However, increased flexibility in implementation may also challenge the aim of unified implementation. When implementing a convention, general principles relating to interpretation of treaties should prevail, such as those stated under article 31 of the Vienna Convention in the law of treaties[99].

[98] Article V 1. 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.

[99] Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969; "*Article 31, GENERAL RULE OF INTERPRETATION*
1. 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.
[…]
4. A special meaning shall be given to a term if it is established that the parties so intended."

Recalling the history of which the convention was built is accordingly an element which may limit the flexibility in implementation. As discussed by McConnell/Devlin/Doumbia-Henry in their book embracing and presenting the preparatory works of the MLC, 2006, it must be kept that what the parties understood as being the meaning at the time of the convention was negotiated, along with the records thereof, will be important input *to "the analysis of a text's "meaning" and, more importantly, what it means for national implementation and application to particular situations*"[100].

At the time of writing, 65 ILO member states have ratified the MLC, 2006.

Limitations to the scope of this thesis, will not allow a detailed presentation of how 65 member states have defined the term "shipowner" in national legislation. I have however chosen a few which will be presented below. The selection presents flags both representing traditional maritime nations and "open registries".

I have chosen to particularly highlight the Norwegian implementation. Norway is one of the "regulatory efficient" flags with a long history of regulating seafarers rights. Norway was also amongst the 10 members of the TWGMLS and was early to ratify the convention. As another example of implementation by a traditional flag, I have chosen to present the United Kingdom (UK). The Republic of the Marshall Islands and Antigua & Barbuda's implementation are examples of "open registries". In addition I will present Gibraltar, being an "open register" but with a strong link to the UK flag regulations.

5.1 Definition of shipowner in Norway

Norway ratified the MLC, 2006 10th February 2009, as the 5th country, after Liberia, Marshall Islands, Bahamas and Panama, and was an active player and contributor in the negotiation process leading up to the adoption of the MLC, 2006.

[100] (Moira L. McConnell, Dominick Devlin, Cleopatra Doumbia- Henry 2011)p.9-10

MLC, 2006 is mainly implemented through the Act of 16 February 2007 No. 9 relating to ship safety and security (Ship Safety and Security Act) and the Act of 21 June 2013 No. 102 relating to employment protection etc. for employees on board ships (Ship Labour Act)[101]. The Ship Labour Act defines "shipowner" by referring to the definition in the Ship Safety and Security Act.

The Ship Safety and Security Act refers to the shipowner as being the "company" in accordance with the ISM-code. Ships not required to be ISM certified will naturally not have a "company" and the owner of the ship will be the "shipowner".

When implementing the MLC, 2006, the Norwegian Maritime Authority, as the competent authority in Norway, issued a guidance note where the term has been further elaborated. In section 2.2 of the *"Guidance Note on Norway's implementation of the Maritime Labour Convention, 2006"* states that: *"The ISM Company is the shipowner for the purposes of the MLC"*[102].

The rationale behind this decision stems from the preparatory works for the implementation of the MLC, 2006, and is stated in Ot.prp. nr. 70 (2007–2008) regarding amendments to the Norwegian Seaman's Act of 30 May 1975 no. 18 (Seaman's Act), [103] and in NOU 2012:18 regarding the development of the Ship Labour Act[104].

Norway had at the time of ratification already a mature legislation covering seafarer's working and living conditions. However, still, the legislation needed some revision to fulfil the requirements of the MLC, 2006. The Seaman's Act was the applicable law at the time of the ratification. The responsibility for seafarers' rights was placed on the shipowner, however by referenced regulations it was clear that in case the SEA was signed by another person, this entity take over the responsibility for the duties imposed by the Seaman's Act.

101 (Terje Hernes Pettersen 2014)

102 (Sjøfartsdirektoratet u.d.)Para. 2.2.

103 (Det Kongelege Nærings- og Handelsdepartement 2008)

104 (Skipsarbeiderlovutvalget 2012)

The fact that seafarers more frequently are employed by crew managers was acknowledged, and with the definition of "shipowner" in the MLC, 2006 it was required to be specifically addressed. A crew manager, although signing the SEA, would normally not be responsible for the operation of the ship nor for the safety onboard, and could accordingly not be considered the "shipowner" for the purpose of the MLC, 2006.

The Ship Safety and Security Act had defined the shipowner according to the ISM-code and the liable entity would be the one having the operational responsibility of the vessel. The Seaman's Act was changed to reflect both the shipowner responsibility and that of the employer; however the change never entered into force.

The change in the Seaman's Act however still did not provide the necessary clarification as its scope was limited compared to the scope of the MLC, 2006. The two main laws were pointing at potentially two different entities. It was decided to completely revise the Seaman's Act and in 2013, it was replaced by the Ship Labour Act. The Ship Labour Act defines the employer and the employer's responsibilities under the MLC, 2006 in section 2-4. In addition, it refers in section 2-3 for the definition of the "shipowner", as corresponding to the one of the "company" in Section 4 of the Ship Safety and Security Act.

By this method, the "company" becomes overall responsible for seafarers rights onboard. In practice, the ISM-company's responsibility has expanded, but the employer remains with the main responsibility for fulfilling the duties imposed by the SEA. The legal implication is two companies with obligations towards the seafarer, but the intention by law is to pursue the practice where the employer has the main responsibility. The practical solution to this has been to place a primary "ensure" responsibility on the MLC-shipowner along with introducing the MLC-shipowner as "jointly liable" with the employer for certain of the duties imposed in the SEA. These duties include wages and other central economic rights laid down by the MLC, 2006.

5.2 Definition of shipowner in the United Kingdom

The UK ratified the MLC, 2006 7th August 2013 – just before the convention entered into force for the 30 first ratifying countries. The UK was also an active player during the MLC, 2006 development and as addressed above under chapter 5.1.1, UK was amongst those who had clear opinions regarding the definition of shipowner[105].

The UK has implemented the MLC, 2006 through amongst others The Merchant Shipping (Maritime Labour Convention) Regulations 2014[106] and The Merchant Shipping (Maritime Labour Convention) (Survey and Certification) Regulations 2013[107]. In order to explain the UK's interpretation of important terms used in the MLC, 2006, they have developed "Marine Guidance Note MGN 471 (M)" regarding "Maritime Labour Convention, 2006: Definitions"[108]. In the introduction to the MGN it is also a reference to what is considered the intent of the MLC, 2006 drafters, which aim UK intends to fulfill. The definition of "Shipowner" is presented in Section 4.2 as follows:

"4.2 The UK definition says: "shipowner" means –

(a) in relation to a ship which has a valid Maritime Labour Certificate, the person identified as the shipowner on that Certificate;

(b) in relation to any other ship, the owner of the ship or, if different, any other organisation or person such as the manager, or the bareboat charterer, that has assumed the responsibility for the operation of the ship from the owner. "

The first part of the definition is simply stating the fact that if an entity is identified on the MLC certificate, this entity is to be considered responsible for the MLC, 2006 on board that particular vessel. It does not

[105] (International Labour Organization 2006)Report of the Committee of the Whole p 8/20 (126, 132 and 147)

[106] (legislation.gov.uk u.d.)The Merchant Shipping Regulations 2014

[107] (legislation.gov.uk u.d.)The Merchant Shipping Regulations 2013

[108] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441053/MGN_471_MLC_Definitions.pdf. Last visited:2015-10-10

provide any guidance for how to reach this conclusion and it is not clear what the rationale behind this part of the clause is.

It must however be appropriate to assume that the second part of the definition is setting out the "procedure". Comparing letter b) with the definition in Article II 1(j) it differs in that it has omitted the word "agent". As discussed under chapter 5.1.1 above, the UK sponsored an amendment regarding deletion of the term "agent" at the final conference in 2006. The proposal was however rejected by the conference[109].

In the introduction to the MGN 471 it is stated under section 1.1:

"In transposing the Maritime Labour Convention, 2006 (MLC) into UK law, it has been necessary to make some changes to the exact words used in the Convention text, in order to achieve the results intended by the Convention. This includes the wording used for some of the definitions – quoted from the Merchant Shipping (Maritime Labour Convention) (Survey and Certification) Regulations 2013."

The reason for omitting the term "agent" from the definition is that it is considered unlikely that the ship owner's "agent" would accept the responsibility for all obligations under the MLC, 2006. Accordingly, the term is considered superfluous.

Further, the UK definition has left out the last part of the definition in Article II 1(j): *"regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner."* The argument for leaving this part out is that it has been claimed to have the potential of allowing the person – which name is on the MLC certificate – to reject the responsibility imposed by the MLC 2006. In conclusion it is stated:

"4.5 MCA believes that there should be no scope for argument that the person named on the certificate has liabilities towards seafarers on their vessels. Whoever is named as shipowner on the Maritime Labour

[109] (International Labour Organization 2006)Report of the Committee of the Whole p 7/20(125)

Certificate and SEA has, by definition, accepted the responsibilities and liabilities set out in the MLC."

The UK does not explicitly state that the MLC shipowner equals the ISM-Company. However when conduction inspections, these are conducted in conjunction with the ISM audits.[110]

5.3 Definition of shipowner in the Republic of the Marshall Islands

The Republic of the Marshall Islands (RMI) was the second member state to ratify the MLC, 2006. The RMI was not a member of the ILO during the development process and was accordingly not a party to the discussions leading up to the adoption of the convention. RMI had to become a member in order to ratify the convention and they filed their ratification on the 25th September 2007.

MLC, 2006 is implemented through The Republic of the Marshall Islands Maritime Act of 1990[111] as amended, and the RMI Maritime Regulations. Marine Notice No. 2-011-33 Rev. 2/15[112], "Maritime Labour Convention, 2006 Inspection and Certification Program" sets out details regarding the application. Section 3 of the notice defines the shipowner as follows:

> *"Shipowner means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed, by written agreement, to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner. The Administrator considers this organization or person to be the certified ISM Code Company."*

[110] (Maritime & Coastguard Agency u.d.) section 4.2

[111] (The Republic of the Marshall Islands u.d.)Maritime Act of 1990

[112] (The Republic of the Marshall Islands u.d.)Inspection and Certification Program

The definition is mainly in line with the one in Article II 1(j) of the MLC, 2006 and places the responsibility on the ISM-company. However it slightly differs by the fact that it requires a "written agreement" for delegation of responsibility. Further guidance regarding the "written agreement" is provided in section 8.2.3.1 & 2 of the Marine Notice 2-011-33.

The "shipowner" will appear on the MLC certificate and on the Declaration of Maritime Labour Compliance (DMLC) part II[113]. A DMLC Part II template is appended to the convention[114]; however the RMI has made a flag specific form where additional details regarding "Company" have been added[115]. The way the form is understood, it provides the possibility to mark whether the "shipowner" is the owner or the ISM-company. In case the latter, an agreement or Power of Attorney between the owner and the ISM-company shall be presented as evidence of the contractual arrangement. The ISM-company will sign the DMLC Part II *"[…] as agent for and on behalf of the shipowner in accordance with the terms and conditions provided in that certain Shipmanagement contract dated* '___'."[116].

5.4 Definition of shipowner in Gibraltar

Gibraltar is part of the Red Ensigns Group[117]. Upon the UK ratification, it was extended to also cover Gibraltar[118]. The Gibraltar Ship Register is per definition an open register, and is fully recognized as an EC Member States' Register.

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113 (International Labour Organization u.d.) MLC,2006 A.5.1.3 para 10 b) "*10. The declaration of maritime labour compliance shall be attached to the maritime labour certificate. It shall have two parts: […](b) Part II shall be drawn up by the shipowner and shall identify the measures adopted to ensure ongoing compliance with the national requirements between inspections and the measures proposed to ensure that there is continuous improvement.*"

114 (International Labour Organization u.d.) Appendix A5-II

115 (The Republic of the Marshall Islands u.d.) MSD 400B, Declaration of Maritime Labour Compliance (DMLC) – Part II

116 (The Republic of the Marshall Islands u.d.), "Maritime Labour Convention, 2006 Inspection and Certification Program" section 8.2.3.2

117 http://www.redensigngroup.org/

118 (Gibraltar Maritime Administration ((Ministry of Maritime Affairs)) 2013)

Gibraltar Maritime Administration (GMA) has implemented the MLC, 2006 through the Gibraltar Merchant Shipping (Maritime Labour Convention) Regulations 2013[119]. According to Section 2.1 under part I preliminary and general application, shipowner is defined as:

> *""shipowner" means–*
> *(a) in relation to a ship which has a valid Maritime Labour Certificate or valid interim Maritime Labour Certificate, the person identified as the shipowner on that Certificate;*
> *(b) in relation to any other ship, the owner of the ship or, if different, any other organisation or person such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner, and in this definition "responsibility for the operation of the ship" includes the duties and responsibilities imposed on shipowners in accordance with the Agreements forming the Annexes to Directive 1999/63/EC and Directive 2009/13/EC;"*[120] [121]

As a footnote to MLC Guidance Notice – 027, "A Route to MLC certification (amended 07.08.13)[122]", the GMA has stated:

"Ship owner refers to ship owner, operator or ship manager as defined by MLC that appears on the DMLC Part II and MLC Statement of Compliance / Certificate. **For the purposes of MLC, unless otherwise agreed by the Maritime Administrator, the ship owner shall be the ISM DOC holder.**" *(Boldfaced by Gibraltar Maritime Administration (GMA).*

The GMA definition of "shipowner" is set out in the same way as the UK definition, and it seems to contain two alternatives. Again, the starting point is that the "shipowner" is determined to be the entity that is stated on the MLC certificate. There is no further description of how to decide

[119] (Gibraltar Maritime Authority u.d.)LN. 2013/120

[120] (Gibraltar Maritime Authority u.d.)LN. 2013/120

[121] "COUNCIL DIRECTIVE 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC"

[122] (Gibraltar Maritime Administration u.d.)MLC Guidance Notice – 027

who should be on the certificate. However, as assumed under the discussion regarding the UK definition, that may be the intent of the second part. If so, the "shipowner" should be the operator. For the responsibility it is referred to the obligations under the European Union (EU) Directives implementing the MLC, 2006.[123] [124] This is a different approach than the one of the UK and could give the impression of a different solution. In the guidance notice it is however particularly emphasized that unless otherwise agreed with the administration, the ISM-company is also the MLC-shipowner.

5.5 Definition of shipowner in Antigua & Barbuda

Antigua & Barbuda ratified the MLC, 2006 on 11th August 2011 and was accordingly amongst the first 30 countries to ratify. The MLC, 2006 requirements are implemented through Merchant Shipping (Maritime Labour Convention, 2006) Regulations, 2012[125]. Further guidance for implementation is provided in Circular 2014-003 Maritime Labour Convention 2006 Guidance[126]. The circular presents a "shipowner" definition which is identical to the one in Article II 1(j)[127]

In the further, the circular emphasizes the importance of the phrase "*has assumed the responsibility for the operation of the ship*" in relation to the person or company being the shipowner for MLC. It also states that since the term employer is not used, the shipowner is responsible for signing the SEA.

