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

Phone: 22 85 96 00
E-post: sjorett-adm@jus.uio.no
Internet: www.jus.uio.no/nifs

Editor: Professor dr. juris Trond Solvang –
e-mail: trond.solvang@jus.uio.no

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Overview over content

Director's preface

As mentioned in last year's preface, the Institute has since 2014 experienced uncertainty in regard to the financing from The Nordic Council of Ministers (NMR). However, in December 2016 we were informed that the contract would be extended throughout 2018 instead of being terminated in 2017. Furthermore, in November 2016 NordForsk offered the new financial instrument designed to continue financing of the Nordic institutions that have been partly financed by NMR. The instrument is called "Nordic University Hub" and its purpose is to promote Nordic cooperation within education and research at University level. In order to apply for this funding the Institute established cooperation with Center for Enterprise Liability at the Faculty of law at University of Copenhagen, the Department of Law at University of Southern Denmark, the Law Department of the School of Business, Economics and Law at the University of Gothenburg, the Axel Ax:son Johnson Institute of Maritime and Transportation Law at the Faculty of Law of Stockholm University, the Faculty of Law at the University of Helsinki, the Faculty of Social Sciences, Business and Economics at Åbo Akademi University, the School of Law, Reykjavik University and the School of Humanities and Social Sciences at the University of Akureyri. The application for funding was submitted in May 2017. The evaluation from NordForsk is expected in November 2017.

The research at the institute has followed the same direction as previous years. The traditional core research area, contracts in the shipping-, offshore- and energy sectors is maintained and developed. The same is true for energy law, petroleum law and ocean law. There has also been a significant amount of research within general commercial law and international economic law. EU law perspectives and environmental issues are included in all these areas.

During 2016 the institute developed a research strategy that included research projects involving all three departments at the institute (Department of maritime law, Department of petroleum and energy law and Center of European law). Of particular relevance in regard to the core research activity mentioned is projects related to ocean law

and energy law. The ocean law project includes questions concerning jurisdiction, regulation of commercial activity, licence systems, safety, pollution liability, insurance and contracts. The energy law project includes the EU regulation of the energy market, licence issues, supply security, environment and climatic issues and maritime and ocean law issues in connection with renewable energy in the ocean. The strategy also aims to develop a research project on fishery law which will further the expertise that has been developed within the traditional maritime law topics, ocean law, petroleum law and energy law.

Tarjei Bekkedal at the Center for European Law was assessed and found eligible for the position as Professor of Law. The promotion was granted retroactively from September 2015.

In terms of publications and activities 2016 has been a most productive year. Researchers at the Institute have contributed to fourteen issues of MarIus, covering topics within EU law, energy law, maritime law and other topics. The Institute has hosted several events of varying size throughout 2016. Among the most notable were the Department of petroleum and energy law seminar 8 February 2016 with the topic "Current oil and gas law trends", and the 20 June seminar on "Managing resources, a Norwegian experience". The department of maritime law hosted a seminar for the University's Arctic initiative 1–2 December 2016 on "Ecosystem based management in the Arctic" and Oslo Law of the Sea Forum hosted a seminar on ocean law issues in June on "New uses and abuses of the sea bed – legal challenges." The Center of European law hosted the seminar "Brexit and the EEA" on 2 September and "Crossing Europe's Borders – New approaches to migration in European law" on 20 October 2016.

The Institute was also co-host at several events. The European Colloquium of Maritime Law Research with NIFS as co-host was arranged in Bilbao 14–15 September on the topic "Maritime liens, mortgages and forced sale". The Department of Petroleum and Energy law hosted together with UiO:Energy and Energy Norway, a seminar on Energy law; Legal and political development, in the spring semester 2016. Further, members of the academic staff are, as in previous years, active participants and partly co-hosts in an array of legal seminars hosted by other institutions (e.g.

the "Kiel seminar" on energy law, the Petroleum Law Seminar and the Solstrand seminar on oil and gas law).

The Institute has maintained its portfolio of taught courses in 2016. This includes elective courses in petroleum law, maritime law, marine insurance, insurance law and EU substantive law within the study programme Master of Law (in addition to courses taught in Norwegian). In addition, a new selective course on ocean law is now offered as an extension of the institute's research on ocean law and participation in the UiO: Arctic initiative. The Institute also provides the complete study programme, Master of Maritime Law. The courses maintain their popularity within the student body. In 2016 there were 245 applicants competing for 20 places on the Master of Maritime Law programme, and accepted candidates have been recruited from thirteen countries.

Approximately fifty percent of the Institutes funding in 2016 has been through external project funding. Our main sponsors and collaborators are:

- The Nordic Council of Ministers
- Research Council of Norway
- the Norwegian Oil and Gas Association
- the Ministry of Petroleum and Energy/the Research Council of Norway
- Energy Norway
- Anders Jahre's Foundation

We are very grateful to all our sponsors.

We would also like to express our gratitude to the numerous practitioners who help us year after year with lectures, student advice, information and examinations, often free of charge. Their contribution is important in making the Institute what it is: a meeting place for young as well as established researchers, practitioners and students, all of whom combine open-minded enthusiasm for new knowledge with penetrating analysis. In particular, we are delighted with the way in which practitioners as well as researchers from other institutions have contributed to our elective courses and the Master of Maritime Law programme.

Trine-Lise Wilhelmsen

Editor's preface

This issue of SIMPLY contains a variety of topics representative of the Institute's activities and areas of law covered by its academic staff, and that of its students, associated academics and practicing lawyers.

First there are two contributions within classical maritime law; Thor Falkanger's article on the system of the Maritime Code concerning who on the carrier's side are bound by the issuance of cargo documents, and Trond Solvang's article concerning shipowners' limitation rights within the scope of section 172a of the Maritime Code. Then there is another maritime law topic, with important aspects into environmental law, by Henrik Ringbom, on the regulative aspects of ships' sulphur emission in controlled areas.

Thereafter there is an article by Finn Arnesen, representing the Center of European law, providing overriding legal analyses of the status of the EEA Agreement – followed by an essay, showing the relationship between maritime law and EU-law, by one of our LLM students, Jonela Kuro. The essay, discussing the effect of EU-regulations on the Greek cabotage shipping industry, was submitted as an exam paper as part of our LLM programme.

From EU-related shipping law we turn to an area of Norwegian law of paramount importance to ship finance, namely the legal status of the Nordic Trustee (Norsk Tillitsmann) when disputes arise from the issuance of bonds within the Norwegian bond market – as presented in an article by Benedicte Haavik Urrang, lawyer with Nordic Legal Services.

Finally we are pleased to have two contributions from Denmark: Vibe Ulfbeck's article discussing procedural topics on whether daughter companies may be sued under the jurisdiction of their parent company – and Kristina Siig's article on the legal status of ship classification societies when performing tasks delegated by administrative regulatory authorities.

Trond Solvang

Bills of lading and sea way bills issued under charter parties: who is bound?

By Thor Falkanger,
Professor Emeritus, Scandinavian Institute
of Maritime Law, University of Oslo

Innhold

1 The topic

When a vessel is on a voyage or time charter, bills of lading will normally be issued for the cargo which is to be carried: either one for the total cargo, or several bills – each for a distinct part of the cargo. The use of the traditional bill of lading has, however, gradually lessened in favour of the sea way bill. The purpose of this article is to analyze some legal aspects of the two documents, and in particular: who is legally bound by them? For the sake of simplicity we assume here that the chartered vessel is engaged in liner service. This means that the original promise of cargo transportation is given by the charterer (the line), and further we assume that this promise is evidenced by a booking note signed by both the line and the cargo side (the sender).