The circular also addresses the fact that duties can be delegated, for instance to a crewing agent, who if authorized by the shipowner can sign the SEA. The responsibility however remains with the shipowner. It can

[123] (Gibraltar Maritime Administration ((Ministry of Maritime Affairs)) 2013)

[124] *Annexes to Directive 1999/63/EC and Directive 2009/13/EC*

[125] (Antigua & Barbuda Department of Marine Services and Merchant Shipping u.d.) A&B Legislation

[126] (Antigua & Barbuda Department of Marine Services and Merchant Shipping u.d.) MLC,2006 Guidance

[127] Ibid

only be one "shipowner", who shall appear on the certificate and who shall sign the DMLC Part II and if any delegations are done, it must be clearly stated in the DMLC part II.

Finally, it is envisaged that the shipowner "in most cases" is the ISM-company, however if different, the DMLC part II shall specify the responsibility between the shipowner and the ISM-company.[128]

[128] Ibid

6 What has changed with MLC?

Sometimes new rules will require changes and new behavior, while other times new rules may have less practical impact.

A seafarer would have a contractual relationship with the natural or legal person having signed the SEA, and any claims relating to the employment conditions had to be routed towards that person. Practice has shown that if this person was difficult to identify, the claim could become time barred before the seafarer was able to reach the responsible person.

Jurisdiction – or lack of such, was another discussion. The MLC, 2006 does not contain any clear jurisdiction clause, so the jurisdiction challenges remains unless covered by national law or the SEA. The matter is however too extensive to be covered in this thesis.

The SEA is a contract between the seafarer and the shipowner, and shall be signed by the seafarer and the *"the shipowner or a representative of the shipowner (or, where they are not employees, evidence of contractual or similar arrangements […]).*[129] This requirement is emphasized in the first report of the CEACR on implementation of the MLC, 2006. A general observation is made regarding the importance of the basic relationship between the seafarer and the person defined as "shipowner" under article II.[130]

To include a definition of "shipowner" in the MLC, 2006, was important for the seafarers. The reason for this was to ensure that the responsibility was placed on a single and easily identifiable person, to protect seafarers from losing rights due to complex owner structures hiding the true identity of the responsible person.

[129] MLC, 2006, Standard A2.1. para 1 a)

[130] (International Labour Organization u.d.)CEACR

As a deliberate act by the drafters, the definition in Article II 1(j) provides the member states with some flexibility in determining who shall be the "shipowner" in their national legislation. The flexibility was necessary to ensure a sufficient level of ratifications and accordingly facilitate that the MLC, 2006 requirements became applicable to as many seafarers as possible.

Under chapter 5 above, I have reviewed how 5 different flag administrations have implemented the definition of "shipowner" as set out in Article II 1(j) of the MLC, 2006.

The result of the review leaves a somewhat scattered picture but which in theory may be pointing in the same direction. In the below I will summarize the different flag solutions and make a preliminary conclusion.

Norway is quite explicit in their implementation guidance, leaving little or no doubt in that the MLC shipowner equals the ISM-company. The determination is based on the rational that it is the operation of the ship which is central, and that the one responsible for operating the ship for all practical purposes will also be responsible for MLC, 2006.

The "jointly liable" solution which was established by law when implemented in Norway, will also allow the seafarer to claim their rights fulfilled directly from the "shipowner", also when their SEA is signed by another person[131]. Compared to the situation before the MLC, 2006, this is a further strengthening of seafarer rights. Before, claims were pointed at the employer, while with the new solution the seafarer will also be able to approach the MLC-shipowner who is also the ISM-company.

Having the preparatory reports and the UK engagement in the negotiation phase in mind, it may be a surprise that the UK has not explicitly mentioned the ISM-company in their definition. Neither is it mentioned in the MGN regarding definitions. We must look at the Merchant Shipping Notice 1848 to find a reference to the ISM-code, and it is limited to state

[131] (Skipsarbeiderlovutvalget 2012) p.123

that MLC inspections are to be conducted at the same time as the ISM audits. The rationale behind this is to reduce inconvenience for the vessel, and it must accordingly be assumed that the basis for the inspection and the audit is the same SMS. Hence it is logic to conclude that the responsibility is by the same company, but from a seafarer's perspective it is however not obvious.

In the UK legislation, the last part of the definition in article II 1(j) has been omitted *(regardless if…)*, as it was claimed to potentially allow the person named on the certificate to dispute the responsibility for the MLC, 2006. The potential consequence of not omitting it could according to the MCA leave the seafarer without their entitlements while waiting for the issue to be resolved. It could also limit the MCA's possibility to take action against the manager, and the action would then have to be taken against the shipowner.[132]

From this it can be concluded that the solution chosen in the UK should leave the seafarer with the same protection as under the Norwegian law.

The RMI specifically states that the ISM-company is the MLC-shipowner. The RMI has amended the model DMLC Part II to include "Company" name and address in addition to the "shipowner". The intention is understood as making it transparent that the shipowner has delegated the responsibility to the ISM-company, in case they are different.

As the seafarer will only be in a contractual relationship with the entity signing the employment agreement he cannot rely on the content of a management agreement, however the DMLC Part II will provide supplementing information.

Gibraltar basically has the same definition of "shipowner" as the UK. In their guidance note it is however emphasized that the ISM-company is the "shipowner" unless otherwise instructed from the administration.

The solution may appear a bit ambiguous as on one side it is clear that the ISM-company is the default, but on the other, the administration can

[132] (Maritime & Coastguard Agency u.d.)MGN 471 section 4.4

determine something else. There is no clarification under which circumstances such a determination may be made, and what the consequence may be for the seafarer. In order to identify if such determination has been made, it will be necessary for the seafarer to compare the MLC certificate with the ISM certificate to see if the name on the certificate is the same.

Antigua & Barbuda has incorporated the definition as it is stated in the convention. The possibility to delegate the employers function is addressed and it is finally concluded that the ISM-company in "most cases" will be the MLC-shipowner, but if not, the relationship between them must be clarified in the management contract.

Again, the seafarer is not a party to the management contract, and cannot be expected to have access to it. Under Gibraltar rules, an MLC-shipowner different from the ISM-company is based on an administrative determination. However in the case with Antigua & Barbuda it seems like the administrative determination is not required, and no preconditions for such decisions are prescribed. Again, the seafarer will have to compare the MLC- and the ISM certificates to identify any differences.

The first report of the CEACR submitted to the ILC 5th February 2015, contains the observations made to the implementation of the 32 first MLC, 2006 ratifying members.[133] The report does not contain any general remarks concerning the members' implementation of the term "shipowner". Furthermore, none of the flag states I have presented above have been directly requested by the committee to explain their implementation of the term.

The solutions as such may accordingly have to be considered as accepted by the ILO.

6.1 What does it mean for the seafarer?

Although the definition as discussed under chapter 4 preliminary concludes with two main scenarios, the review of the practical imple-

[133] (International Labour Office 2015) p.477

mentation of the term under the 5 different flags states discussed above seems to identify 3 different scenarios for implementation.

1: The owner of the ship is operating the ship himself, is both the ISM-Company and the MLC-shipowner and the employer of the seafarers.

This scenario is reflecting the "traditional" way the shipping industry was organized and the seafarer will have one person to relate to. Further, this person who is also operating the ship is subject to verification under the ISM-code, and the implementation of MLC, 2006 will normally be covered by the SMS.

2: The owner of the ship has delegated operation of the ship to the ISM-company who has also accepted to be the MLC-shipowner. It can be the employer, or the SEA can be with the owner or a third party.

The shipowner will issue the ISM section 3.1 statement to the flag administration for delegation of the ISM responsibility and the MLC responsibility is assumed appropriately handled through the management agreement. The delegated person will have the main responsibility to ensure seafarers getting their rights under the MLC, 2006. In case the seafarer has its SEA signed by a crew manager or another entity being the employer, the obligations under the SEA is still with the employer but the seafarer has the option to file claims also against the MLC-shipowner.

Accordingly, it seems like this solution is providing the seafarer with another layer of protection compared to the first scenario.

3. The owner of the ship has delegated the operation of the ship to the ISM-company but the ISM-company has not accepted the MLC responsibility. The owner keeps the MLC responsibility or delegates it to a third party.

The main challenge in this scenario is that the overall responsibility for overlapping requirements, as discussed under chapter 4.4 above. It is difficult to see how a crew manager can take on the responsibilities imposed on the MLC-shipowner. It is also difficult to see how the owner of the ship can keep the responsibility for requirements in practice being outside his control, and which already has been delegated to a different person. The seafarer will have the SEA signed with the employer so the employer will formally have accepted the responsibilities set out in the

SEA. However, the transparency gained by the mechanisms of the ISM-code, is however lost in this scenario. A worst case scenario is that we are back where it started before the MLC, 2006 as the seafarer may have a SEA signed by a person which may be difficult to identify.

6.2 Other safeguards for seafarer rights

Regardless of who is responsible for the rights set out in the MLC, 2006, the seafarer will still benefit from the access to already existing safeguards set out in other international instruments. Some examples of existing rights are provided below:

Bringing or securing a maritime claim by arresting a ship is a right that is recognized by most maritime states. It is an important tool for seafarers when seeking to enforce their rights.[134] In general, arrest is however only available for claims regarding monetary rights.

Arrest of ships is covered by the following international legislation:

- *International Convention Relating to the Arrest of Sea-Going Ships, adopted in Brussels 10 May 1952*
- *International Convention on Arrest of Ships, adopted in Geneva 12 March 1999*

In addition, the following convention is relevant for maritime liens:

- *International Convention on Maritime Liens and Mortgages, adopted in Geneva, 6 May 1993*

Maritime liens are also a recognized tool in the maritime industry. Claims for wages gives rise to a maritime lien, and the lien relates to the vessel on which the wages were earned.

Furthermore, the MLC, 2006 requires the "shipowner" to provide financial security to ensure seafarers' monetary rights are covered. Such financial security shall cover health and safety protection, repatriation and wages and is often covered by the protection and indemnity (P&I) insurance of the owner. Currently, the seafarer will normally not have

[134] (Michael R Anderson; Deirdre Fitzpatrick 2005) p.211

directly access to this insurance, unless specifically stated in national legislation. The P&I clubs operates under the "pay to be paid" principle, meaning that indemnity will not be paid unless the shipowner pays first[135].

However, as a result of amendments to the MLC, 2006 adopted in 2014, the scope of financial security requirements will be extended to cover security for up to four months wages in the event of abandonment of seafarers. A new standard A2.5.2 – Financial security will apply in 2017 and under paragraph 4 it is required for the financial security system to provide *"[…] direct access, sufficient coverage and expedited financial assistance […]136.* The financial security is in addition to wages required to cover repatriation costs, essential needs like food, accommodation and medical care. The requirement for "direct access" will challenge the current "pay-to-be-paid" principle if to be covered by P&I.

The special concept of self-enforcement through the onboard and onshore complaints procedures is new with the MLC, 2006. Flag- and port state administrations are required to follow up on complaints resulting in shipowners holding the certificate will be subject to "questioning" and additional inspections on board may be required to further investigate the complaint.

In addition to the planned enforcement set out by the flag state inspection and certification regimes, PSC is the basis for the "no more favorable treatment" concept and may through unannounced inspections verify compliance on board shipowners' vessels.

Based on the above, it should accordingly be difficult for any person involved to "plan" one self out of legal responsibilities.

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135 (The Swedish Club 2012) Rule 2.9 and 2.10

136 (International Labour Office 2014) p.55

7 Conclusion

The globalization of the shipping industry experienced over the last decades has resulted in substantial changes to the way shipowners organize their business. Traditionally, the owner of the ship was also the operator and the employer, and accordingly it was clear to the seafarer who was to answer for rights set out by the employment agreement. However, as shipowners sought alternative ways to finance their business, and "open registries" facilitated this need by opening up for alternative owner and operational structures, the picture became fragmented and difficult to oversee. It was clear that the term "shipowner" did no longer provide a clear identification of the responsible person that seafarers needed, and this was accordingly defined as an important aim of the MLC, 2006.

The definition of "shipowner" in the MLC, 2006 is modelled by that of the "company" in the ISM-code and the "shipowner" in ILO C179, and was designed to capture the variety in organizational structures seen in modern shipping. "Built in" flexibility for implementation should facilitate such variations. Simultaneously, it was important to reflect that the "shipowner" in principle would be the responsible employer, regardless of any other contractual arrangements the seafarer might have.

The definition presents two main scenarios, and starts out by placing the responsibility on the owner of the ship, assuming that the owner is both the employer of the seafarers and the operator of the ship. This is reflecting the "traditional" shipping organization and should accordingly not involve any new challenges.

The shipowner can operate the ship himself – or he can delegate it to a ship manager, and this is the second scenario addressed by the definition. The ship manager will then be the MLC-shipowner, in addition to also normally being the ISM-company.

Without challenging these two main scenarios, the definition provides for the delegation of crew management to a third party.

The SEA is considered the "heart" of the convention and it is natural to conclude that the person signing the contract with the seafarer is responsible for fulfilling the rights set out in the SEA. However, the seafarer rights in the MLC, 2006 are not only covering economical rights. A comprehensive part relates to operational requirements, and it is difficult so see how these can be addressed by someone not operating the ship. The result should accordingly be that the overall responsibility for fulfilling the MLC, 2006 obligations is placed on the ship manager, regardless of the seafarer being an employee of the ship manager or not. The employer will be obliged to fulfill the contractual obligation towards the seafarer, and where these obligations overlap with those of the MLC, 2006, a joint responsibility will exist between the employer and the ship manager. The practical consequence should be increased responsibility on the ISM-company rather than on the employer.

It is commonly accepted in modern shipping that seafarers are recruited through one person, have the SEA concluded with another, are employed on a ship under a foreign flag, which is owned by a third person and managed by a fourth and the "shipowner" definition in the MLC, 2006 should clarify the responsibility under such conditions.

The MLC, 2006 is given effect only after being implemented into national legislation of the member concerned. Different implementation of the definition of "shipowner" may in practice lead to different protection for seafarers.

When reviewing the implementation made by the 5 different flag administrations, it shows variations in the level of flexibility allowed under national legislation.

In general, there is a common understanding that the ISM-company will also be the MLC-shipowner. In such cases, the seafarer can turn to the MLC-shipowner in case rights are breached.

However, the review of the flag state solutions also shows that flag administrations may introduce a third scenario, providing additional flexibility by allowing the ISM and the MLC, 2006 responsibility to be held by different companies. In a best case scenario the seafarer is left with an added level of protection due to this "cross" responsibility, in that the MLC-shipowner and the ISM-company will practice "joint and several" responsibility for operational requirements being outside the MLC-shipowners real control.

However, the worst case scenario is that the responsibility "falls between chairs". The seafarer can still turn to the MLC-shipowner, but cannot rely on it being able to fully fulfil its obligation under the MLC, 2006.

The overall conclusion must still be that the MLC, 2006 provides a clear definition that holds a single person responsible for fulfilling the seafarer´s rights, and accordingly that this aim of the convention should be considered fulfilled.

Review of the practical implementation in selected flag states basically returns the same result. However, it also shows that the final result relies on the implementation by member states, and any additional flexibility provided beyond the intended, may lead to a different conclusion.

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Interpreting uniform laws – the Norwegian perspective

as illustrated by the Hague-Visby Rules, enacted into domestic law by the Norwegian Maritime Code 1994

By Mads Schjølberg

Content

1 Introduction

The topic of this thesis is the interpretation of domestic legal provisions that enacts uniform laws, from a Norwegian perspective.

Uniform laws are international conventions where the signatory states agree on a uniform text that is to regulate a given private law subject with the purpose of achieving uniform legislation in all contracting states, i.e. international uniformity. Once the convention text has been agreed, it is enacted into the domestic law of each signatory state. These conventions (hereafter "uniform laws") are especially prevalent in private law matters that operate in a largely international sphere, such as transportation law.

In an increasingly globalised world a growing number of legal matters take place in the international sphere and the need for uniform laws is no longer reserved for transportation law. The latter half of the 20th-century saw the formation of a number of uniform laws within international commerce, be it international sale of goods, international commercial contracts or international arbitration. Further, in terms of international trade, after the breakdown of the Doha Round in 2008, economists such as the former Dean of Harvard and U.S. Treasury Secretary, Larry Summers, has recently argued that uniform laws may prove more effective in achieving a fairer international marketplace than the large and wide-reaching trade agreements that have dominated the political landscape so far[1]. Additionally, typical private law areas such as family law have become subject to uniform laws as people themselves increasingly move between jurisdictions.

Given the increased significance of uniform laws it is important to look closer at how these conventions should be approached. Are there characteristics to these uniform laws, or rather the domestic provisions that enact them, that entail that they should be construed differently than other parts of domestic law?

The central ambition of this paper is to draw up the framework applicable to the interpretation of uniform laws. The interpretative approach

[1] Summers (2016)

set out is in essence a consensus driven, purposive approach. It is rooted in the fundamental purpose of international uniformity and utilises the legal sources common to all signatory states – the convention text itself and its legislative history – as well as case law from other signatory jurisdictions, even where such an approach entails the disregard of domestic law.

As will be seen from the discussion below such an approach to uniform laws has broad international acceptance.

In Norway, there has traditionally been no emphasis on the interpretative approach to uniform laws. Instead, uniform law provisions have usually been subjected to the same methods of interpretation as other domestic legislation, which primarily entails an interpretation of the wording of the provision, the domestic travaux préparatoires, domestic case law and legal theory.

There is currently no Norwegian Supreme Court decision that expressly considers how the interpretation of uniform laws should be approached. There are however recent signs (albeit small) of a more conscious approach to uniform law interpretation in the lower courts. Similarly, the issue has received modest consideration in both preparatory works and legal theory. The last full treatment of the issue was done by Lødrup in 1966[2], followed by a shorter article by Oftedal Broch in 1968[3]. In the nearly half a century since, there has been significant developments in the law both at home and abroad that renders the issue ripe for a renewed treatment.

The discussion on uniform laws will be structured in two parts; the first part considers the formation of uniform laws and the second part discusses the interpretation of uniform laws.

The first part, on formation, gives an overview of the purpose and process that leads to an international uniform law convention in chapter 2, before considering how the uniform law is enacted domestically into Norwegian law in chapter 3. As will be seen in the second part on interpretation, the formation of a uniform law – its legislative history – may have a significant impact on the subsequent interpretation of the uniform law.

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2 Lødrup (1966) pp. 69-104

3 Oftedal Broch (1968)

The second, and predominant, part of this thesis considers the interpretation of uniform laws and is structured around the following three elements of interpretation:

i) The significance of the domestic enactment of the uniform law, which will be discussed in chapter 4.

ii) The use of the original convention text and *travaux préparatoires*, which will be discussed in chapter 5.

iii) The consideration and weight of case law from other jurisdictions, which will be discussed in chapter 6.

The absence of Norwegian law addressing the issue renders it necessary to explore any legal basis for such an approach in Norwegian law. From a Norwegian perspective three fundamental grounds may give rise to a purposive interpretation of uniform laws, aimed at international consensus:

i) The Norwegian customary law principle oft described as the *presumption principle* which states that there is a presumption that the Norwegian legislature passes domestic law in accordance with Norway's international law obligations.

   The presumption principle is of particular relevance in considering the relative weight of the domestic enactment of a uniform law and will be discussed in chapter 4 which considers any bearing the domestic enactment of a uniform law may have on its interpretation. The presumption principle does however extend further and will be revisited in regards to both the use of the original convention text (chapter 5) and case law from other jurisdictions (chapter 6).

ii) *Customary international law* principles on the interpretation of treaties, as codified in the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention") articles 31 to 33. Whilst Norway has not ratified the Vienna Convention, the Norwegian

Supreme Court has recognised articles 31 to 33 as codifying existing customary international law binding upon Norwegian courts.

These principles relate primarily to the use of the original convention text and its legislative history and will therefore be considered in conjunction with the discussion in chapter 5 on the use of the original convention text and its legislative history.

iii) That the approach of supreme courts in other jurisdictions, in that interpretation – in the interest of uniformity – should not be rigidly controlled by domestic precedents but rather general and internationally accepted principles, is evidence of *an implied obligation* in the convention to the same effect. This is of particular importance in terms of chapter 6 which considers the weight of case law from other signatory jurisdictions.

To render the discussion more tangible I have chosen to illustrate the interpretation of uniform laws by reference to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (hereafter "the Hague Rules"[4]). The Hague Rules is a central uniform law in maritime law that, in essence, regulates liability for cargo damage.

Under the Hague Rules, a carrier of cargo by sea will – as a general rule – be liable for damage caused to the cargo whilst in his custody, unless the carrier can show that the damage was not caused by his negligence. A significant exemption to this general rule is the so called nautical fault exemption. The exemption provides that where damage to the cargo is a result of an act or omission of the master or crew in the navigation or management of the ship, the carrier will be exempt from liability regardless of negligence.

[4] The convention is, in Scandinavian sources, more often referred to as "the Hague-Visby Rules" ("Visby" referring to the 1968 amendment to the Convention negotiated in Visby, Sweden). As the Visby amendment has no relevance to nautical fault and this thesis frequently cites case law that pre-dates the Visby amendment and the Visby amendment not having been ratified by the United States; "the Hague Rules" or "the Rules" are used throughout the thesis to harmonise the wording with that contained in the cited case law and literature.

I will primarily rely on the Hague Rules' nautical fault exemption – which is provided in the Hague Rules article IV rule 2(a) – and its Norwegian enactment – provided in the Norwegian Maritime Code 1994 (hereafter "the NMC") § 276 – when discussing the interpretation of uniform laws.

The reasons for utilising the Hague Rules and its nautical fault exemption when discussing the interpretation of uniform laws are many. Primarily the Hague Rules is a (relatively) old uniform law which has been the subject of much debate and considerable litigation the world over, for no provision of the Rules is this more true than for the nautical fault exemption. Further, the history of Hague Rules provides a representative illustration of the purpose and formation of uniform laws. Furthermore, the Rules has arguably proved to be a successful uniform law with a broad following amongst states[5] and private parties[6] alike.

In addition, the current and previous domestic enactments of the Rules into Norwegian law provides a good basis for contrasting the relationship, relevant to all uniform laws, between an international obligation and its domestic enactment. The reason being that there are clear differences in wording and structure between the Norwegian enactment and the Hague Rules themselves. Such differences may shed light on Norway's obligation under uniforms laws both in terms of enactment by the legislature and interpretation by the courts.

[5] The Rules have been adopted, with the exception of China, by all major maritime nations.

[6] I am referring here to the widespread use of so-called *paramount*-clauses ensuring the application of the Hague Rules to charter parties, cf. *Granville*, and bills of lading issued under a charter party.

PART I – FORMATION

2 The international formation of a uniform law

2.1 Introduction

Before turning to the interpretative approach in construing uniform laws, a closer look at the reasons and process behind the creation of uniform laws is in order. The formation of uniform laws are important not only because the specific legislative history of each uniform law is relevant upon their interpretation, but because the underlying rational of uniform laws forms the basis upon which the interpretative approach rests. Accordingly, it is the rational of uniform laws rather than specific history that this chapter seeks to illustrate.

2.2 The reason and purpose (the pre-Hague law on cargo damage)

As was highlighted in the introduction, the prevalence of uniform laws is found in areas of laws that operate in the international sphere (meaning: between two or more jurisdictions). The reason being that once a legal dispute arises in the international sphere the key issue that occur is: in which of the jurisdictions should the dispute be resolved? If the law in the jurisdictions are different in relation to the matter at hand, the parties will invariably seek to have the dispute heard in the jurisdiction most beneficial to them.[7] This is usually referred to as "*forum shopping*" and is determined by the conflict of laws in the respective jurisdictions.

[7] See also Oftedal Broch (1968) p. 595.

The combination of differences in law and forum shopping may result in uncertainty, the exploitation of imbalances in contractual strength[8] and costly litigation for the involved parties. As follows, it is detrimental to business efficacy within industries that largely operate in the international sphere.

The problem may be solved however if the substantive law applicable to the legal dispute is the same in both/all jurisdictions. If the law is the same, i.e. uniform, there is reduced uncertainty and no incentive for forum shopping.

The law relating to cargo damage at sea provides an illustrative example of the need for uniform legislation.

By the mid-19th century a default rule had developed in both common law[9] and civil law jurisdictions[10] to the effect that a carrier of cargo by sea was liable for damage to the cargo whilst in his care, regardless of fault[11]. This unless the carrier could prove that the loss was caused solely by certain excepted causes: act of God, act of public enemies, shipper's fault or inherent vice of the goods[12]. Unsurprisingly, carriers found this near strict liability for cargo damage onerous.

In order to avoid the very stringent liability laws, the carriers included clauses in their bills of lading exempting them from liability for cargo damage, in particular so-called "negligence clauses" – clauses that exempted the carrier from liability even where a loss was caused by the carrier's own negligence[13].

It was the respective jurisdictions approach to these negligence clauses – whether or not they accepted them – that caused international uncertainty. The Atlantic trade was particularly affected due to the discourse between English and U.S. courts. The 1889 decision of the English Court

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8 E.g. Falkanger (2016) p. 279

9 Although the carrier's absolute liability for cargo damage in common law goes as far back as the 14th century, cf. Beale (1898).

10 Sturley (1991) p. 4

11 *Ibid.*

12 *Ibid.*

13 See *Re Missouri* (1889) 42 Ch. D. 321discussed below.

of Appeal in *Re Missouri*[14] is a good example. *The Missouri* stranded due to the master's negligence on a voyage from Boston to Liverpool loaded with cattle. The contract for carriage included the clause:

> "Ship not accountable for… loss or damage… whether arising from the negligence, default, or error in judgment of the master… or others of the crew,"[15]

Under English law the courts allowed such clauses in deference to contractual freedom. In Massachusetts, U.S. (the alternative jurisdiction) however, such clauses were deemed contrary to public policy[16]. The case before the Court of Appeal accordingly turned on whether the case fell under English or American jurisdiction. The court held the contract to be governed by English law and found the carrier not liable for the cargo owner's loss[17].

Not only did the different approaches in England and the U.S. give rise to uncertainty, it also allowed for what some consider the carrier's exploitation of the relative bargaining strength of the parties[18] in that the (American) producers/cargo owners were wholly dependent on (British) shipowners/carriers to get their products to overseas markets, this dependence enabled the carriers' imposition of unreasonable negligence clauses.

It was this conflict that created the desire for international uniform legislation on cargo damage[19].

2.3 The solution and compromise (the Hague Rules)

In order to achieve uniformity between the different jurisdictions, the states must agree on what the uniform law is to be, a compromise.

14 *Ibid.*

15 *Ibid.*

16 As set out in *ibid.* at p. 322

17 As per Lord Halsbury LC on page 336 and 337. An example of a Norwegian negligence clause to the same effect can be seen in *D/S Atna* (Rt. 1929 p. 1081 at 1084).

18 See Falkanger (2011) p. 277

19 Sturley (1991) p. 6

Normally this is done by agreeing on a convention text that is to regulate the given issue (in relation to the Hague Rules, cargo damage under bills of lading) in all jurisdictions[20].

The negotiation and conclusion of a uniform law may be done through international institutions such as the UNIDROIT[21], set conferences such as the Hague Conference on Private International Law or ad hoc diplomatic conferences[22]. The Hague Rules were a result of the latter. As the Rules illustrates, the process leading to a uniform law may entail more than the negotiations directly preceding the conclusion of the uniform law.

In response to the carriers' negligence clauses and their allowance by English and other European courts[23], the United States, led by strong cargo interests[24], enacted the Harter Act in 1893. The Harter Act subjected bills of lading in international trade, i.e. to and from ports of the United States, to mandatory legislation that expressly prohibited negligence clauses[25] and rendered the carrier liable for cargo damage in all but certain exempted cases, hereunder nautical fault, but then only if the carrier had exercised due diligence in making the ship seaworthy[26].

By 1920 further jurisdictions had passed Harter-style legislation[27] and several more had indicated they were considering doing the same[28].

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20 Another, but less usual, method is close collaboration in legislation drafting. The Nordic law collaboration is an example of such a means of uniformity. It is less formal and not binding as a uniform law *per se*, see 6.5 below.

21 Not all of UNIDROIT's work is or results in uniform laws. For instance model laws share many features with uniform laws, but they are voluntary and not anchored in a convention (i.e. not binding on states) like uniform laws. The arguably most prominent UNIDROIT uniform law is the CMR (the Convention on Contracts for the International carriage of Goods by Road 1956).

22 NOU 1972:16 p. 9

23 Sturley (1991) p. 5; footnote 15 above.

24 The act's namesake, Rep. Michael Harter, himself represented Ohio which was dominated by grain and flour producers dependent on shipowners to carry their produce to overseas markets.

25 The Harter Act 1893 § 1.

26 The Harter Act 1893 § 3; see also Sturley (1991) p. 14.

27 Sturley (1991) p. 15-18

28 *Ibid.* at 17

The main resistance to such legislation was in England, dominated by shipowner interest[29]. But by 1920 internal pressures in the British Empire (Australia, New Zealand and Canada were dominated by cargo interests) had put the English shipowners on the defensive[30]. Under the prospect of being subjected to Harter legislation even in their home jurisdiction, the British shipowners instanced[31] the series of ad hoc British and international conferences that ultimately led to the Hague Rules being signed in Brussels in 1924[32].

In the convention[33] that resulted from the negotiations was a concession by the shipowners in relinquishing their ability to contract out of liability through negligence clauses. They were however not willing to return to the original default risk allocation which entailed near strict liability for cargo damage[34]. The shipowners instead accepted liability caused by his own negligence or that of his servants in the due diligence to make the ship seaworthy, with a reverse burden of proof[35], and an extended "catalogue" [36] of exempted perils which included nautical fault[37]. This was accepted by the cargo owners.