The use and consequences of using the bill of lading are fairly well regulated by the Maritime Code 1994 (the MC),[1] whereas the sea way bill is only addressed in two sections.

One common characteristic feature, which should be mentioned at the outset, is that both the bill of lading and the sea way bill are considered as evidence of a previously concluded contract, cf. MC Section 292 paragraph one and Section 309 paragraph two. As already indicated, in the liner trade this contract is (usually) the booking note.[2]

Due to the historical order of development of the documents and the extent of legal regulation, it is the bill of lading that requires our first attention and has the highest number of words in the article.

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1 The Maritime Code of 24 June 1994 no. 39 is translated and published in MarIus no. 435 (2014). This unofficial translation is used in this article. The quotations from the preparatory works to the Code and from judgments have been translated by the author.

2 This means that both sides may argue that the bill of lading or the sea way bill is not in conformity with the booking note: a date or the freight rate is wrong, an exception has been forgotten, etc. The ordinary rules on evidence are applicable; there is no qualification (with e.g. words like "clearly" or "without doubt"). However, it must be expected that the burden of proof is somewhat heavier when the line argues that the bill which it has formulated and signed in error does not protect the line, as envisaged in the booking note. And conversely when the shipper has filled in the document and presented it for signature.

2 Bills of lading issued under a charter party – an overview

2.1 The simple situation: the line is the owner of the carrying vessel

Naturally, the rules of the MC are primarily aimed at the situation where the line is the owner of the carrying vessel. In these circumstances, the cargo is delivered to the line by the party who has the contract with the line (the sender, who is, e.g., a cif-seller) or by someone having a contractual relation with the sender (the shipper, who is, e.g., a fob-seller). In the latter case, it follows from the line's contract with the sender that the line is obliged to accept the cargo and transport it (see, however, below).

According to general principles of contract law, the person delivering cargo to the vessel is entitled to some kind of receipt.[3] The MC has more specific rules on this point in Section 294 paragraph one:

> "When the carrier [in our context: the line] has received the goods, the carrier shall at the request of the shipper issue a received for shipment bill of lading."

Paragraph two then states that this received for shipment bill of lading may later on be substituted by an ordinary on board bill of lading. The important feature is that the shipper – who is not necessarily the sender – is entitled to a bill of lading, and the contents of such a document and its legal effects are stated in the MC (on some of the details, see below). The obligation to issue a bill of lading rests on the line, in its capacity as carrier.

It is remarkable that although the MC defines the shipper (Section 251), and also says that the shipper is entitled to have a bill of lading (Section 294), it has no provision as to who is or may be a shipper without

[3] Se. e.g., Augdahl, *Den norske obligasjonsretts almindelige del* (5. ed. 1978) p. 57 and p. 164, and Hagstrøm, *Obligasjonsrett* (2 ed. 2011) p. 215.

being the sender. Has the sender the right to nominate anyone as shipper? And when and how should such decision be notified to the carrier? Furthermore, a standard booking note, such as CONLINEBOOKING 2000, has no box for shipper, but one for "Merchant" – a concept that is defined in clause 1 as including "the shipper, the receiver, the consignor, the consignee, the holder of the bill of lading, the owner of the cargo and any person entitled to possession of the cargo". The document gives, however, no indication as to who the shipper is or may be.[4]

It should be added that the standard voyage charter forms also do not have a box for the insertion of the name of the shipper.

At the port of discharge the situation is simpler: a bill of lading is a negotiable document that can, of course, be transferred. And fulfilling the obligation to transport and deliver is subject to the presentation of the document. It is sufficient here to quote the MC Section 302 paragraph two:

> "The person who presents a bill of lading and, through its wording or, in the case of an order bill, through a continuous chain of endorsements or through an endorsement in blank, appears as the rightful holder, is prima facie regarded as entitled to take delivery of the goods."

2.2 Bills of lading when the line uses chartered tonnage

We now turn to the situation where the line uses chartered tonnage; we assume here that this is permitted under its contract with the cargo side (the booking note).[5]

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4 In Falkanger, *The concept of shipper in sea carriage law – with some deviations to other modes of transport*, SIMPLY 2014 (= MarIus no. 456, 2015) pp. 31 et seq. it is stated that there is no definition of who the shipper is as regards Sect. 294 and that one way of explaining that the shipper who is not the sender is nonetheless entitled to a bill of lading, is that the sender – directly or presumably – has transferred this right to the shipper. The better view, however, is that the shipper's position is not a right derived from the sender, but is given him by law, and that this obligation on the part of the carrier arises on receiving the goods for transportation" (p. 40).

5 Whether the carrier has such freedom is not regulated in the MC; the answer depends upon the construction of the transport agreement.

The shipper is, as we have seen, entitled to a bill of lading, issued by "the carrier" (MC Section 294). The obligation to issue a bill of lading rests on the line in its capacity as carrier, and the preparatory works to the section make it quite clear that it is not sufficient that a bill of lading is issued, it must be "binding on the carrier".[6] Section 295, on the master's bill of lading, conforms with this approach:

> "A bill of lading signed by the master of the ship carrying the goods is regarded as having been signed on behalf of the carrier."[7]

However, sometimes there is no doubt: the bill of lading is signed by or on behalf of the owner of the vessel, not on behalf of the contracting carrier. In such a case the bill of lading cannot really be said to be *evidence* of a contract of carriage (Section 292 paragraph one no. 1); it is *the contract,* binding the owner. There is no doubt that the owner hereby incurs liability according to the rules governing bills of lading, see in particular ND 1955 p. 81 (= Rt. 1955 p. 107) (Lysaker) where the Supreme Court said:

> "The bill of lading is signed by the master, who has also designated himself as such, and according to usual rules it is then the owner, not the time charterer, that is bound."

In any case, the owner will incur liability as a sub-carrier (a performing carrier): see the first sentence of Section 286 paragraph one, stating that a sub-carrier is liable for such part of the carriage as he performs, "pursuant to the same rules as the [contracting] carrier."

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6 NOU 1993: 36 p. 45. After having described standard practice on the issuance of bills of lading, it concludes: "The point is that the issued bill of lading shall be binding on the carrier." And in our context the carrier is the line.

7 See NOU 1993: 36 p. 45 on the situation where the transport is performed by a ship whereof the carrier is not the operator-owner: "The section removes the doubts that may have existed. A bill of lading signed by the master of the performing vessel is deemed to be signed on behalf of the carrier".

But the line is not – in contrast to what was previously the law[8] – thereby free of liability; see the main rule in Section 285 paragraph one:[9]

> "If the carriage is performed wholly or in part by a sub-carrier [here: the owner of the vessel], the carrier [here: the line] remains liable according to the provisions of this Chapter as if the carrier had performed the entire carriage him- or herself."

A distinction should be noted: the carrier (the line) is not liable according to his contract (adjusted as the case may be because of the peremptory rules in the MC), but according to the rules of the MC Chapter 13 on the carriage of general cargo.

In addition to the liability following from Section 285, we have the carrier's obligation to issue a bill of lading, if so demanded by the shipper (regardless of whether or not he is the sender), cf. Section 294. There is no exception, e.g. for the case where another party issues a bill of lading for the cargo. But if the shipper accepts a bill of lading issued by the owner of the vessel, it may be argued that the shipper has waived this right according to Section 294.[10]

The carrier may have agreed to better terms than those provided by the MC, e.g. that the limitation amount shall not be 667 SDR per unit (Section 280), but instead 1 000. However, this is not binding on the sub-carrier unless he has given his "written consent" (Section 286 paragraph two). With the line's continued liability, based upon the rules in Chapter 13, it appears that the 1 000 SDR-limitation becomes inoperative when the line exercises an option to use a sub-carrier. The unfortunate result, seen from the cargo side, is a breach of the promise given by the carrier

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8 See in particular Supreme Court decisions in ND 1903 p. 331 (= Rt. 1903 p. 642) (Gerdt Meyer) and ND 1955 p. 81 (= Rt. 1955 p. 107) (Lysaker) as well as the Swedish Supreme Court decision in ND 1960 p. 349 (Lulu).