The convention was then to be enacted by the signatory states – which included all major western maritime nations – as mandatory legislation for international trade[38]. Accordingly, once enacted, there was no longer a difference in the legislation on cargo damage between the major trading nations, thereby enabling certainty by removing the incentive for negligence clauses and forum shopping.

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29 *Ibid*. at 19

30 *Ibid*. at 18 *et seq*.

31 *Ibid*. at 19

32 *Ibid*. *at* 20-32

33 The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924.

34 See 2.2 above.

35 I.e. the carrier himself has to prove that he has not been negligent in due diligence, which in practice is a considerably higher threshold than the ordinary burden of proof in matters of negligence where the claimant (the cargo owner) has to prove negligence.

36 The Hague Rules article IV rule 2

37 Article IV rule 2(a)

38 Article X and the Protocol of Signature.

2.4 Conclusion

The role of uniform laws is to avoid differences in the substantive law of different jurisdictions and thereby provide international certainty by removing the incentive for forum shopping. Accordingly, the strength of a uniform law is in its uniformity, as any difference between jurisdictions invariably will be sought relied upon by the parties, recreating a situation like the one at the time of *Re Missouri*.

Further, it is important to bear in mind the nature of a uniform law as a compromise, not so much between the states that signs it, but between the interested private parties that the uniform law will affect. If one for instance reads the *travaux préparatoires* to the Hague Rules it is the considerations of the cargo interests and shipowners that are being voiced[39], not the more typical (geo)political interests of each state. In this sense, it may be said that a uniform law has much in common with private law standard contracts.

[39] E.g. Sturley (1990) p. 248 *et seq.* containing the discussion on "the catalogue".

3 The domestic enactment of uniform laws

3.1 Introduction

In order for the purpose of uniformity to succeed it is crucial to acknowledge that the uniformity efforts are not concluded by signing the convention text[40]. It is equally important that the domestic legislatures are conscious of the overriding purpose of uniformity when enacting the uniform law into domestic law[41].

As the domestic enactment forms the starting point of interpretation[42] it may have a significant bearing on the later construction upon which the court settles. In fact, discrepancies in the domestic enactment of uniform laws between signatory states are generally viewed as a key hindrance to international uniformity[43].

This chapter will explore the nature of the international law obligation Norway is under in enacting uniform laws and how uniform laws are typically enacted in Norway. Much of the discussion in this chapter, and indeed the later chapters on interpretation, builds on the thorough review of transformations and their implications on Norwegian law that was carried out by the *Transformation committee*[44] in 1972. The Transformation committee was a law commission appointed by the state to conduct a review of Norway's approach to the transformation of international obligations, among them uniform laws, in view of the Norwegian EC (now EU) vote later that year[45]. As Norway voted no to EC membership, much of the committee's purpose was rendered obsolete. The report's discussion of uniform laws remains however the only detailed discussion on uniform laws from a legislative perspective. The uniform

40 Lødrup (1966) p. 103

41 *Ibid*.; see also Røsæg (2009) to the same effect.

42 Oftedal Broch (1968) p. 603

43 See; Lødrup (1966) p. 76, Røsæg (2009) p. 174-175, Stanford (1987) p. 254-255, Sturley (1987) p. 739-740.

44 NOU 1972:16

45 NOU 1972:16 p. 7

law considerations remain unaffected by the EC vote and are, I would submit, as relevant today as they were in 1972.

3.2 Domestic enactment – the obligation under international law

A convention becomes binding upon the signatory state when it is ratified[46]. In this relation binding is meant in the sense: has to be performed. Performance of conventions may vary and entail an array of possible obligations from giving general rights to citizens to more specific performance such as respecting an agreed border or paying set contributions to an international organisation[47].

In terms of uniform laws, the performance obligation upon ratification will invariably be the enactment of the uniform law into domestic law. As will be seen below, the reason for this is that an international obligation must be enacted into domestic law in order for it to be directly applicable in Norwegian courts[48]. In Norway, the process of enacting an international obligation into domestic law is traditionally referred to as *transformation*.

The central question regarding enactment is; is Norway obligated to enact the wording of the convention or its content (in the meaning; the intention of the provisions)?

In transforming a uniform law, Norway is under a "good faith" obligation as per the fundamental international law principle of "*pacta sunt servanda*" ("agreements must be kept"), which is codified in the Vienna Convention article 26. This obligation does not however render an answer as to whether it is the wording or content the state is bound to perform.

Where a convention does not itself provide for how enactment is to be carried out, the good faith obligation must be considered to allow the individual state to enact the convention as it considers appropriate[49]. In

46 See NOU 1972:16
47 See NOU 1972:16 p. 10
48 Ruud (2006) p. 58
49 See NOU 1972:16 p. 13

other words, as long as the substantive meaning of the convention is carried forth the state has fulfilled its performance obligation.

The Hague Rules represent a uniform law that specifically provide for how the Rules are to be performed, as per the Protocol of Signature:

> "The High Contracting Parties may give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Convention."

There is no apparent difference between this obligation and the general "good faith" obligation under international law. It is however clear, that even if there are discrepancies in the wording of the NMC and the Hague Rules, Norway will *prima facie* not be in breach of any international law obligation by rewording the Rules in the domestic enactment as long as the underlying meaning of the convention provisions remain[50].

That is not to say that rewriting is advisable to enact a uniform law that differs from the international text. As will be discussed below, domestic enactments that rewrite the international text may, even where the substantive meaning is retained in the domestic enactment, become contrary to the overriding purpose of international uniformity.

3.3 Transformation – enacting the uniform law in domestic law

As already highlighted, the transformation of the uniform law is essential in order to achieve uniformity. If an international obligation is transformed into domestic law by a provision that carries little resemblance to the original text, the likelihood of an interpretation that diverts from the intention of the original text increases[51].

Under Norwegian international law, three alternative methods of transformation are usually identified; (i) active transformation (the

[50] It is clear from the domestic preparatory works to the NMC 1994, that there is no intention to enact provisions contrary to the Hague Rules; cf. Ot. prp. nr. 55 (1993-94) p. 3.

[51] See footnote 43.

translation method), (ii) incorporation (the referral method) and (iii) passive transformation (ascertainment of conformity method).

A detailed discussion on the relative advantages and disadvantages of these methods of incorporation is beyond the scope of this paper[52]. But there are certain differences that merit mention. Traditionally *transformation* and *incorporation* was seen as opposites[53] in that transformation entails a rewriting of the convention text, in most cases this means translating the convention to Norwegian[54], whereas incorporation requires no rewrite, but simply an act that enacts the convention text as domestic law[55]. Today however incorporation is generally viewed as a method of transformation[56]. The last method of transformation, passive transformation, is merely an ascertainment that the domestic legislation fulfils the obligations under a convention[57].

The transformation method of the Hague Rules into Norwegian law was subject to debate prior to the enactment of the Bill of Lading Act 1938. In a letter to the Parliamentary Judiciary Committee in 1937 the Ministry of Justice wrote in favour of an *incorporation* of the Hague Rules:

> "[Incorporation] has the advantage that the courts and other interested parties readily will be able to take foreign case law and legal theory as aids in the interpretation of the convention's provisions."[58]

The Judiciary Committee rejected incorporation and chose instead an active transformation of the Hague Rules, by translating the Rules

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52 See Ruud (2006) p. 58 *et seq.* for a more detailed discussion on these methods of transformation.

53 See NOU 1972:16 p. 13-15

54 NOU 1972:16 p. 14; Ruud (2006) p. 58-59

55 NOU 1972:16 p. 14-15; Ruud (2006) p. 59

56 Ruud (2006) p. 58-59

57 NOU 1972:16 p. 15; Ruud (2006) p. 62 The classic example being if Norway entered into a convention banning the death penalty. As Norway has no death penalty, the fulfilment of the obligation could easily be ascertained in the existing legislation.

58 Letter included in Innst. O. II (1938) at p. 3-4 (*author's translation*)

into Norwegian and then enact it as the Bill of Lading Act 1938[59]. The committee's reasoning for such an approach was *inter alia* that the other signatory states had done it that way. The committee did see fit to point out however that:

> "[The rendition of the convention] has of course not had the intention at any point to change the content. On the contrary, it has been imperative for the commission to carry forth the provisions' content as accurately as possible."[60]

Active transformation is still the predominant transformation method for uniform laws[61]. The Hague Rules is not however enacted through active transformation.

The Bill of Lading Act 1938 was repealed through the Norwegian Maritime Code 1893 Amendment Act 1973 (which entered into force in 1985[62]). The provisions of the Bill of Lading Act 1938 were transferred to the NMC 1893[63] as part of a larger revision. The carriers' central liability exemptions for cargo damage in the Hague Rules article IV ("the catalogue"), including the nautical fault exemption, which was enacted by § 4 of the Bill of Lading Act, largely kept its wording but was moved to § 118 of the Norwegian Maritime Code 1893.

From a transformation perspective this change in enactment may in my opinion still be considered an active transformation. Whilst for instance article IV (§ 4 Bill of Lading Act 1938) were separated from the other provisions of the Rules, it remained by its wording and structure (in § 118 NMC 1893) a clear enactment of article IV.

The moving of article IV to § 118 of the NMC 1893 was however a modest change compared to the original intentions[64] of the Norwegian

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59 Original title being the Enactment of the International Convention on Bills of Lading of 25 August 1924 Act 1938

60 Innst. O. II (1938) at p. 4 (*author's translation*)

61 See Ruud (2006) p. 58

62 Cf. Royal Decree 11. January 1985 no. 20

63 Cf. the Norwegian Maritime Code 1893 Amendment Act 1973.

64 NOU 1972:11 p. 14

Maritime Law Committee chaired by Sjur Brækhus. Brækhus had in the time leading up to the 1973 revision argued that the "catalogue" of exemptions in article IV, beyond nautical fault and fire, were superfluous and could be significantly simplified (and thereby improved) as a simple negligence rule[65].

The maritime law committees of the other Nordic countries[66] rejected such a redraft however because they considered it a deviation from the original article IV and contrary to their obligations under the Hague Rules[67]. The Norwegian committee thereafter decided to abandon their redraft in deference to the Nordic collaboration[68]. Instead changes in the wording were carried out to bring the provision into closer alignment with the Hague Rules[69].

Then in 1994, the Norwegian maritime law committee (then no longer led by Brækhus, but Selvig) succeeded in enacting a redraft of the catalogue in article IV of the Hague Rules in the new NMC 1994 (where it remains today), with a simple negligence provision included in § 275[70] and the nautical fault and fire exemptions in § 276 – much like the suggestion that had been proposed and rejected in 1973.

From a transformation perspective this was a transition from an active to a passive transformation. Whilst the new § 276 arguably retains the substantive meaning of article IV (i.e. it will likely yield the same result), as was indeed argued by Brækhus[71], it does not retain resemblance to the wording and structure of the convention text. It appears as a domestic provision which the legislature has stated meets the obligations under the Hague Rules[72], accordingly it is a passive transformation of article IV.

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65 Brækhus (1967) chapter VI; see also Ot. prp. nr. 28 (1972-73) p. 10.

66 There is a close collaboration between the Nordic countries in maritime law matters; see 6.5 below.

67 Falkanger (2016) p. 297; see also Ot. prp. nr. 28 (1972-73) p. 10 and NOU 1972:11 p. 14.

68 Ot. prp. nr. 28 (1972-73) p. 10.

69 NOU 1972:11 p. 14 (second column)

70 Which included the exemption for deviation, cf. § 275(2).

71 Brækhus (1967)

72 NOU 1993:36 p. 35 as cited in Ot. prp. nr. 55 (1993-1994) p. 19

In the following I will first, in sub-chapter 3.4, look closer at this ousting of the catalogue from the NMC in order to shed light on instances where the original convention text are substantially rewritten upon enactment into domestic law. Then I will address the potential practical detriments such rewriting may cause to uniformity in sub-chapter 3.5.

3.4 Example: Ousting "the catalogue" in article IV from the NMC

The Hague Rules article IV rule 2 provides the carrier's exemption from liability due to nautical fault or fire in letters (a) and (b). It then goes on to list a multitude of other exemptions including peril of the sea, act of god, act of war, strike etc. – in total seventeen further exemptions from liability including a residual provision in letter (q) "*any other cause arising without the actual fault or privity of the carrier*" – these exemptions, in letters (c) to (q) is usually referred to as "the catalogue".

Brækhus was not the first to consider the catalogue superfluous. Already during the negotiations of the Hague Rules the French delegate Leopold Dor brought this to the attention of the Conference[73]. Dor highlighted that, at least from a French perspective, the catalogue could be condensed into one single term – *force majeur*[74]. He further suggested that from an English perspective it could be condensed as *"causes beyond the control of the shipowner"*[75]. Dor's British counter-part, Sir Norman Hill (representing the British Shipowners' Association) abstained from a discussion on the substantive implications of Dor's suggestion, but stated that he would "*despair of ever getting [the Rules] accepted with the shipowners unless [he] could point to their old familiar exemptions*"[76]. As evidenced by the inclusion of the catalogue in the eventual Rules, the Conference conceded to Sir Norman's worries about obtaining acceptance.

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[73] I.L.A. Second Day's Proceeding p. 143 (included in Sturley (1990) p. 249)

[74] *Ibid*. at p.250

[75] *Ibid*.

[76] *Ibid*. at p. 251

The position taken by Brækhus and Dor is in my opinion substantively correct in that the catalogue contributes nothing that is not encompassed by a simple negligence rule with a reverse burden of proof. As both further argued the position would be the same in English law[77]. Sir Norman Hill for instance accepted the possibility that the catalogue contained nothing that was not already encompassed in letter (q), he even went as far as inferring that the catalogue may be "pig-headed" (or rather the shipowners insisting on it)[78].

The basis upon which Brækhus argued for the ability to rewrite the catalogue was the Hague Rules Protocol of Signature[79]. Only a difference in substance would be in breach of the Rules he argued[80]. As already told the Scandinavian collaboration did not agree with Brækhus in 1973 and rejected such a rewrite as contrary to the Rules[81].

In terms of the Protocol of Signature, it allows "*including [the Rules] in… national legislation in a form appropriate to that legislation*". Natural in addressing what is "appropriate" would, in my opinion, have been if there had been voiced difficulty in applying the Rules by the courts or other interested parties. No such difficulty existed. In fact, Tiberg has argued to the contrary in that the catalogue had proved a useful practical tool for, for instance, claims adjusters[82].

Whilst I, as set out in 3.2, agree with Brækhus in the stricter sense that the performance obligation goes towards the enactment of the substance rather than wording, redrafts ousting a central part of the uniform law compromise is certainly pushing boundaries. It further stands to reason that when a proposal, to the same effect as Brækhus', was discussed and rejected at the negotiations of the Hague Rules[83], it must be considered

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77 Brækhus (1967) Chapter VI, citing the 12th (1925) Edition of Scrutton; Dor *ibid.* at p. 250

78 *Ibid.*

79 Brækhus (1967) Chapter 1.

80 *Ibid.*

81 Falkanger (2016) p. 297; see also Ot. prp. nr. 28 (1972-73) p. 10 and NOU 1972:11 p. 14.

82 Tiberg (1995) p. 339

83 I.L.A. Second Day's Proceeding p. 143 (included in Sturley (1990) p. 249)

a substantive breach of the convention for a signatory state to enact the rejected solution regardless.

Further, and more damaging, such an approach ignores the overriding purpose of uniformity. As highlighted by the current chair of the Norwegian Maritime Law Committee, Erik Røsæg:

> "There is a reason why one agrees on a wording, and not on a set of abstract ideas, to ensure uniformity."[84]

These uniformity aspects and implications of the redrafted provision were left unaddressed by the Norwegian Maritime Law Committee in their proposal for the ousting of the catalogue from the NMC 1994.

3.5 The practical detriments caused by rewriting

As already highlighted above, discrepancies between the international text and the domestic enactment are unfortunate because they work against the purpose of uniform laws by increasing the likelihood of difference in interpretation[85]. For that reason alone the legislature should be reluctant to significantly rewrite provisions when enacting uniform laws.

Rewriting may also have a more practical implication in terms of how courts, practitioners and other interested parties relate to the domestic enactment. As argued by Lødrup there is a correlation between how likely a judge is to utilise international sources of law in interpretation, and how much of the conventions international character that is retained in the domestic enactment[86].

This is unfortunate because the use of foreign sources in and by itself cements a uniform approach to the uniform law[87]. Further, such sources could prove useful aids to Norwegian interpreters whilst foreign

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84 Røsæg (2009) p. 174-175.

85 See: Lødrup (1966) p. 76, Røsæg (2009) p. 174-175, Stanford (1987) p. 254-255, Sturley (1987) p. 739-740.

86 Lødrup (1966) p. 80. See also; Innst. O. II (1938) at p. 3-4

87 Stanford (1987) p. 269

practitioners, in turn, may more readily rely on Norwegian practices if the domestic enactment closely resembles that in their own jurisdiction.

Taking for instance the most recent Norwegian Supreme Court case on the nautical fault provision, § 276 NMC, in *the Sunna* as an example:

> *The Sunna* concerned a ship that ran aground off the Orkney Islands when the duty officer fell asleep on a voyage from Iceland to England. The master had established a practice, contrary to safety regulations, of not keeping an additional lookout when sailing in darkness.
>
> Whilst the Supreme Court considered the duty officer falling asleep as a nautical fault, the carrier was not able to rely on the exemption due to the masters' malpractice constituting a failure in due diligence in making the ship seaworthy at the commencement of the voyage.

The Supreme Court made no reference to foreign case law although for instance the issue of whether the masters' intended malpractice of not properly manning the bridge, i.e. his state of mind prior to commencement, could have found some guidance in the decision of the House of Lords in *the Hill Harmony*[88]. Further, whilst the Supreme Court did not see fit to consider whether gross negligence, in this case falling asleep, fell within the scope of nautical fault. They could have found guidance on that issue in the then very recent decision of the New Zealand Supreme Court in *the Tasman Pioneer*. The other way around the Norwegian decision may aid other courts on the proximate cause of the damage in terms of nautical fault as well as the possibility of the master's state of mind constituting unseaworthiness. The fear however is that a foreign court, understandably, may be hesitant in relying on Norwegian decisions that considers a provision that is worded and structured differently to the original convention text.

In summary, again returning to the catalogue, my point is this: there may or may not be a substantive difference between article IV of the Rules and the NMC §§ 275 and 276. I would think that there is not. What is,

[88] Solvang (2011) p. 6250

however, is a considerable difference in wording. And that difference is more likely – due to entirely practical reasons – to cause discrepancies in the interpretation of the uniform law by stunting the scope of material that the given interpreter may deem available to him.

3.6 Conclusion

For an international obligation to become binding upon Norwegian courts it has to be enacted into domestic law. The innate purpose of uniform laws in enabling international uniformity speaks strongly in favour of an *active transformation* of the international text into domestic law – in the sense that the uniform law is translated into Norwegian with changes to the wording only where there is a concrete need for clarity – or even better, through *incorporation*[89].

The discussion on the ousting of the catalogue has shown that whilst the international law obligation in terms of enactment relates to the substantive content of the uniform law, rather than the wording, this does not entail free reign. Rewriting should be considered with reluctance due to the adverse effects it may have on uniformity. As Røsæg writes, rewrites may look better on the local eye, but they will likely cause more confusion than clarification[90].

[89] NOU 1972:16 p. 97.

[90] Røsæg (2009) p. 185

PART II – INTERPRETATION[91]

4 The weight of domestic provisions

4.1 Introduction

In his 1966 treatment of uniform law interpretation Lødrup states that in principle the means by which the uniform law has been enacted into domestic law – its transformation – should have no bearing on the subsequent interpretation of a uniform law provision in that the result should be the same regardless of enactment method[92]. He interjects however that so may not be the case in practice and that the result may very well be affected by the chosen means of transformation[93]. The reason for this is that, regardless of international considerations, the domestic enactment will form the starting point of interpretation[94].

As will be seen below, the Norwegian common law *presumption principle*, may however work in favour of uniform interpretation at expense of the domestic enactment, very much adhering to the principle set forth, in that the domestic enactment should have no bearing on how a uniform law provision is construed[95].

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91 It is again highlighted that the interpretation of uniform laws discussed is private law matters. For uniform laws within criminal law, the principle of legality would dictate that the domestic enactment is binding on the state, regardless of the underlying convention; Oftedal Broch (1968) p. 603-604.

92 Lødrup (1966) p. 79

93 Lødrup (1966) p. 80

94 Oftedal Broch (1968) p. 603

95 See also NOU 1972:16 p. 41, where the *Transformation committee* states that there are "strong reasons" for interpreting the domestic enactment in light of the original convention, see also p. 91-92

4.2 Dualism and sovereignty

A good place to start when considering the relationship between domestic and international law in interpreting a provision deriving from a uniform law, is to ask the question: why is there even a need for a domestic enactment of an international uniform law?

The answer is *dualism*[96] – the notion that international law is predicated on the acceptance of sovereign states, rather than the other way around (that states derive their authority from international law)[97]. The consequence of dualism is that for an international convention to be binding in Norway (i.e. for a convention to be relied upon by the Norwegian courts), it has to be enacted into domestic law by an act of parliament[98].

Whilst there has long been a clear acceptance of dualism in Norwegian legal theory[99], it was first expressly stated by the Norwegian Supreme Court in 2000, in its plenary judgement in *Finanger I* [100] – a case regarding the relationship between Norwegian domestic law and EU law (that Norway under the EEA agreement have agreed to enact).

> *Finanger I* concerned a personal injury claim against an insurance company from a passenger of a car whose driver was driving under intoxication and drove off the road. The passenger sustained severe

[96] Although, Lødrup (1966) p. 74 expressly denies the relevance of dualism in terms of enactment, instead he attributes the need for enactment to the legality principle ("*legalitetsprinsippet*"). This must be seen in light of the rather substantial Norwegian *dualism/monism* debate of the era. The leading "modern" Norwegian international law texts however attribute the need for enactment to dualism, see Ruud (2006) p. 58 and Fleisher (2005) p. 358-359.

[97] The opposite of dualism is *monism*; which dictates that domestic sovereignty is based on international law, and so international law will always be superior and (directly) binding on domestic law.

[98] As Norway is not a member of the EU, there is no issue in terms of the sovereignty of the EU within the four freedoms. In accordance with the EEA-agreement, even EU regulations need enactment of the Norwegian parliament to be binding (unlike in EU member states where they have direct effect).

[99] See Helgesen (1982) p. 11 *et seq.* historical account of the debate on *dualism* or *monism* in Norway.

[100] Rt. 2000 p. 1811.

injury leaving her permanently disabled. The passenger was herself intoxicated at the time of the accident and knew that the driver was too.

A central issue in the case was whether Norwegian domestic law – that at the time enabled an insurance company to refuse damages to an injured person that knew the driver was driving whilst intoxicated – was at odds with EU law. And if so whether the Norwegian domestic law then had to be interpreted in a manner consistent with EU law.

The Supreme Court held (plenary decision) that there was a contradiction between the Norwegian domestic law on the one hand and EU law on the other. In such cases it was beyond the powers of the courts to force alignment through interpretation, rather it was for the Norwegian parliament to align Norwegian domestic law with EU law through legislation (10-5 dissent)[101] and Miss Finanger's claim against the insurance company was dismissed (dissent 8-7)[102].

Looking at it from a strictly dualistic point of view it appears that Norwegian courts will only be bound by the domestic law enacted by the Norwegian parliament along with its preparatory works and subsequent case law. Such a view, whilst a starting point, would however be overly simplistic in relation to international uniform laws.

As will be argued below, the strength of dualism in a given case may range from a *strict dualistic approach* – which entails that the courts are bound to the domestic enactment passed by parliament with no avail in the international obligation it enacts – to a *strict presumptive approach* – which entails that once an international obligation has been enacted into domestic law, the courts are bound to force alignment through

[101] In these "*Brexit*"-days it is noteworthy that *Fiananger I* finds its parallel in the decision of the House of Lords in *Factortame I* (*R v Secretary of State for Transportation, ex parte Factortame* [1991] 1 AC 603), but with the opposite conclusion as to the impact of EU law. This highlights the central difference in parliamentary sovereignty within EEA and EU law respectively.

[102] Miss Finanger did however later succeed in a claim against the state for its failure to bring domestic law in line with EU law; see *Finanger II* Rt. 2005 p. 1365 (plenary decision; dissent 9-4).

interpretation with the international obligation regardless of the wording of the domestic enactment or other domestic legislation or precedents[103].

The means by which the relevant standard of dualism is determined is the force of the presumption principle in a given case. The force of the presumption principle is in turn determined by the characteristics of the relevant international obligation enacted and the domestic law area to which it relates as discussed in 4.3 and 4.4 below.

4.3 Presumption and loyalty

As expressed above the *presumption principle* ('presumsjonsprinsippet') – which entails a presumption that an enactment of an international convention into domestic law is done in good faith and with loyalty towards the obligations conferred on the signatory states by the convention – works as an important supplement under a dualistic approach to international law. It follows from the principle that a domestic enactment of an international obligation is presumed to have been passed by the legislature in accordance with the international obligation, and that the courts therefore must construe provisions of a domestic law in a manner consistent with the international obligation it enacts. Accordingly the principle works as a means of mitigating dualism in holding the legislature to its international obligations by enabling alignment through interpretation.

In *Finanger I*, justice Flock (with whom the majority agreed) outlined the central determining factors as to the force of the presumption principle:

> "*The presumption principle* in Norwegian law has been developed in case law. The force[104] of this principle will depend on the nature

[103] The *strict presumptive approach* must not be mistaken for *monism*. The *strict presumptive approach* is predicated on dualism in that it requires enactment of the international obligation, which would be unnecessary under a monistic approach.

[104] The original Norwegian wording is "*gjennomslagskraften*" which directly translates to "*the breakthrough force*". In context, and particularly with reference to the last sentence of this paragraph, this refers to the force with which the presumption principle may break through the dualistic starting point.

> of the relevant obligation under international law and to which area of law the domestic legal rule is associated. [...] Norwegian domestic law will provide little resistance if there is talk of conflict with an obligation under international law that gives citizens protection against intervention by the state, while the resistance will be greater where such an obligation intervene in private legal matters."[105]

The essence of this statement, in my opinion, is that the force of the presumption principle is variable and dependent upon the nature of the international obligation and the area of law of a given case. Read antithetically it entails that the strength of dualism is similarly variable. This is particularly clear from the last sentence which entails that dualism will offer the state little protection against an international law obligation, whereas private parties will enjoy greater protection.

When discussing the interpretation of uniform laws by Norwegian courts it is therefore essential to look closer at their nature and characteristics, in order to determine the force with which the principle applies.

4.4 The force of the *presumption principle* when interpreting uniform laws

It is evident from the discussion of the legislative history of the Hague Rules in chapter 2 above, that the purpose of the Rules was to reach an international compromise on risk allocation for cargo damage. As the term implies, this is the very nature of all *uniform* laws.

Given the emphasis of "*the nature of the relevant obligation under international law*" in justice Flock's lead judgement in *Finanger I*, the innate purpose of international uniformity alone, clearly indicates that the presumption principle will apply to uniform laws with considerable force. This is also finds support in the 1972 report of the *Transformation committee:*

[105] Rt. 2000 p. 1811 at 1829 (*author's translation*, justice Flock's italics).

> "[It may] be emphasised that typical uniform law conventions tasked with implementing uniformity between convention states within the area [of law] the convention covers. If this is to be achieved, states must be most loyal to the convention. Even if there are arguments in favour of transforming the text of the treaty and as such break the Norwegian rules from the convention, one should nevertheless when interpreting the enactment provisions aim to achieve harmonization between the convention states.
>
> [Accordingly] there are strong reasons in favour of Norwegian provisions that implements transformed convention obligations, being interpreted in light of the convention."[106]

It may be interjected however whether uniformity is not the purpose of all international law; to create similar legal obligations in all signatory states? Yes and no. It is certainly not true of all international obligations, for instance trade, tax or border treaties only apply between two (or a limited number of) states. Norway's trade treaty with state A may be very different to the trade treaty with state B. On the other hand, human rights conventions – such as the European Convention on Human Rights – are intended to confer similar obligations on all signatory states (and similar rights to their citizens). There is however a substantial difference between conferring *similar* obligations and creating *uniform* obligations. Whereas human rights conventions confer broad and overarching obligations on signatory states, uniform laws confer very specific obligations based on a detailed international compromise on a strongly confined area of law.

What sets uniform laws further apart, is that the main purpose is not necessarily to confer domestic obligations, but rather to harmonise legislation in the international sphere. This is well illustrated by the Hague Rules article X that states that the Rules only applies to carriage of goods in international trade ("*carriage of goods between ports in two different States*"). In terms of the nautical fault exemption, this is additionally emphasised by the NMC § 276(3) which expressly states that the nautical fault exemption does not apply to contracts for carriage in domestic trade.

[106] NOU 1972:16 p. 41

The international, rather than domestic, scope of application of uniform laws, as evidenced by the Hague Rules, further speaks to the proposition that the presumption principle is given a forceful application when interpreting domestic enactments of uniform laws. This finds support in justice Flock's statement in *Finanger I* above that *"the force of [the presumption] principle will depend on… which area of law the domestic legal rule is associated"*. The domestic enactment of the Hague Rules are closely associated with international legislation in an area of law, transportation law, which itself is of a considerable international nature.

It should here be mentioned that the nautical fault exemption for instance has been expressly exempted from domestic application in Norway, cf. § 276(3). It is submitted that it would be entirely meaningless to give dualism any weight, beyond a simple assertion of enactment, when interpreting a provision that has no domestic application. Uniform law provisions such as the nautical fault exemption, which are exempted from domestic application, provides the clearest possible example of provisions that must be interpreted with the full force of the presumptive principle; forcing alignment through interpretation by any means necessary.