9 There are important modifications in the second and third paragraphs; the important point in the present context is, however, the principle.

10 However, a clause in the booking note stating that there is no obligation on the part of the line to issue a bill of lading would not be valid, even if the line promised a sea way bill as a substitute.

(the line) and a consequence of how the carrier has acted – and for such breach the carrier will be responsible.[11]

2.3 The rules in MC Chapter 14

We have shown above that the rules in MC Chapter 13 entitle the shipper – even when he is not the sender – to request a bill of lading, and that this document will then be binding on the carrier, being the contracting carrier named in the booking note.

However, when we turn to Chapter 14 on the chartering of ships, the rules are different. Regarding voyage charters Section 338 paragraph one says:

> "When the goods have been loaded, the voyage carrier [Norwegian: reisebortfrakteren] or the master or the person otherwise authorized by the voyage carrier shall, at the request of the shipper, issue a bill of lading, provided the necessary documents and information have been made available."

Such a document is binding on the voyage carrier, which is made abundantly clear by the recourse right according to paragraph three: if the voyage carrier has been held liable under the bill of lading because the bill contains stricter rules than those imposed by the charter party, the voyage charterer has to hold him harmless.

Words to the same effect are used for time chartering, see Section 382 paragraph one:

> "The time carrier [Norwegian: tidsbortfrakteren] shall issue a bill of lading for the goods loaded for the voyage the ship is to perform, with the conditions usual in the trade in question. If the timer carrier thereby incurs liability to the holder of the bill of lading in excess of the liability according to the chartering agreement, the time charterer shall hold the time carrier harmless."

[11] It may be found otherwise if it has been made sufficiently clear that a diminished liability may be the consequence of sub-carriage.

These contradictions in Chapters 13 and 14 have a historic explanation. The previous MC 1893 – as amended in 1938 when the Hague Rules were implemented – established, in a joint subchapter on voyage charters and carriage of general cargo, the rule that bills of lading should be signed by the master, with recourse for the owner to the charterer in cases where the bill contained "other terms than in the agreement and this leads to increased liability" (MC 1893 Section 95). In the time charter section of the Code there was a similar regulation: the owner was obliged to issue bills of lading for loaded cargo "with the terms of carriage that are usual for the trade in question", and again in this case with recourse to the charterer in case of increased liability.

Nowadays, the general rule on the issuance of bills of lading has changed (the previous Section 95 compared with today's Section 294, cf. Section 295): The obligation rests on the carrier, i.e. the counterparty to the sender. This change should be seen against the background of the extensive discussions after a Norwegian and a Swedish Supreme Court decision. In ND 1955 p. 81 (= Rt. 1955 p. 107) (Lysaker) a time chartered vessel was used in liner service. Since a possible cargo damage claim against the owner of the vessel was time barred, the cargo interests sued the line, arguing that the line was bound by the bill of lading which had been signed by the master. The Norwegian Supreme Court found, however, that the master bound the time charter owner, not the line: "Should the time charterer [the line] be liable under the bills of lading, his behavior, in the specific circumstances, must have been understood as acceptance of bill of lading responsibility" – and that was not the case. The Swedish case – ND 1960 p. 349 (Lulu) – concerned loss of cargo under a liner shipment: the bill of lading was signed on behalf of the master, and consequently the owner of the vessel was held liable, not the line that had the vessel on charter. The first sign of a changed attitude can be found in Ot. prp. no. 28 (1972–73) p. 9:[12]

[12] This is a preparatory work for an act of 8 June 1973, whereby the rules in MC 1893 on carriage of goods were restructured and adapted to the Hague-Visby Rules.

> "Questions have been raised as to whether the master can bind not only his owner by issuing bills of lading, or whether he also can bind a contracting carrier [Norwegian: kontraherende bortfrakter] who is not the owner of the vessel [Norwegian: reder]. The latter understanding is the correct one, according to the view of the Department of Justice, and this should also follow from the wording of the section [Section 95 in MC 1893], cf. ' … the master or the one the owner [Norwegian: bortfrakteren] o t h e r w i s e authorizes … '. "

In other words: the master's signature on the bill of lading does not necessarily bind his employer; the above preparatory notes suggest that MC 1893 Section 95 ordinarily has the effect of making the contracting carrier bound by the master's signature. The owner of the vessel could be liable as the actual carrier, according to rules that at that time were not as developed as in today's Section 286.[13]

The statement quoted above was followed up and reinforced in NOU 1993: 36 p. 45 in the commentaries to today's Section 295 on the master's bills of lading.

By contrast, in the rules dealing specifically with voyage and time charters, the old regime has been maintained (Sections 338 and 382) – without any indication on how the dividing line between "carriage of general cargo" and "chartering of ships" should be drawn[14] regarding our bill of lading problem.

In short: When the line uses chartered tonnage: "Chartering of ship" may be a condition for "carriage of general cargo", and the bill of lading belongs to the "grey area" between the two regimes.

As between owner and charterer, there is in principle no problem; there is freedom of contract, and the parties may – with varying degrees of clarity – agree that the owner will or will not issue bills of lading which will be binding on him. A typical example of the first is the traditional clause stating that the master shall "sign bills of lading as presented".

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[13] See Ot.prp. no. 28 (1972–73) p. 13, cf. NOU 1972: 11 pp. 18–20.

[14] Se NOU 1993: 36 p. 19 and p. 57.

The real problem is the expectations on the cargo side. Sender A has a contract with line B. This contract may be crystal clear: B has the right to use chartered tonnage, and it is stated in the contract that in such a case the cargo liability is the chartered owner's and his alone. It has not been argued that such an arrangement is contrary to the Hague-Visby Rules.[15] Accordingly, it might be said that the real issue is the necessity for a clear agreement, and that the starting point is that question marks over construction works against the carrier (the line). Here the legislators have made a contribution in respect of one typical situation: the master's signature is "regarded" as binding the line (Section 295). However, this doesn't provide us with any reasonable explanation for Sections 338 and 382. Take the Lysaker case: if we start with Section 295 the line is bound, but if we start with Section 382 the owner of the vessel is bound. It might, however, be argued that the master is not mentioned in Section 382, i.e., the line is bound when *the master* signs (without qualifications). An argument along such lines is not convincing: Section 338 mentions the master, and above all, Section 295 is a confirmation of what follows from Section 294 on the liability of the line.[16]

2.4 The terms of the charter party and the bill of lading – the tramp bill of lading

When the vessel is on charter, questions may arise as to the relationship between the bill of lading and the charter party. The answer is given in MC Section 325 – which is entitled "Tramp bill of lading":

> "If the carrier [Norwegian: bortfrakteren] issues a bill of lading for goods on the ship, the bill of lading shall govern the conditions for the carriage of and delivery of the goods as between the carrier

[15] This may be formulated in this way: in real terms, the line has acted on behalf of the actual carrier (the owner of the chartered vessel) and created a contractual link between the cargo and the actual carrier.

[16] One possible, but not very tempting, "escape route" is to accept that there are two regimes: one for liner trade (including the situation that chartered tonnage is used) and one for the remainder. The obvious question, difficult to answer, is: how can one decide which of Chapter 13 or Chapter 14 is applicable?

> [bortfrakteren] and a third party holder of the bill of lading. Provisions of the chartering agreement which are not included in the bill of lading cannot be invoked against a third party unless the bill of lading includes a reference to them.
>
> The provisions relating to bills of lading in Sections 295 to 307 also apply to a bill of lading as mentioned in paragraph one. When it follows from Section 253 that the provisions of Chapter 13 apply to the bill of lading, the liabilities and rights of the carrier [bortfrakteren] in relation to third parties are governed by the provisions of Sections 274 to 290, cf. Section 254."

Here the "carrier" is defined in Section 321 as "the person who, through a contract, charters out a ship to another (the charterer)", and that may be on voyage or time charter terms.

The background here is that when the charterer delivers goods to the vessel – he is the shipper – he is entitled to demand a bill of lading (Section 338).[17] It is trite law, however, that a bill of lading issued to the charterer does not change the terms of the charter party.[18] One qualification is necessary: the bill of lading does have one important function in this context: it is an acknowledgement of having received goods in the quantity and condition described in the bill of lading, at the time stated in the document. The evidentiary effect of this information is regulated by MC Section 299: there is a presumption that the information is correct (paragraph one). The non-rebuttable provision in the third paragraph, in favour of a bill of lading holder who has acquired the document "in good faith", cannot be pleaded by the charterer, unless he is not the actual shipper.[19]

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[17] Here we are clearly outside our practical limitation to liner carriage: it is very unlikely that the line delivers goods to the chartered vessel and demands a bill of lading. But it has been considered useful to include an overview of Section 325, since it throws light on the attitude to the basic bill of lading questions.

[18] Exceptions may arise from clear statements, as in the old Baltimore Form C Berth Grain Charter Party stating that the charter "shall be completed and superseded by the signing of bills of lading".

[19] He is e.g. a buyer on fob-terms and has paid the purchase price against receipt of the bill of lading; he may then be protected by the third paragraph.

When the charterer transfers the bill of lading[20], the legal position of the issuing owner may change dramatically, cf. Section 325. The bill of lading now constitutes a contractual relationship between the issuer and the bill of lading holder.[21] The terms of the charter party are immaterial (e.g. a limitation of liability or jurisdiction clause), unless there is "a reference to them".

A simple reference to "all the terms of charter party are incorporated" has been met by courts with scepticism:[22] As the shipper in most instances has no knowledge of the charter, and the reference may have serious consequences, there has been a tendency to disregard terms that deviate from what could have been reasonably expected – and such terms have not been accepted as "incorporated". This is the background for adopting the wording "all terms, including exceptions and jurisdiction clauses" or similar. It is surprising that this issue was not commented upon in connection with the preparatory work for the MC 1994.[23]

The cargo may be delivered to the vessel by a party who is not the charterer (typically: a fob-seller). In such a case, the bill of lading issued by the owner of the vessel to this shipper then constitutes a contract between them (Section 325 paragraph one first sentence), and the contents of the charter party are immaterial unless there is a "reference" to those charter party terms.

We should add some remarks here about Section 325 paragraph two, regarding the effects of the bill of lading issued by the owner of the chartered vessel. The second sentence – dealing with the application of the general rules on cargo damage and delay and to what extent the rules are peremptory – requires no comments. It is partially otherwise with the first sentence. This says that Sections 295 to 307 apply. Of these

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20 E.g., the charterer is a cif-seller who is paid against transfer of the bill of lading.

21 Receiving the bill of lading does not necessarily mean that the holder is bound, but at least on receiving the goods the relationship is changed, see Section 269 paragraph one: "If the goods are delivered against a bill of lading, the receiver becomes liable on receiving the goods for freight and other claims due to the carrier pursuant to the bill of lading."

22 See Falkanger & Bull, *Sjørett* (8 ed. 2016) p. 412.

23 See NOU 1993: 36 p. 61, where one could have expected a discussion.

general bill of lading rules, only those in Section 295 are of interest in our context. First, it should be noted that there is no reference to Section 294 concerning the general obligation to issue bills of lading when demanded by the shipper, which is explained in the preparatory works:

> "There is no reference to Section 294, which gives the shipper the right to demand a received for shipment bill of lading. In voyage chartering the owner is only obliged to issue an on board bill of lading, cf. Section [338]" (NOU 1993: 36 p. 61)."

This is not quite correct, since Section 294 paragraph two deals with the right to demand an on board bill of lading. The essence, however, is that the shipper can demand an on board bill of lading according to Section 338.

The preparatory works do not comment on the reference to Section 295, which says, as stated above, that the "carrier" is bound by the master's signature on the bill of lading. The *carrier*, according to Section 251, is the contracting carrier, while Section 338, as pointed out in 2.5, makes the *owner* of the vessel liable under the master's bill of lading.

3 The sea way bill issued under a charter party

3.1 Introduction

A sea way bill, in contrast to the bill of lading, is a non-negotiable document, which the legislators found it unnecessary to regulate until the MC 1994, and even then, restricting this to only two sections. In Section 308 the sea way bill is said to have two elements: (i) it evidences a contract of carriage and the receipt of cargo for carriage, and (ii) it contains a promise to deliver the goods to the named receiver, albeit with the possibility for the contracting party (the sender) to decide that the goods

shall be delivered to someone else.[24] Section 309 concerns the contents of the document: the identification of the parties, information on the goods received, the conditions of carriage and freight and other charges payable by the receiver. Furthermore, it is stated in Section 309 that both Section 296 paragraph three (regarding the signature requirement) and Section 298 (on the carrier's duty to check the accuracy of the information given regarding the cargo) apply. And, finally, Section 309 deals with the evidentiary effects (as have already been indicated):

> "Unless otherwise shown, the sea way bill shall be evidence of the contract of carriage and that the goods have been received as described in the document."

The relationship to the provisions on the carrier's duty to issue bills of lading is clarified in Section 308 paragraph three:

> "A bill of lading can be demanded according to Section 294 unless the sender has waived his or her right to name a different receiver."

This right to demand a bill of lading also exists after a sea way bill is issued and received by the sender or by a shipper where not the sender. The issuance of the bill of lading does not require redelivery of the sea way bill.[25] In the underlying sales and payment agreements it may be stipulated that the right to change receiver is waived, and this is the reason why there is no right to demand a bill of lading when the possibility to name another receiver under the sea way bill is waived.[26]

The rules are based on delivery of the goods by the sender, see e.g. Section 309 on the contents of the document: the sender and the receiver must be identified, but the shipper is not included or referred to – in

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[24] This right may be waived, see below, and it ends when «the consignee has … asserted his or her right" (Section 308 paragraph two second sentence).

[25] Compare ND 1960 p. 338 Bergen.

[26] The question has been raised as to whether this restriction on the right to demand a bill of lading is in conformity with the Hague-Visby Rules, see Utgaard in MarIus 223 (1996) p. 25–26.

contrast to Section 296 paragraph one no. 4 on bills of lading. So, if a shipper who is not the sender delivers cargo to the line, his right to a sea way bill will depend upon the agreement between the line and the sender.[27] But this agreement cannot deprive the shipper of his right according to Section 294 to demand a bill of lading.

The paramount feature is that the contract evidenced by the sea way bill is a contract of carriage to which the "provisions of this Chapter [13] apply" (Section 252).

3.2 What is the binding effect of the sea way bill?

Usually, the sea way bill is issued by the line, as for bills of lading, and it is "evidence" of the booking note.