A third characteristic, but not absolute[107], is that uniform laws govern private law areas; for instance contract law[108], transportation law[109] and arbitration law[110]. The statement of justice Flock in *Finanger I* that "*the resistance [of Norwegian domestic law] will be greater where such an obligation [under international law] intervene in private legal matters*" would accordingly pull in the direction of a less forceful application of the presumption principle in the interpretation of uniform laws.

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[107] The central customs convention; the International Convention on the Harmonized Commodity Description and Coding System (the HS Convention), which includes the so-called HS-nomenclature (which in turn is the basis for a uniform nomenclature/tariff in 150 countries and the EU, representing 98% of world trade) is an example of a uniform law within public law.

[108] CISG

[109] The Hague Rules, CMR, the Warsaw Convention

[110] The New York Convention

The reluctance of intervening in private legal matters was justice Flock's reason for ultimately rejecting a strong application of the presumption principle in *Finanger I*:

> "It is in this regard also essential that [the domestic provision] regulate the legal relations between private parties, where the presumption principle as previously mentioned do not have the same force as in for example cases where obligations under international law gives the citizen protection against intervention by the state. …
>
> I also emphasise that such an application of the presumption principle that A asserts, would create general uncertainty about what applies in legal relations between private legal entities and the public, and in legal relations between two private parties. The [EU] directives constitute both in number and scope a very large and not very clear legal material. They often contain generally formulated requirements about what content the national rules must have. In the future, there could be cases where it will be clear that the legislature has considered the relationship with the EEA law in a different manner than the courts later decide is correct. It would be problematic for private legal entities if they cannot rely on legal provisions that the legislature has deemed in accordance with Norway's international obligations. This also suggests that clear legal provisions should not be set aside in cases like the present."[111]

The essence of this approach is to ensure predictability and certainty in the legal relationship between two private parties. It is worth emphasising that the matter in *Finanger I* was a dispute between a private individual and an insurance company, as to whether a domestic legal provision should be set aside in deference to EU law.

There is in my opinion two reasons why these concerns are largely inapplicable to private parties in relation to uniform laws. The first is that uniform laws provide specific legislation within a limited area of law. For instance the Hague Rules provide a set of rules for the carrier's liability for cargo damage under bills of lading. Whilst the Rules certainly has

[111] Rt. 2000 p. 1811 at 1832 (*author's translation*).

their intricacies they are worlds apart from the vast and complex body of directives, regulations and case law that so often signifies EU law[112].

It is granted however that a strong presence of the presumption principle when interpreting uniform laws will entail giving considerable weight to decisions from domestic courts in other signatory states, see chapter 6 below, and that this may give rise to a fragmented (and thereby uncertain) body of relevant law. The international body of law will not however become any less fragmented or more certain by the contracting states approaching interpretation in an isolated and strictly dualistic manner.

The second, and more important, reason again stems from the international nature of uniform laws. The parties, although private, will primarily be subjected to uniform laws only if they venture into the international sphere, or intend to do so. When contracting across borders it is reasonable to expect that domestic provisions do not apply with the same force as in entirely domestic legal matters. Further, in the international sphere it is the uniform law that provides certainty for private parties. In terms of bills of lading you will for instance be hard pressed to find a bill of lading issued under a charter party that does not include a so-called *paramount*-clause (a clause that ensures that the issued bill of lading is subjected to the Hague Rules), precisely to provide the parties certainty between themselves regardless of where the cargo damage should occur or other aspects relevant to the conflict of laws. In order to provide certainty to private parties that venture into the international sphere then, the presumption principle should therefore be given considerable weight.

Lastly it is added that the presumption principle could not, even in relation to uniform laws, form a basis for forcing alignment through interpretation where a domestic provision has been passed by the legislature with the express knowledge and intention to enact a provision contrary to an international obligation[113]. For that dualism and the sovereignty

[112] As per justice Flock in *Finanger I* above.

[113] See Ruud (2006) p. 64-65.

of parliament is too strong under Norwegian law[114]. There is however no known occurrence in Norwegian law of a provision that explicitly rejects a ratified international obligation[115].

4.5 Conclusion

Difference in text and structure between a uniform law and it domestic enactment gives rise to the central question of which text takes precedent when domestic courts are to interpret a given provision.

Although the relationship between international law and domestic law in Norway is based on dualism – meaning that as a starting point it is the domestic provision that takes precedent – this is substantially modified by the *presumption principle* – which dictates that a domestic enactment of international law is presumed to be in conformity with said obligation. In terms of uniform laws the presumption principle may have a particularly forceful application enabling Norwegian courts to force alignment through interpretation.

As the presumption principle is a significant force in the interpretation of uniform laws it is of further interest to discuss what legal sources, beyond the wording of the uniform law itself, may be used by the courts when construing provisions of uniform laws. The central international sources of law available to the courts – the convention text and its legislative history as well as case law from other contracting jurisdictions – are discussed further below.

[114] See also *Finanger I* above.

[115] *Ibid.* at p. 64.

5 The convention text and legislative history

5.1 Introduction

The significant strength of the *presumption principle* in interpreting uniform laws, and thereby the modest if any weight attributed to the wording of the domestic enactment provision, renders the question as to which legal sources the courts are to reach for beyond the domestic enactment. The natural first port of call is the text of the convention itself and its legislative history.

5.2 The Vienna Convention and customary international law

Internationally, the applicability of the convention text and legislative history appears to have risen from the purpose of uniformity alone[116], the rational being that the text itself and the legislative history represent the one common denominator, shared by all contracting jurisdictions and that reliance on common denominators is most likely to yield a uniform result.

From a Norwegian perspective Lødrup suggests that the relevance of the convention text and its *travaux préparatoires* may be found by considering both as part of the preparatory work to the domestic enactment[117]. I find this approach unsatisfactory as it indirectly subjects the uniform law to the domestic enactment. Another approach may be to see the use of the convention text as a necessary consequence of the *presumption principle*.

A stronger basis may however be to anchor the applicability of the uniform law text in article 31 of the Vienna Convention – stating interpretations of a treaty shall comprise the text of the convention itself – and article 32 – which states that recourse may be had to the preparatory work

[116] See the House of Lords in *Stag Line*.

[117] Lødrup (1966) p. 98 (written prior to the Vienna Convention).

of the convention. Norway has not ratified the Vienna Convention but the Norwegian Supreme Court has held articles 31 and 32 as customary international law principles applicable to Norway[118]. There is not yet any decision from the Norwegian Supreme Court on the applicability of article 31 and 32 to uniform laws however.

Some academics take the applicability of the Vienna Convention to uniform laws as granted[119], as did the Transformation committee[120].

Some caution should be exercised however in the reliance on the Vienna Convention in terms of the interpretation of uniform laws[121]. The Vienna Convention was concluded with the intention to regulate relations between states[122], whilst uniform laws primarily regulate relations between private parties. Gardiner are amongst the few to expressly address this issue, and concludes that the Vienna Convention is applicable to *all* treaties due to the fact that the Vienna Convention merely codifies existing customary international law principles which are already generally applicable[123]. It is worth noting however that the House of Lords in *the Rafaela S*[124] based their reliance on the convention text and legislative history on the purpose of uniformity alone [125], despite the appellant's submission of the Vienna Convention as basis for such interpretation[126] (a submission that was passed in silence by the House of Lords).

It should also be added that the Vienna Convention may only apply to uniform laws concluded after the Vienna Convention[127], a fact which

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118 Rt. 2004 p. 957 (case on the tax agreement between Norway and the Ivory Coast, the cases that considers the Vienna Convention are primarily cases on tax agreements and the law relating to refugees).

119 See Tetley (2004) p. 11, Røsæg (2009) p. 180, Sturley (1987) p. 740

120 NOU 1972:16 p. 43

121 See also Stanford (1987) p. 268-269.

122 Mann (1983) p. 378

123 Gardiner (1995) p. 621 citing the House of Lords in *Fothergill v Monarch Airlines Ltd* [1981] AC 251.

124 [2005] 2 AC 423

125 Citing their 1932 decision in *Stag Line*.

126 *Ibid*. at p. 425-426

127 Gardiner (1995) p. 621

would exclude a considerable number of uniform laws within transportation law. Customary international law however renders the principles expressed in article 31 to 33 applicable regardless[128].

Given the clear academic bias towards the applicability of the Vienna Convention, and from a Norwegian perspective, the emphasis put on the Convention by the Transformation committee, my conclusion is that the principles expressed in the Vienna Convention articles 31 to 33, will provide the basis for utilising the convention text and its legislative history when interpreting uniform laws in Norway.

5.3 The use and weight of the convention text

As the original expression of the intention of the framers, the convention text is the primary source of law when construing a provision under the remits of a uniform law[129].

The question then becomes what is the original text? Conventions usually state its authentic language. For instance, the authentic language of Hague Rules is French, meaning that if there is a difference between a translation and the French text, the French text takes precedent[130].

An important issue in terms of language is that the choice of authentic language as, for instance, French does not entail that the provisions are to be interpreted in accordance with French law and legal tradition[131]. In terms of the Hague rules this is important. The Rules may be seen as a hybrid civil law/common law text, but mostly common law[132]. As was seen in section 3.4 above, article IV of the Rules for instance has a clear bias towards the common law tradition. It would accordingly be erroneous to construe them based on the French law and legal tradition

[128] See the House of Lords in *Fothergill v Monarch Airlines Ltd* [1981] AC 251.

[129] See Tetley (2004) p. 37, citing the U.S. Supreme Court in *Itel Containers v. Huddleston* (1993) and the House of Lords in *the Giannis N.K.* (1998). See to the same effect Lødrup (1966) at pp. 83 and 84.

[130] Lødrup (1966) p. 73.

[131] Lødrup (1966) p. 90-91

[132] Tetley (2004) p. 14

as background law; instead the language must be given their normal everyday meaning[133].

It is not necessarily so that the original text will render clear answers to issues on interpretation, indeed when a case arises before the court it is most likely because the text is unclear or silent as to the issue in question. To shed further light on the intention of the framers recourse may be had to the legislative history of the rules and the *travaux préparatoires*.

5.4 The legislative history and travaux préparatoires

Where the convention text renders no clear answer the next source to turn to would be the legislative history of the convention.

Whilst the reliance on the convention text is largely uncontroversial the use of the legislative history and *travaux préparatoires* has been more contentious from a Scandinavian point of view. Lødrup states that the majority Scandinavian view is that legislative history may not be utilised[134]. The reason being, as argued by Grönfors[135], that not all convention states, primarily England, utilise legislative history as a means of interpretation. Accordingly, using a different method of interpretation than that used in all other signatory states would be detrimental to uniformity.

Lødrup takes the opposite view in that the use of the legislative history will shed an objective light on the intentions of the convention's framers; reducing the subjective attitudes of the interpreter and thereby contribute to uniform interpretation[136]. In addition, he argues, the approach of the English courts does not outweigh the prevalence in western jurisdictions of utilising the legislative history of the convention[137].

Much of this discussion stems in my opinion from a misunderstanding of the position on legislative history under English law. Whilst English courts have refused to look to domestic preparatory works (such as the

133 Lødrup (1966) p. 91
134 Lødrup (1966) p. 100
135 Grönfors (1957) p. 20
136 Lødrup (1966) p. 100-101
137 *Ibid.*

Hansard[138]), they have never abstained from utilising legislative history when interpreting uniform laws. This is for instance evidenced by the opening remarks of Viscount Simonds in *the Muncaster Castle*[139] in 1961:

> "[The] solution depends on the meaning of the words occurring in [the Hague Rules] article III, rule 1, and repeated in article IV, rule 1, "due diligence to make the ship seaworthy." To ascertain their meaning it is, in my opinion, necessary to pay particular regard to their history, origin and context…"[140]

In any case, in the landmark decision of the House of Lords in *Pepper v. Hart*[141] in 1992, it was held that the courts may in certain instances utilise the legislative history of a domestic statute. Effectively the English absolute "ban" on preparatory works was lifted. Accordingly there is no resistance left in the arguments against Lødrups position on the use of legislative history.

A possible remnant of the traditional English scepticism towards the use of legislative history may however be found in the Court of Appeal decision in *the Rafaela S*[142]. The case concerned the question of whether a straight bill of lading fell within the scope of the Hague Rules. Lord Justice Rix, in his judgement stated that when approaching the *travaux préparatoires* "only a bull's eye counts"[143]. In other words, statements in the preparatory works have to be unequivocally clear and address the issue at hand directly in order to lend decisive weight[144]. Such an approach seems sensible and is aligned with the position taken by Lødrup

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138 The verbatim reports of proceedings of both the House of Commons and the House of Lords.

139 [1961] AC 807 (see also section 6.4 below). In CoA judgement in *the Rafaela S* Rix LJ states the origins of this approach as the House of Lords' 1932 decision in *Stag Line*; see [2004] QB 702 at 724.

140 *Ibid.* at p. 836

141 [1993] AC 593

142 [2004] QB 702

143 *Ibid.* at 724-725

144 I build this on how Rix LJ in the subsequent paragraphs considers and concludes on the *travaux préparatoires.*

who, from a Norwegian perspective, states that some restraint should be shown when utilising the legislative history[145] given their varied nature and thereby value[146].

5.5 Conclusion

Customary international law, as codified by the Vienna Convention articles 31 and 32, provides the courts the necessary basis to utilise the convention text and the *travaux préparatoires*. Whilst there has previously been uncertainty as to whether one can utilise *travaux préparatoires* in the interpretation of uniform laws, this is no longer the case. Some restraint should be exercised in the use of *travaux préparatoires*, and "only a bull's eye counts" as was held in *the Rafaela S (CoA)*.

The use of the convention text and *travaux préparatoires* is further important because they represent the only sources common in all signatory jurisdictions. Accordingly, they are most likely to yield a uniform interpretation. The interpretation of uniform laws should not stop at the convention text and legislative history, it is further important to look to case law from other signatory jurisdiction.

[145] Lødrup (1966) p. 103.

[146] Lødrup (1966) p. 100. See also NOU 1972:16 p. 40-42 to the same effect.

6 Case law from other signatory states

6.1 Introduction

Whilst the use of convention text and preparatory works may provide important insights into the intention of a uniform law, it is not always so. In those instances, and indeed even where the preparatory works does provide insight, it is natural to look to how the courts of the other signatory states (hereafter "foreign case law") have construed disputed provision. Whereas the use of convention text and *travaux préparatoires* may be accepted as customary international law[147], the use and applicability of foreign case law is however – again from a Norwegian perspective – more unclear and unaddressed by the Norwegian Supreme Court. This is unfortunate because, as Martin Stanford has emphasised, the consideration by judges of the approach taken by their fellow-judges in other countries to the provisions of uniform laws, is probably the best guarantee for uniformity[148].

Because the purpose of uniform laws is the enactment of uniform legislation in different countries it is often the case that an interpretive question facing a domestic court has previously faced a court in another contracting states. The question therefore is; to what extent may a Norwegian court apply such foreign case law when interpreting a domestic provision that corresponds to the provision considered by the foreign court?