In other words: being bound by the sea way bill is, in this context, primarily a question of the evidentiary effect of the cargo description. The substantive rules on cargo liability are not changed, with a small exception for the right to demand a bill of lading, cf. Section 308 paragraph three.

The receiver, named either in the sea way bill or in a subsequent order from the sender, derives his rights from the sender. He may, therefore, argue that he is entitled to rely on the sea way bill, but in a dispute between the carrier and the receiver, both parties may contend that the sea way bill is not decisive.

The above covers the situation where the performing vessel is on charter to the line, and the sea way bill is issued and signed by or on behalf of the line. The only additional remark required is a reminder of the liability of the performing carrier, as laid down in Section 286.

Now we turn to the possibility of a sea way bill being issued by the performing carrier.

According to the MC, the shipper has the right to demand a bill of lading from the carrier, and we have seen that Chapter 13 places the obligation on the line as contracting carrier, while the rule in Chapter 14 is that the duty to issue a bill of lading rests on the performing carrier.

[27] See above in 2.1 on delivery of cargo by a shipper who is not the sender in a bill of lading context.

The MC has no rules on the issuance of sea way bills. However, as stated above, general contract law entitles the shipper to demand a receipt, and it may be argued that in maritime transport such a receipt should comply with the modest requirements of Sections 308 and 309. The decisive factor is, however, that since the shipper is entitled to a bill of lading, he should have the right to demand a document that is less burdensome than a bill of lading, as seen from the carrier's point of view.

We have also seen that a bill of lading issued by the performing carrier constitutes a contract of carriage between him and the shipper. Does the issuance of a sea way bill have a similar effect? The shipper is, e.g., a fob-seller.

The performing carrier has a full Chapter 13 liability (see Section 286), and the question is, therefore, of no practical interest unless the terms of the sea way bill deviate from those of Chapter 13.

If the sea way bill has more carrier-friendly rules, such rules will very often be contrary to the peremptory regime. Consequently, the practical situation to consider is whether a sea way bill with increased obligations binds the owner, or whether he is entitled to state that his liability is limited to what follows from the receipt declaration. It is submitted that the performing carrier is bound by what is stated in a document signed by him: if it is stated, as mentioned in an example above, that the unit limitation is 1 000 SDR, then the 667 SDR rule cannot be relied upon.

For bills of lading we have an explicit regulation in Section 325 paragraph one addressing the consequences of signing a bill of lading, but no similar stipulation regarding sea way bills. The different attitude is, no doubt, partly due to tradition, but can also be explained by the important, special rules connected with the bill of lading as a negotiable instrument. The obligation to issue such a document should have clear basis.

3.3 Additional remarks on the reference to Section 296 paragraph three and Section 298

The statement in Section 309 paragraph one second sentence, that Section 296 paragraph three and Section 298 shall apply, requires some

comments, in view of the fact that the contract evidenced by the sea way bill is a relationship governed by Chapter 13 (Section 252, se above in 3.1).

Section 296 deals with the contents of the bill of lading: in paragraph one there are 13 required items listed, and the inclusion of further requirements follows from paragraph two. These requirements do not apply to the sea way bill; what must be included therein appears from Section 308 paragraph one. Section 296 paragraph three states that the bill of lading must be "signed by the carrier or a person acting on behalf of the carrier", and the reference in Section 308 makes it clear that the sea way bill shall also be signed.

Section 296 paragraph one item 1 states that the bill of lading must contain information on the goods: "the nature of the goods, including their dangerous properties, the necessary identification marks, the number of packages or pieces and the weight or otherwise expressed quantity of the goods". When the shipper has supplied such information, Section 298 imposes a duty on the carrier to "check the accuracy of the information". A similar duty applies in respect of information in the sea way bill, but here it should be noted that Section 309 describes the required information in vague words: "statements on the goods received".

3.4 The receiver and the sea way bill

The position of the receiver has been mentioned above. A summary may be useful.

The receiver may be the sender (typically: the fob-buyer is party to the transport agreement), and will be named as receiver in the sea way bill.

When the receiver is not the sender, his position may depend upon his being originally named in the sea way bill (typically: he is a cif-buyer). His rights are derived from the sender; he cannot have better rights, but the opposite is possible: the sender may decide to transfer less than all of his rights to the receiver. The right to get the possession of the cargo may be subject to payment of freight. But the receiver's obligation to pay may depend on whether he has actually received the goods, see Section 269 paragraph two:

> "If the goods were delivered otherwise than against a bill of lading, the receiver is only liable to pay freight and other claims according to the contract of carriage if the receiver had notice of the claim at the time of delivery or was aware or ought to have been aware that the carrier had not received payment."

The originally named receiver may lose this status as a result of the sender's instruction to deliver the goods "to someone other than the consignee named in the document" (Section 308 paragraph two). What is said above applies equally to the new named receiver. The original one has obtained no rights as against the carrier, and is therefore obliged to accept the change. As regards the relationship between the first named receiver and the sender, the change may very well be a breach of their agreement – typically a sales agreement.

Some reflections concerning the scope of the Maritime Code section 172a

By Trond Solvang,
Professor Scandinavian Institute of Maritime Law,
University of Oslo

Contents

1 Introduction

Section 172a of the Maritime Code regulates claims arising from clean-up efforts relating to maritime accidents, where such claims are subject to the limitation amounts set out in section 175a. These sections – 172a and 175a – constitute domestic rules derived from the 1976 LLMC Convention, in the sense that Norway exercised its right under the Convention to "lift out" this topic of clean-up efforts and legislate it separately. The remaining claims of the Convention not "lifted out" in this way are found in section 172, together with their limitation amounts stated in section 175, which are lower than those of section 175a.

One aspect of the scope of section 172a was recently decided by the Norwegian Supreme Court in the Server-case (HR-2017-331-A). That case concerned, among other questions, the relationship between a shipowner's limitation rights under sections 172a/175a, and the shipowner's duty to perform wreck removal pursuant to an order to that effect given by the relevant authorities. The argument by the shipowner was that it was not obliged to follow such an order if/when the costs of wreck removal exceeded the limitation amount under section 175a. The Supreme Court disagreed, holding that a shipowner's duty to perform wreck removal and its right of limitation in respect of wreck removal costs were two separate issues; the limitation right did not "cap" the shipowner's duty perform wreck removal. As part of its reasoning the Supreme Court looked into the legislative history of section 172a and the scope of claims intended to be covered by it.

There are, however, other aspects of the scope of section 172a which are also occasionally brought up for discussion. One such aspect concerns the relationship between the category of clean-up costs covered by section 172a and the clean-up related claims forming part of consequential loss to property damage, arguably falling outside the scope of section 172a and within the scope of section 172. This type of question will be discussed in this article, based on the following scenario:

Ship B, owned by shipowner B, collides with ship A, owned by shipowner A. Ship B is solely to blame for the collision. Ship A sinks and shipowner A is ordered by the relevant authorities to remove the wreck. Shipowner A incurs the resultant removal costs and claims indemnity[1] against shipowner B. The question concerns shipowner B's limitation right for such a claim by shipowner A. Is such a claim subject to the limitation amount in section 175, ref. section 172, or is it subject to the increased limitation amount in section 175a, ref. section172a?

One may perhaps say that the answer to this question simply depends on a proper construction of section 172a, including its intended scope. But as will be seen in the following, the legislative history behind this provision and its relationship to those parts of the Convention from where section 172a was extracted, is fairly complex.

2 The concept of "consequential losses" within the scope of sections 172 and 172a of the Code

The claim in question – shipowner A's claim for recovery of wreck removal costs against shipowner B – would probably be labelled a claim for consequential loss under the ordinary terminology of the law of damages. The primary loss would be that related to the property damage caused to ship A, while the subsequent event of shipowner A having to incur wreck removal costs would constitute a consequential loss.[2]

[1] The term «indemnity» has a legal technical meaning under English law which is not entirely equivalent to the linguistic pendant «skadesløsholdelse» in Norwegian law. In the context of our case I would in Norwegian use the term "erstatning" (damages) rather than "skadesløsholdelse". In the following I will mostly use the more neutral term: claim for recovery.

[2] I use the term «consequential loss» as translation of the term "konsekvenstap" which in the context of Norwegian law on tort and damages is used interchangeably with "følgestap" (secondary loss) and "avledet tap" (derivative loss), see e.g. Lødrup. Erstatningsrett, Oslo, 2009, pages 457–59. Such consequential loss is recoverable subject to ordinary principles of foreseeability and remoteness ("påregnelighet og adakvans").

These brief remarks are of some significance, since when the 1976 Convention was ratified by Norway, Norway made no reservation as to the items of loss relating to wreck removal in Article 2, 1 (d)[3] and removal of cargo in Article 2, 1 (e)[4] of the Convention – such right of reservation being provided for in article 18, 1. Hence when implemented into the Maritime Code,[5] Article 2 was in its entirety transformed into the then section 235.

Moreover, when commenting on the various provisions of Article 2 in light of the corresponding section 235, the then Maritime Law Commission, headed by professor Brækhus, remarked on the relationship between, on the one hand, claims under Article 2, 1 (a) dealing with property damage and personal injury[6] and, on the other hand, claims under Article 2, 1 (d) and (e) relating to wreck removal.[7] The Commission took the view that costs or liability involved in wreck removal would ordinarily fall within Article 2, 1 (a) as consequential loss to property damage,[8] and that Article 2, 1 (d) and (e) had a correspondingly limited scope, being applicable merely to instances where wreck removal was not a consequence of property damage; in other words, that such costs formed part of a claim for mere financial loss.

In our case it seems obvious that a consequential loss in terms of the incurrence of wreck removal costs would as such be considered recoverable, i.e. not too remote. For the purpose of this paper there is however no need to go further into this.

3 The provision reads: "claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship".

4 The provision reads: «claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship».

5 By Act 27 May 1983 no. 30.

6 The provision reads: "claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operation, and consequential loss resulting therefrom".

7 In the following I use the term "wreck removal" as a collective term for that covered by Article 2, 1 (d) and (e).

8 See also Article 2, 1 (a) in line with the explicit reference to "… consequential loss resulting therefrom".

These remarks had however little practical significance at that time, since the Convention was adopted in its entirety. In other words, whether costs for wreck removal were placed within one or other of the sub-provisions of Article 2 (and the corresponding section 235) had no impact on what limitation amount was to be applied. The views expressed by the then Commission are nevertheless of interest, since they formed part of the later discussion when Norway – pursuant to the 1996 Protocol to the Convention – did make a reservation to Article 2, 1 (d) and (e), which led to the current section 172a.

The Commission expressed the following view (NOU 1980:55 page 17) with which the Ministry concurred (Ot prp nr 32 (1982–83) page 25):[9]

> "The raising etc. [of a wreck] concerns "a ship"[10] which is sunk, stranded etc. It is probably first and foremost aimed at the ship for which the shipowner seeks to limit his liability; this ship is for example sunk in the entrance to a port as a consequence of grounding and it is ordered to be removed by the authorities on the basis of the Harbour Act 1933 section 55[11] or corresponding provision under foreign law. The indeterminate form, "a ship", as compared to the determinate form "the ship" in litra e) of the Convention, indicates however that liability for removal of other ships may also be subject to limitation where such liability has the required nexus to the ship for which limitation is claimed. In many instances liability for removal etc. of other ships may be a liability for consequential losses[12] of a physical damage to this other ship, for example in connection with a collision. If so, the liability seems limitation-wise to fall under section 235 first paragraph no. 1 in

[9] This and the following quotes in my translation – the emphasis in this and later quotes are mine.

[10] The quotation refers to the wording in Article 2, 1 (d).

[11] Now the Harbour Act 19/2009 section 35.

[12] Norwegian: «avledede følger».

> its entirety.[13] Liability for wreck removal of another ship ought to be allocated to [section 235 first paragraph] no. 4[14] only in cases where it cannot be claimed as a loss consequential to property damage.[15] It may for example be the case that port authorities in a country have a legal basis for claiming joint and several liability for wreck removal costs against the shipowners of two colliding ships, even if the collision is not caused by negligence by either of the ships. If the shipowner of ship A in such situation is made liable for removal of the wreck of the meeting ship B, he must be entitled to limitation of liability under section 235 first paragraph no. 4."[16]

Hence, in a situation of ship collision it is taken as a starting point that if liability towards the other ship includes wreck removal of the other ship, this would be considered a loss consequential to property damage, and in that sense placed on the same footing as other consequential losses following a collision, for example a claim for loss of time/earnings suffered by the shipowner whose ship is damaged (NOU 1980:55 page 16).

Moreover, it is worth noting that the Commission found it unnecessary to insert into the Code Article 2, 2. of the Convention, which states: "Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse, or for indemnity under a contract or otherwise". The Commission held that the content of this passage followed already from the introductory wording to each sub-paragraph in Article 1 ("… claims in respect of …"), which was considered wide enough to cover whatever basis of such a claim (NOU 1980:55 page 16). Therefore, irrespective of the terminology of shipowner A's claim against shipowner B in our above example,[17] a claim for costs incurred in wreck

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13 Corresponding to Article 2, 1 (a).

14 Corresponding to Article 2, 1 (d).

15 Norwegian: «avledet tingsskadekrav».

16 Corresponding to Article 2, 1 d).

17 See footnote 1.

removal would have fallen within the ambit of Article 2, 1 (d) (or the corresponding section 235 no. 4) if it had not been for the significance given to the category of consequential losses to property damage.

In summary: at this initial stage of legislation, a claim for recovery of costs of wreck removal by shipowner A against shipowner B in our example, would be categorized as a consequential loss to property damage and with limitation being governed by the then section 235 first paragraph no. 1, corresponding to the now section 172 first paragraph no. 1.

However, although perhaps correct from a legal-systematic approach, such a restrictive scope of Article 2, 1 (d) and (e) might seem questionable in view of the right of reservation of contracting States to enact specific national rules covering wreck removal. In other words, it would make limited sense if contracting States were at liberty to regulate limitation of wreck removal costs at variance with the Convention, while at the same time such claims were to be construed as falling within those parts of the Convention from which contracting States were not at liberty to depart.

Not surprisingly this point was raised once again when Norway did later make reservation[18] to Article 2, 1 (d) and (e)[19], and with the then Maritime Law Commission, now headed by professor Selvig, creating draft legislation following Norway's reservation (NOU 2002:15). The Commission was asked to consider various alternatives to national rules in the form of either: unlimited liability, a higher limitation amount than under the Convention, or priority being given to wreck removal claims within the limitation of the Convention (NOU 2002:15 page 7–8). As will be known, the Commission proposed the alternative of an increased limitation amount, leading to the current sections 172a, 175a, 178a and 179.[20]

With respect to our discussion of how to categorize A's claim for wreck removal costs against B, it is first of all worth noting some remarks by

[18] By Royal Decree 27 May 2002.

[19] By way of Article 18 to the Convention as amended by the 1996 Protocol whereby a right of reservation existed not only at the time of signature, ratification, approval or accession but also "any time thereafter".