6.2 The use of foreign case law

It would be uncontroversial to say that foreign case law may provide a useful and persuasive supplement for Norwegian courts when interpreting a domestic provision that has a similar provision or other relevant law in another country[149]. There is however no mentionable tradition in Norway

147 See 5.3 above.

148 Stanford (1987) at p. 269.

149 See also Skoghøy (2007) p. 567 *et seq.*

for relying on foreign case law outside of EU/EEA law[150] and certain areas of maritime law, like the law relating to charter parties[151].

Given the purpose of uniform laws and the strength of the presumption principle when interpreting uniform laws (see chapter 4 above), it may however be argued that foreign case law is of more than comparative interest and rather a source of law of considerable weight in the interpretation of uniform laws.

Eckhoff takes a rather moderate position on the matter:

> "A purpose of uniform laws is to create uniform rules within the relevant field in the different countries. Intending to realise the legislative purpose is here as elsewhere an important interpretive factor. Realising the above purpose implies that emphasis is not only out on the preparatory works but also on how the law has been interpreted by courts in the countries where [the uniform law] has been enacted. That a provision is understood in a specific way in most other countries is an argument for interpreting it likewise here. But it is not an unconditionally decisive argument, because there may be applicable factors to the opposite, for instance if the interpretation is unreasonable or if it is in poor harmony with other Norwegian legal rules."[152]

I describe this position as moderate, because it is rather vague. Foreign case law is considered "an argument". The relative weight of such an argument is not described. I would also be reluctant to read the last sentence "it is not an unconditionally decisive argument" antithetically, as meaning that foreign case law is decisive unless there are factors to the opposite. The reason being that whether "the interpretation is unreasonable" is a highly subjective standard that leaves a domestic court considerable room for rejecting any foreign case law it does not like. I do

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150 Within EU/EEA law however, there is a considerable tradition for such use of foreign case law as detailed in Fredriksen (2011).

151 See for instance the arbitration award in *Arica* ND 1983 p. 309; see also Solvang (2013); although Solvang's article goes more towards the absence of Nordic case law in charterparty matters and the role of (English) common law in that vacuum.

152 Eckhoff (2001) p. 290 (*author's translation*).

however have reservations against the remarks carried in the last sentence of the above quote (see 6.3 below).

It is testament to the lack of reliance on foreign case law by the Norwegian Supreme Court that neither Lødrup, Oftedal Broch, Eckhoff nor Skoghøy cites a single case where emphasis was put on foreign case law in the interpretation of a uniform law. A rare example of the Norwegian Supreme Court relying on foreign case law in interpreting a uniform law provision may be found in *the Sunny Lady*, which was a case regarding the nautical fault exemption. The cargo side argued *inter alia* that the nautical fault exemption was of no avail to the shipowner due to initial unseaworthiness. The Norwegian Supreme Court rejected the argument of initial unseaworthiness. When setting out the general standard of seaworthiness in its assessment of the cargo sides argument, the court referred to the judgement of the US Supreme Court in *Racer*[153] that the "*standard is not perfection, but reasonable fitness*"[154]. Whilst a clear example of the use of foreign case law in interpreting domestic provisions enacting uniform laws, the reference is brief and never expressed as deference to international uniformity as an interpretive approach.

An expressed and more conscious approach to the application of foreign case law in interpreting a uniform law provision was taken in the recent decision of the Norwegian Court of Appeal (Borgarting) in LB-2014-15414 (*Ministry of Finance against Hordafór AS* – hereafter *Hordafór*). The case concerned a customs classification of animal fodder under the Norwegian customs tariff. The Norwegian customs tariff is in turn an active transformation (transcription) of the uniform HS-nomenclature under the International Convention on the Harmonized Commodity Description and Coding System 1983 (HS Convention). The

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153 362 US 539, also reported in [1960] AMC p. 1503.

154 This quote is somewhat unfortunate given that *Racer* concerned the common law principle of the shipowner's strict liability for personal injury caused by unseaworthiness. A more suitable US Supreme Court precedent would in my opinion have been *the Silvia* 171 US 462, which (unlike *Racer)* was a case regarding the nautical fault exemption under the Harter Act 1893. The Court set out the standard of seaworthiness in relation to the nautical fault exemption as "*the test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport*." (at 464).

court remarked as follows as to the role of foreign case law in interpreting the HS-nomenclature as a uniform law:

> "The HS Convention and the HS nomenclature are used for the majority of all world trade and administered by the World Customs Organization (WCO). The purpose of the Convention is to facilitate a uniform international practice, and although individual states are not bound by other countries' classification of a product within the HS nomenclature, it must be assumed that practice in other countries are given considerable weight."[155]

The Court of Appeal here goes further than Eckhoff in that foreign case law is not just an argument, but an argument of considerable weight. In a recent judgment from the Oslo District Court in *F and NBK (Visual Artists Association) against the Ministry of Finance*[156]– a case concerning the customs classification of works of art – the Oslo District Court rejected the argument that the Court of Appeal in *Hordafór* only referred to foreign customs practices and not foreign case law. Instead the court put decisive weight on case law from the CJEU[157] in similar classification matters.

Given the purpose of uniform laws (ensuring international uniformity) and thereby the strength of the presumption principle in interpreting them, it should be uncontroversial to say that foreign case law must be considered an argument of considerable weight when Norwegian court are faced with a similar issue of interpretation. After the decision of the Norwegian Court of Appeal in *Hordafór* there is now case law in support of such an argument.

6.3 Conflict between domestic law and foreign case law

Whilst the use of foreign case law in interpreting uniform law provisions in general should be readily accepted, the issue becomes more complex

[155] *Author's translation.*

[156] Judgment of 14 April 2016 case no. 14-143774TVI-OTIR.

[157] Customs/the HS Convention fall outside of EEA law, accordingly reliance on the CJEU is akin to relying on foreign case law, rather than within EEA law where there is a substantial practice of relying of CJEU practice (see also footnote 57).

where there is a conflict between the international precedent set by foreign case law and precedent set in Norwegian case law or where the foreign interpretation conflicts with other parts of Norwegian domestic law. As maybe remembered from the previous section, Eckhoff states that foreign case law is an argument in interpreting uniform laws, but:

> "[Foreign case law] is not an unconditionally decisive argument, because there may be applicable factors to the opposite, for instance if the interpretation is unreasonable or if it is in poor harmony with other Norwegian legal rules."[158]

This approach to foreign case law is in my opinion flawed because it ignores the considerable body of international case law that developed through the 20th-century which gives clear direction to domestic courts to set aside domestic law and precedents where it is necessary to achieve the purpose of international uniformity.

The principle of ensuring international uniformity through interpretation is almost as old as the Hague Rules and was first expressed by the House of Lords in the *Stag Line* case[159].

> *Stag Line* concerned a cargo of coal to be carried from Swansea to Istanbul onboard the Ixia. The shipowner had fitted the ship with special equipment to reduce fuel consumption. The equipment was not functioning properly and two engineers were on board to remedy the equipment when the ship left Swansea, the intention being that the engineers were to leave with the pilot somewhere off Lundy. The engineers had not finished the necessary work by Lundy, remained on board and was later landed off St. Ives (off the contractual route). Before the ship had returned to the contractual route she stranded.

The question before the House of Lords in *Stag Line* was *inter alia* whether the deviation was a "reasonable deviation" under the Hague Rules article IV rule 4. That same question as to what was a "reasonable deviation"

158 Eckhoff (2001) p. 290 (*author's translation*).

159 [1932] AC 328

had been considered by English courts on numerous occasion prior to the Hague Rules and a key consideration for the House of Lords was accordingly whether the court was bound by the existing common law on the matter (which was still good law from a domestic perspective) or whether they had to set domestic law aside to ensure international uniformity. Lord Macmillan, with whom their Lordships agreed, stated his opinion as follows:

> "It is important to remember that the [Carriage of Goods by Sea] Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interest of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."[160]

This dictum has later been applied by the House of Lords to the interpretation of other uniform laws. In *Buchanan v Babco*[161] it was applied to the Carriage of Goods by Road Act 1965, enacting the CMR convention, and in *Fothergill v Monarch Airlines Ltd*.[162] it was applied to the Carriage by Air Act 1961, enacting the Warsaw Convention.

The sentiment of Lord Macmillan's statement in *Stag Line* is not exclusive to the House of Lords (now Supreme Court). Since *Stag Line* the very same principle has been laid down or referred to by the Federal German Supreme Court[163], the Belgian Cour de Cassation[164], the High Court of Australia[165], the Supreme Court of Canada[166] and the New

[160] *Ibid*. at p. 350.

[161] See footnote 66

[162] [1981] AC 251

[163] B.G.H.Z. 52, 220 (25. June 1969)

[164] *Sauvage, Veuve Tondriau et consorts v Air India Corporation* [1978] ULR I 346

[165] *Shipping Corp. of India Ltd.* v *Gamlen Chemical Co. (Australasia) Pty. Ltd.* (1980) 147 CLR. 142; and *Great China Metal Industries Co. Ltd.* v. *Malaysian International Shipping Corp. Berhad* (*the Bunga Seroja*) (1998) 158 ALR 1

[166] *Dominion Glass Co. Ltd.* v t*he Anglo Indian* 1944 AMC 1407

Zealand Supreme Court[167]. The principle has not been expressly stated or relied upon by the US Supreme Court[168], but it has been relied upon by the US Federal Court of Appeal[169].

The case before the High Court of Australia in *the Bunga Seroja*[170] provides an illustrative example of the setting of side of domestic law in deference to international uniformity.

> *The Bunga Seroja* concerned ten containers of aluminium coils carried from Australia to Taiwan via Tasmania. Before Tasmania the ship made a stop in Melbourne, in Melbourne the weather forecast warned of gale in the Bass Strait (an area renowned for heavy weather). Despite the forecast the master decided to head for Tasmania after preparing the ship and cargo for "the worst possible weather conditions". Once in the Bass Strait the ship encounter much heavier weather in a violent storm. In the storm the aluminium coils was dislodged and damaged.
>
> The cargo owner sued for damages and the shipowner raised the "peril of the sea" defence contained in the Hague rules Art. IV rule 2(c) as enacted by the Australian Sea-Carriage of Goods Act 1924. The cargo owner in turn argued that the storm was foreseeable and that the "peril of the sea" defence could not be raised where the peril was foreseeable.
>
> In its submissions regarding the correct construction of "peril of the sea" the cargo side argued *inter alia* that the Hague rules, in Australia, derived its authority from domestic legislation incorporating them into Australian law, and that the Australian High Court accordingly had to construe "peril of the sea" against Australian background law, in this instance the developed Australian common law on contracts of bailment.
>
> The High Court of Australia rejected the applicability of Australian domestic law in the interpretation of the Hague rules and

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167 *Tasman Orient Line CV v New Zealand China Clays Ltd* (2010) (*the Tasman Pioneer*) [2010] NZSC 37

168 Although; see *Norfolk Southern Railway Co. v Kirby* (2004) 543 U.S. 14

169 *Sunkist Growers Inc.* v *Adelaide Shipping Lines Ltd.* 1979 AMC 2787 (9 Cir. 1979), appeal denied to the US Supreme Court.

170 See footnote 165.

> further rejected that the storm had been foreseeable and accordingly allowed the shipowner's "peril of the sea" defence.

In rejecting the cargo owner's reliance on domestic Australian law, the Court explained:

> "The approach of this Court to the construction of an international legal regime such as that found in the Hague Rules must conform to settled principle. Reflecting on the history and purposes of the Hague Rules, the Court should strive, so far as possible, to adopt for Australian cases an interpretation which conforms to any uniform understanding of the Rules found in the decisions of the courts of other trading countries. It would be deplorable if the hard won advantages of international uniformity, secured by the Rules, were undone by serious disagreements between different national courts.[171] …
>
> In construing texts such as the Hague Rules, this Court, to the greatest extent possible, should prefer the construction which is most consistent with that which has attracted general international support rather than one which represents only a local or minority opinion. That is a reason why it would be a mistake to interpret the Hague Rules as a mere supplement to the operation of Australian law governing contracts of bailment. That law, derived from the common law of England, may not be reflected in, or identical to, the equivalent law governing carriers' liability in civil law and other jurisdictions. The Hague Rules must operate in all jurisdictions, whatever their legal tradition.[172]"

Two important elements should be observed from this dicta; first, the dictum is intended for uniform laws in general, not limited to the Hague Rules, as per "*an international legal regime such as… the Hague Rules*". The second observation is that the principle is not absolute, but "*to the greatest extent possible*". The High Court does not elaborate on instance that might fall outside of scope, but it is clear that domestic background

171 *Ibid.* [137]

172 *Ibid.* [138]

law cannot constitute a reason for abandoning the construction that has attracted general international acceptance[173].

6.4 Conflicting foreign case law

It is important to emphasise that it is not a given that foreign case law gives a clear answer in one direction. It may be that there are considerable disagreements between jurisdictions. If one interpretation is generally accepted internationally, that interpretation must be followed by Norwegian courts in the interest of uniformity unless there are special reasons not too[174].

If there is general disagreement as to interpretation internationally the courts are "thrown back to their own resources"[175]. For instance, in *Buchanan v Babco* – a case concerning the interpretation of the CMR – the House of Lords considered that courts in six signatory states had produced twelve different interpretations of the same provision[176] and that the English court therefore had to rely on their own methods of interpretation and broad principles[177]. I see no reason why Norwegian courts likewise should not resort to their own methods of interpretation where there is general disagreement between foreign courts.

From the international body of case law and theory considered above, certain considerations may be utilised to distinguish foreign case law in terms of their relative weight when interpreting a uniform law provision (in no particular order):

i) The weight of the decision within its own jurisdiction[178] (*stare decisis*), meaning; to what extent is the other courts of the jurisdiction bound by it. This consideration admittedly creates a bias towards common law jurisdictions where the decisions of a court

[173] See Lødrup (1967) p. 104 to the same effect.
[174] Lødrup (1967) p. 104 (does not expand on such special reasons).
[175] *Buchanan & Co. v Babco Forwarding & Shipping Ltd.* [1978] AC 141 at 161.
[176] *Ibid.* at 153.
[177] *Ibid.* at 161
[178] Skoghøy (2007) p. 570 and Lødrup (1966) p. 71

are binding on itself and all lower courts[179]. This would entail that for instance a decision of the English High Court[180] may carry more weight than a decision from the French Cour de Cassation[181]. Whilst this at first glance may appear strange, a Norwegian court should be reluctant to give decisive weight to a judgement that would not even be binding on lower courts in its own jurisdiction, as would be the case with the Cour de Cassation, cf. article 5 of the French Civil Code that expressly prohibits any binding effect on other courts[182].

ii) The proximity of the (domestic) enactment provision considered by the court to the original convention text. A decision that considers the original uniform law text will carry greater weight than a decision which turns on a domestic enactment of the uniform law which has rewritten the original text (greater discrepancy, lesser weight). This consideration is based on the near universal acceptance of the detrimental effect discrepancies in text may have on uniform interpretation[183].

iii) The reliance on, and analysis of, the convention text and its legislative history[184]. Thorough analysis of the convention text, and legislative history, lends a decision greater weight as they are common sources amongst all contracting states.

iv) Decisions pre-dating the uniform law, and decisions that rely on pre-dated, precedents carry less weight[185]. Unless it is clear that

179 See Tetley (2004) p. 15 *et seq.*

180 In its capacity as a court of first instance.

181 The French Supreme Court.

182 See also Tetley (2004) p. 16 and Lødrup (1966) p. 71

183 See *inter alia* Lødrup (1966) p. 76, Røsæg (2009) p. 174-175, Stanford (1987) p. 254-255, Sturley (1987) p. 739-740.