[20] Implemented by Act no. 88/2005.

the Commission on the meaning of the concept of consequential loss to property damage, and how a given construction of it would dramatically limit the scope of contracting States to enact specific rules relating to wreck removal, (NOU 2002:15 page 15):

> "In case of maritime accidents which lead to damage to harbour facilities, basins, waterways and navigational aids,[21] the costs of removal of ship and cargo etc., may however be conceived of as part of the liability for the property damage. If ordinary rules of assessment of damages are applied, such costs will form part of a claimant's overall claim for damages. In NOU 1980:55 page 17 the view is therefore taken that the claim for damages will fall in its entirety within the Maritime Code section 172 no. 1. If this construction is correct, section 172 first paragraph nos. 4 and 5 will only apply to situations where the claimant has suffered no property damage, and therefore claims damages exclusively for costs and other loss as a result of removal or failure to remove ship and cargo etc.
>
> Under the governing law it is without significance whether a claim is allocated to one or other of the sub-provisions in section 172. If a claim as mentioned in section 172 first paragraph no. 4 and 5[22] is taken out of the list, the question concerning the scope of section 172 first paragraph no. 1 concerning claims pertaining to property damage, is, however, no longer of mere theoretical interest. If the view is adopted as laid down in NOU 1980:55 page 17, the scope of the reservation to the Convention becomes correspondingly restricted. The delimitation between these provisions ought therefore to be assessed anew. In

[21] See the corresponding list of enumerated damages in Article 2, 1. (a).

[22] Corresponding to Article 2, 1. (d) and (e), and the earlier section 235 first paragraph nos. 4 and 5, see above.

> the view of the Commission the better reasons point in the direction of instead drawing the line based on a distinction between, on the one hand, the specific property damage[23] and its economic consequences and, on the other hand, the costs relating to removal and cleaning-up as required by the maritime accident."

The essence of this is therefore that property damage is separated from whatever consequential loss in terms of subsequent wreck removal, and that these latter costs fall within the scope of section 172a.

The Ministry concurred with the views of the Commission, stating (Ot prp nr 79 (2004–2005) page 42): "The Ministry agrees with the Maritime Law Commission on this point. The Ministry assumes[24] that section 172a covers all measures taken to remove, destroy or render harmless the ship or anything which has been onboard the ship".

The Ministry however then continues with a passage which is partly obscure:

> "This also concerns measures directly relating to an incident of property damage, for example removal of bunker oil spill from a quay.[25] Section 172a applies generally, without regard to what type of damage is avoided or rectified by the said measures, whether this concerns for example mere environmental damage or property damage. By removing bunker oil from a quay the owner of the quay may, for example, claim loss of income from being deprived of the use of the quay by reason of the oil spill, based on section 172. If the loss of income is, on the other hand, a result of damage to the quay caused by measures falling

[23] In Norwegian: «selve tingsskaden».

[24] In Norwegian: "legger til grunn".

[25] The use of an example of bunker oil, as opposed to oil carried as cargo, stems from the latter being governed by the specific rules relating to oil pollution, see the Maritime Code chapter 10.

> within section 172a, the loss is covered by section 172a. This follows from the fact that such consequential damage from these measures will be "claims in respect of such measures."

It is hard to grasp the delimitation being attempted to be made here. It seems, firstly, that a different concept of property damage is used than in the earlier discussion by the Commission. Secondly, the discussion mainly concerns consequential losses in terms of loss of use, which in any event is of limited relevance to our case, in the sense that whatever loss of time/earnings relating to ship A, would in our scenario clearly be a loss consequential to the property damage, falling within section 172 (Article 2, 1 (a)). We therefore go no further into the meaning of this passage.

Returning to our case, it seems clear that what must be considered decisive is that the claim by shipowner A is of the nature of wreck removal costs. There is no indication in the preparatory work that an exemption should be made dependent on whether a claim relating to wreck removal pertains to the liable shipowner B's ship, or to a colliding ship for which shipowner B is liable. In other words, the whole "package" of the earlier section 172 (Article 2, 1 (d) and (e)) is lifted out and made subject to national rules by way of section 172a.

This view also seems to be supported by the fact that when adopting the new sections 172a/175a, the legislator chose to distinguish between vessels of tonnage beyond and below 300 tons. Claims for costs of wreck removal relating to ships below 300 tons fall under the lower limitation contained in section 172.[26] There is clearly no room for applying different concepts of what constitutes claims relating to wreck removal, depending on whether one is faced with wreck removal situations involving ships below or beyond 300 tons.

[26] See section 172 i.f. The reason for this solution was that such smaller ships were deemed to have limited financial resources and access to appropriate P&I insurance, while at the same time not posing the threat of excessive clean-up costs, NOU 2002:15 page 37–39.

This result of having all claims "in respect of" wreck removal allocated to section 172a,[27] also seems to make good sense from a perspective of policy consideration (reelle hensyn). To stick to the scenario of our case, albeit with the facts slightly twisted: If shipowner A were not to incur the costs of wreck removal of ship A, but, for some reason, the authorities were instead to incur those costs on shipowner A's behalf, section 172a would clearly apply in relation to such removal costs being claimed by the authorities against shipowner A.[28] If shipowner A, as in our case, were then entitled to claim recovery against shipowner B, it would make little sense if this claim by shipowner A against shipowner B is made subject to the lower limitation amount under sections 172/175. Shipowner A would then be caught in the middle, having to bear the excess of the lower limitation amount, despite the claim clearly arising from a situation of wreck removal.

Moreover, the fact that in our case the above view may result in a split up of shipowner A's respective items of claim against shipowner B, is clearly nothing extraordinary. Such a split up may occur also in other instances, for example as stated in NOU 2002:15 page 15: a claim for property loss caused by damage to port facilities would be covered by section 172, whereas clean-up or wreck removal costs relating to the same incident and claimed by the same party, would be covered by section 172a. Similarly in our case: shipowner A's claim for damages relating to physical damage to, or the loss of, ship A would be covered by section 172 while the claim by shipowner A for recovery of wreck removal costs would be covered by section 172a.

[27] Or section 172 if the ship is below 300 tons.

[28] See NOU 2002:15 pages 17–23 discussing i.a. situations of the «responsible party» (den ansvarlige) being subject to orders and/or claims for recovery by the authorities under the Harbour Act and the Pollution Act.

3 Some reflections on the significance of section 179 of the Code

Given the above conclusion, there is limited value in speculating what the position would have been if we had held that shipowner A's claim for recovery of costs for wreck removal was not subject to shipowner B's right of limitation under section 172a. If we were nevertheless to lend some thoughts to such a scenario, the following might be mentioned.

If not covered by section 172a, then shipowner A's claim for recovery of costs for wreck removal would be covered by section 172. That would, in turn, mean that we are within the rules of the Convention – in other words, we are outside the scope of those rules of the Convention which allow for contracting States to promulgate their own rules in respect of clean-up costs relating to maritime accidents.

Going back to our example, we now assume that shipowner B rather than shipowner A was ordered by the authorities to remove the wreck of ship A, as could conceivably happen, by reason of shipowner B being liable for the collision resulting in the sinking of ship A.[29] If we further assume that shipowner B would not be entitled to bring its own costs of wreck removal as part of the overall claims subject to limitation – contrary to what follows from section 179, see below – it might be viewed as unreasonable that shipowner B should "benefit" from the wreck removal order instead being directed towards shipowner A, and with shipowner B being entitled to limit shipowner A's claim for recovery against shipowner B.

This example would not "fit" under the Maritime Code, by reason of the fact that section 179 expressly allows a liable shipowner to bring his own wreck removal costs as part of the claims which are subject to limitation. But, again, section 179 refers to claims falling within the scope of section 172a, so that section 179 would not apply if the recovery claim in our example were to fall within 172 rather than within 172a.