184 As per Viscount Simonds – in rejecting of the judgement of the Court of Appeal – in *the Muncaster Castle* at p. 836.

185 As per Lord Macmillan in *Stag Line*.

the uniform law did not intend to alter the legal position on the matter in question[186].

v) A decision that reflects a broader international view of the issue in dispute will carry more weight than a decision which reflects only a local or minority opinion[187]. A decision that considers the position of courts in other jurisdictions will accordingly carry favour. A decision that turns on domestic law will carry less favour[188].

vi) The general strength of the arguments in favour of the chosen solution[189].

vii) A decision which entails an unreasonable or absurd result may be disregarded[190].

The above list is intended as a non-exhaustive overview of considerations that have been deemed relevant by courts and academics when considering foreign case law, and must be subjected to a broad discretionary consideration by the court with international uniformity as its overriding principle.

International disagreement on the interpretation of a provision should, in any case, be no hindrance for examining the body of international case law however, as emphasised by the current justice of the (English) Supreme Court, Lord Mance:

> "Even in cases where no single direction can be discerned in the international jurisprudence, the very exercise of examining foreign cases and material and analysing the considerations which have been weighed with foreign courts may have a large contribution to make to the development and adoption of sensible solutions."[191]

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186 Cf. *the Muncaster Castle*

187 Cf. *the Bunga Seroja* (Australia)*; the Rafaela S* (England (CoA)); see also Lødrup (1966) p. 104.

188 *Ibid.*

189 Skoghøy (2007) p. 571

190 Eckhoff (2001) p. 209; see also the Vienna Convention article 32(b).

191 Mance (2001) at p. 422.

Norwegian courts would do well in heeding such an approach to foreign case law. It seems Norwegian academics more readily take on board foreign opinion, than does the courts. For instance, in terms of the Hague Rules, the last full treatment of the Bill of Lading Act 1938 was Sejersted's commentary in 1976[192], there he utilises a considerable number of foreign cases in his treatment of the subject. Similarly, Borchsenius' commentary on the nautical fault exemption[193] in the mid-1950s is an exceptional example of a thorough treatment of foreign law in relation to a Norwegian domestic provision. In case law however, the judgement in *the Sunny Lady* remains a lonely example of the Norwegian Supreme Court emphasising (albeit very briefly) foreign (non-Scandinavian) case law in its interpretation of a uniform law provision.

6.5 Scandinavian uniformity

Whilst Norwegian courts are reluctant to consider foreign case law, such reluctance does not extend to case law from the other Scandinavian[194] jurisdictions.

The natural reason for this is the close collaboration between the Scandinavian countries in a number of private law areas. For instance the NMC, in its entirety, was formed in collaboration with the Swedish, Danish and Finnish maritime committees and closely resembles the respective Acts of those countries. Accordingly, it may be said that the NMC Chapter 13 (which enacts the Hague Rules) enacts an international uniform law within a Scandinavian uniform law.

Usually, the Scandinavian collaboration does not take the form of a convention that the Scandinavian states sign; rather it is a more informal collaboration[195]. Only where the parties consider the need for uniformity so strong that identical legislation is needed will the countries enter into a convention[196]. The Convention between Norway, Denmark, Finland,

192 Sejersted (1976)

193 Borchsenius (1955)

194 Scandinavia here referring to; Denmark, Finland, Norway and Sweden.

195 Eckhoff (2001) p. 287.

196 Skoghøy (2007) p. 570.

Iceland and Sweden on the Recognition and Enforcement of Private Law Judgments 1932 which is enacted in the Enforcement and Recognition of Nordic Private Law Judgements Act 1977, provides an example of an instance where the Scandinavian countries considered the need for uniformity so strong they entered into a convention.

It is only in the latter instances – where the countries enter into a convention – where Norway will be under an international law obligation towards the other Scandinavian countries in terms of uniformity. That is not to say that Scandinavian case law is without relevance in the interpretation of provisions that has resulted from the more informal collaboration. There is a long tradition for looking to the other Scandinavian countries when interpreting such provisions as the collaboration in itself must be seen as an expression of an intention of uniformity[197].

It remains a paradox however that Norwegian courts looks to Scandinavian jurisdictions which they strictly speaking owe no obligation, but ignores international jurisdictions which they do owe an obligation under uniform law conventions. That said; case law from other Scandinavian jurisdictions may of course be relevant foreign case law. For instance, the other Scandinavian countries have also ratified the Hague Rules, under the Hague Rules their body of case law becomes relevant sources for interpretation just like jurisprudence from other contracting states. But Scandinavian case law may be said to provide only a local opinion. If one relies solely on local opinion, there is a risk that the courts may get a limited and slanted view of the position taken on a given issue internationally. In the interest of uniformity it is therefore important to look not only to the other Scandinavian jurisdictions, but also beyond.

An interesting issue arises where there may be a contradiction between the Scandinavian legal position on a uniform law issue and the position taken in other jurisdictions. Støen[198] identifies such a possible contradiction in a recent article discussing the House of Lords decision in *the Muncaster Castle*[199] in light of Scandinavian law.

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197 Skoghøy (2007) p. 570-571

198 Støen (2016)

199 [1960] AC

The Muncaster Castle concerned whether a carrier was liable for cargo damage caused by a latent defect of the ship which in turn had been caused by the negligence of a worker at a yard where the ship had been repaired. The latent defect had gone unnoticed in inspections by the carrier and Class. The question before the House of Lords was whether the scope of the carriers due diligence under Hague Rules article III rule 1 in making the ship seaworthy extended to the negligent yard worker. If so, the carrier would be liable due to failure in making the ship seaworthy.

The House of Lords concluded that the scope of the carrier's due diligence requirement extended to the negligent yard worker.

After a thorough analysis of both *the Muncaster Castle* and Scandinavian law, Støen[200] concludes that under Scandinavian law the scope of the carrier's due diligence would not have extended to the yard worker, citing *inter alia* the decision of the Finnish Supreme Court in *M/S Tuulikki*[201] to the opposite of *the Muncaster Castle*.

From an interpretation perspective it is interesting to consider the relative weighting of two foreign judgements to the opposite where one of the judgements is Scandinavian.

In my opinion there is no obligation on Norwegian courts to give particular preference to Scandinavian judgements in a scenario such as *the Muncaster Castle*. Norway is, through the Hague Rules, under an obligation aimed at international uniformity. If the Scandinavian collaboration was to be interpreted as necessitating a uniform view on an already uniform obligation, that would render the underlying international obligation pointless. In other words, a Scandinavian preference would be contrary to the purpose of international uniformity.

Then we are left with two Supreme Court decisions which *prima facie* carry equal weight. As outlined above in 6.4, the two decisions may then be considered on a range of factors such as: the proximity of the considered provision to the original convention text, the relative harmony with the conventions legislative history and *travaux préparatoires* and whether the decision reflects a wider international approach or just a local

[200] Støen (2016) p. 89-90

[201] ND 1979 s. 383

or minority opinion. As with the consideration of all case law, the depth of analysis and the strength of the arguments relied upon in concluding on the matter are also central to the weight of the respective judgements[202]. Performing such a comparative analysis of these two judgements and reaching a conclusion is however beyond the scope of this paper.

6.6 Uniformity through interpretation: an implied obligation?

Whereas the *presumption principle* will align the legislature's domestic enactment with its international obligations and international customary law will hold interpretation to the convention text and legislative history, it begs the question; on what legal basis may foreign case law become precedents that Norwegian courts must heed?

In discussing the legal basis for the use of foreign case law Lødrup argues that where *many* foreign courts have followed a certain practice, Norwegian courts can only diverge where there is particularly strong reason to do so[203]. He emphasises in his conclusion however that Norwegian courts are in fact under no international law obligation to utilise foreign case law[204].

Whilst the customary international law codified in the Vienna Convention clearly does not extend to the regard for foreign case law there is a strong argument for the proposition that due regard to foreign case law is an obligation implied in uniform laws, stemming from its purpose of international uniformity. As stated by Skoghøy:

> "Even if it is not expressly provided, it will in my opinion for conventions that aim to render uniform rules in a particular area of law, easily be implied an obligation to the effect that one in interpreting the convention must have due regard of legal developments in other

202 See Skoghøy (2007) p. 571 to the same effect.
203 Lødrup (1967) p. 104
204 *Ibid.*

> contracting states, as it otherwise could become difficult to achieve the harmonization objective that underlies the Convention."[205]

I would argue that the long standing international practice of relying on foreign case law in interpreting uniform laws, outlined in the previous sections of this chapter, cements the argument that there is an implied obligation to give foreign case law due regard, and that Norwegian courts are equally bound by that obligation[206].

6.7 Practical challenges

Eckhoff states that in order for domestic courts to rely on foreign case law it is necessary for there to have been made comparative analysis in legal theory. This because carrying out such analysis would usually be beyond what one can reasonably expect of the parties and the courts[207].

It is of course more difficult for the parties and the courts to get orientated in a landscape consisting of international sources rather than the familiar domestic sources that they use every day. I take issue however, with the notion that such practical difficulties entail that domestic courts cannot be expected to consider foreign case law[208].

In the latter half of the 20th century active steps were taken to ease the availability of uniform case law to domestic courts, primarily through the Uniform Law Review (which is edited by, but not limited to uniform laws from, the UNIDROIT). Further, in terms of transportation law, European Transport Law (ETL) also provides substantial analysis of foreign case law in the transportation law area. There is also a considerable number of newsletters and other circulars from insurance companies, law firms

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205 Skoghøy (2007) p. 569 (*author's translation*)

206 The letter from the Norwegian MoJ included in Innst. O. II 1938 at p. 3-4 (set out on p. 16 of this thesis) would, discusses the reliance on foreign case law in relation to the Hague Rules, would support the view that this was an obligation already from the outset.

207 Eckhoff (2001) p. 290-291, see also Oftedal Broch (1968) p.634.

208 See Solvang (2009) p. 70 *et seq.* for a discussion of such use of foreign case law in terms of contract interpretation; also Solvang (2013).

and other industry actors that, at least on a primer-level, may shed light on the developing case law in other countries.

6.8 Conclusion

Norwegian courts appear reluctant to consider foreign case law when interpreting uniform laws. This is both unfortunate from a uniformity aspect and contrary to the long and substantial practice of courts in other jurisdictions that regularly rely on uniform law interpretations of other courts. Whilst it understandably is easier to look to the other Scandinavian countries that we collaborate with and share a common legal tradition, the Scandinavian view only represents a regional opinion and it is therefore important to look beyond to other signatory jurisdictions. Indeed, we are under an obligation to do so.

7 Conclusion

The fundamental purpose of this thesis has been to describe the central tenets of uniform law interpretation and their basis, from a Norwegian perspective, utilising the Hague Rules as the primary reference for illustration.

The thread of the discussion on uniform laws is their overriding purpose of creating international uniformity on a given legal issue. In essence, it is this purpose that renders the rules on uniform law interpretation different from other conventions and the usual interpretation of domestic law. In short, interpretation of uniform laws must be consensus driven, actively seeking international uniformity.

The discussion on the enactment of uniform laws into domestic law has shown the dangers of transformations of uniform laws that create significant differences in wording and structure between the domestic and international text. These differences in text may in turn form the basis for differences in interpretation contrary to the purpose of uniformity. Accordingly, uniform laws should be given an active transformation into Norwegian law containing the wording and structure of the uniform law to the greatest extent possible.

Where a difference between the Norwegian enactment and the uniform law occurs, the *presumption principle* however gives the courts a basis for forcing alignment through interpretation. In other words, the wording of the domestic provision itself carries little to no weight.

As further laid out in chapter 5 and 6 the convention text itself and its *travaux préparatoires* as well as case law from other contracting jurisdiction will provide the courts with an important means of interpretation as well as aiding in *de facto* uniform application of the rules internationally. Customary international law provides the legal basis for utilising the convention text and its legislative history in the interpretation of uniform laws. The obligation to consider foreign case law does not stem from public international law however, but is rather an implied obligation stemming from the purpose of uniformity that underpins uniform laws.

It may be noted that this paper, whilst highlighting the absence of legislative history and foreign case law in Norwegian case law, makes no specific mention of a Norwegian authority that is in conflict with other international authorities. But that is rather beside the point. The point is to highlight the need for a more conscious approach to interpretation and international uniformity where Norway has ratified a uniform law and the instrumental role of domestic courts in ensuring that the uniform law fulfils its purpose to the greatest extent possible[209].

For a *tour de force* display of uniform law interpretation, I would recommend as further reading the judgement of Lord Justice Rix in *the Rafael S*[210] – a case concerning whether a straight bill of lading (a bill of lading consigned to a named consignee, i.e. it is non-transferrable) fell within the scope of the Hague Rules. In his judgement, Lord Justice Rix examined the issue by comprehensively setting out the legislative history of the Hague Rules and detailing the *travaux préparatoires* before turning to the treatment of the issue by foreign courts in other jurisdictions. He then concluded, on those authorities rather than English common or statutory law[211], that a straight bill of lading fell within the scope of the Hague Rules[212].

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209 That said; the judgement of the Norwegian Supreme Court in Rt. 1995 p. 486 (CMR case regarding whether gross negligence is "equivalent to wilful misconduct" in art. 29 (as enacted by the Norwegian Road Carriage Act § 38)) is in clear contradiction with German and French case law (but in line with Belgian practice), see Clark (1987) at p. 157, (in my opinion, given the absence of gross negligence in English common law (e.g. *Wilson v Brett*), the same result as German and French practice would be rendered in England; see also *Denfleet International v TNT Global* and *Chitty* para. 36-131); neither is it unlikely that the Norwegian Supreme Court would have come to a different result in *the Sunny Lady* had it taken into consideration the views of the House of Lords on the meaning of "the management of the ship" in *the Canadian Highlander*, the Australian decision in *the Novoaltaisk* and the US Supreme Court in *the Germanic*, or that other Norwegian judgements on uniform laws would not have benefitted from a discussion on similar decisions in other jurisdictions; see also chapter 3.5 above.

210 [2004] QB 702

211 "*Whatever, the history of the phrase [straight bill of lading] in English common or statutory law may be, I see no reason why a document which has to be produced to obtain possession of the goods should not be regarded, in an international convention, as a document of title. It is so regarded by the courts of France, Holland and Singapore.*" at pp. 751-752.

212 Upheld on appeal, [2005] 2 AC 423.

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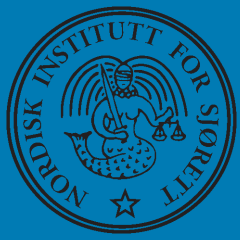

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