[29] For the purpose of the example we disregard the fact that in practice the owner of the wreck would be the party subject to an order for removal of the wreck, as under the Pollution Act section 37 second paragraph.

Moreover, it should be noted that this section 179 is questionable in terms of Norway's right of reservation under the Convention. Article 18 of the 1976 Convention (on the relevant point not being amended by the 1996 Protocol) states:

> "1. Any State may, at the time of signature, ratification … or at any time thereafter, reserve the right:
> a) To exclude the application of Article 2, paragraphs 1 (d) and (e);
> b) […]
>
> No other reservations shall be admissible to the substantive provisions of this Convention."

Article 2, 1 (f) is therefore not made part of such a right of reservation, and this sub-section (f) provides for a right of limitation relating to "claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability.. ."

The reason why the person liable was disallowed from bringing his own costs as part of the overall claims subject to limitation was that, during the Diplomatic Conference of the 1976 Convention, it was considered immoral that such liable party should benefit from his own mischief in this way (NOU 1980:55 page 15–16). This topic created, however, quite an amount of discussion in connection with the legislation of the Norwegian national rules (sections 172a etc.), which ended up with a provision contrary to Article 2, 1 (f) by way of section 179. The way this apparent conflict with the Convention is justified by the legislator seems to be along the lines that the binding effect of Article 2 is restricted to those sub-provisions which regulate the nature of claims which are subject to limitation, and that sub-paragraph (f) may be seen as a provision different in kind. Still, it is surprising that the relationship between the enacted section 179 and the clear wording of Article 18 of the Convention

was not brought up for discussion, neither by the Commission nor by the Ministry.[30]

We shall not go further into that topic as it is a remote aspect of the question put at the opening of this article – but it may nevertheless be worth mentioning that if a case were to be brought under Norwegian law, involving the interest of a contracting State (e.g. through the vessel's flag), there may be a question as to whether section 179 should be set aside as being contrary to Norway's obligations under the Convention.[31] On the other hand, if only domestic interests were to be involved, this type of question would clearly not arise.

[30] See NOU 1980: 55 page 40 and 46, and Ot prp nr 79 (2004–2005) pages 26 et seq.

[31] Which would mean contracting States to the 1996 Protocol.

Enforcement of the Sulphur in Fuel Requirements: The Same, only Different

By Henrik Mikael Ringbom1
Professor II, Scandinavian Institute of Maritime Law, Faculty of Law, University of Oslo, Norway; Adjunct Professor (Docent) Department of Law, Åbo Akademi University, Turku/Åbo, Finland.

[1] The article is a shortened and slightly modified version of a study made by the author in the context of the CompMon project: 'The Legal Framework for Monitoring and Enforcing Compliance with the Sulphur in Marine Fuel Requirements of Marpol Annex VI, Draft Report Prepared by Åbo Akademi University, Co-financed by the Finnish Ministry of Transport and Communications and the European Union's Connecting Europe Facility (2014-EU-TM-0546-S), available at http://compmon.eu/reports.

Contents

1 Introduction

A new set of rules govern ships' air emissions and fuel quality requirements in Sulphur Emission Control Areas (SECAs) since 1 January 2015. In the Baltic Sea, English Channel and large parts of the North Sea,[2] it is thereby no longer permitted to use fuel containing more than 0.1 per cent sulphur, unless equivalent methods are in place. In view of their economic implications for ship operators, these requirements were unusually controversial before and after their adoption in 2008. Since their entry into force, focus has shifted to implementation and enforcement. It is widely accepted, by governments[3] and industry representatives[4] alike, that a strict policy for enforcement is necessary to ensure that non-compliance is not encouraged and that operators that comply with the new rules are not placed in an economically disadvantageous position.

Yet, to date very few sanctions have been imposed on ships for failure to comply with the new rules. This is not because compliance has been impeccable, even if it is true that poor implementation of the fuel quality requirements in SECAs does not appear to have been a major concern in the first two years of their operation.[5] More likely explanations for the relative lack of enforcement are that non-compliances are not detected at all, in particular at sea, and that the legal framework governing

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2 The precise limits of the two Northern European SECAs are made through references to the special areas under Annexes I and V respectively. See MARPOL Annex VI, regulation 14(3).

3 At regional level, the European Commission has established a *European Sustainable Shipping Forum (ESSF)* to enable dialogue between Member States and brings together governments and maritime industry to discuss practical issues that could be encountered during the implementation of the Sulphur Directive. More information about ESSF can be found at: http://ec.europa.eu/transparency/regexpert/index.cfm.

4 See e.g. www.tridentalliance.org

5 See e.g. the various reports of at-sea monitoring as presented at http://compmon.eu/reports. According to the Danish Maritime Authority's action plan on efficient enforcement of regulations on ships' sulphur emissions from 2016, preliminary inspection data indicated a compliance rate of 94% in the SECA, while remote sensing measurements in Danish waters indicated a compliance rate of 2%.

enforcement is not effective for dealing with this type of pollution, even if detected and confirmed.

This article addresses the latter aspect, i.e. the international legal framework for enforcing the rules, and places a special emphasis on sanctions for non-compliance, which is considered to represent a particularly weak link in the existing enforcement scheme (section 6) and on the availability of other supplementary enforcement measures (section 7). The preceding sections address the regulatory framework for such measures, notably in terms of material standards (section 3) and jurisdictional limitations (section 4).

Questions relating to implementation and enforcement of the sulphur in fuel requirements have recently gained further relevance through the decision by the International Maritime Organization (IMO) in October 2016 to strengthen the sulphur in fuel requirement on a worldwide basis as from 1 January 2020. The issues discussed in the article will therefore be of global relevance when the new requirements come into effect.

2 Some key differences to other forms of ship-source pollution

The enforcement of ship-source pollution more generally is governed by a well-established legal framework at international level, set up by jurisdictional rules of UNCLOS and technical rules established by the IMO, notably the International Convention on the Prevention of Pollution from Ships (MARPOL). However, in comparison to other forms of ship-source pollution, such as oil discharges, the enforcement of air emission standards presents some particularities and specific challenges, which justify a separate legal assessment of this specific matter.

As opposed to oil spills, air emissions do not happen as a result of isolated events or incidents of a one-off nature, but are of a continuous operational nature. Compliance with the rules entails significant costs

for ship operators.[6] Conversely, there are important gains to be made by rule avoidance and it is technically relatively easy to switch between compliant and non-compliant fuel. This starting point would call for a robust monitoring and enforcement system, including at sea, and sizeable penalties for identified instances of non-compliance. Yet air emissions involve specific challenges in both areas

Unlawful emissions are not as easily detected as oil spills. Even an initial indication of non-compliance requires sophisticated equipment and the eventual verification of a violation is a technically complex operation, requiring specialist expertise and equipment and a considerable amount of time. The continuous character of the violation also means that proof that the rules have been violated at a given moment does not necessarily say much about the extent or duration of the violation.

Even if proof of the (objective) violation is available, the infringement also needs to pass the requirements on (subjective) culpability of the persons concerned. Many persons are involved in the decisions relating to fuel usage and the ones who carry out the operations in practice are not necessarily the ones that benefit from them. The range of liable persons and the level of culpability required for an infringement are regulated at national level, but in most cases some degree of negligence is required. Proving negligence is also complex when it comes to fuel quality requirements. High sulphur contents in the fuel may be due to many different reasons. Documentary evidence is normally not available to demonstrate culpability while proof that compliant fuel has been purchased is normally easy to present.[7]

Moreover, the principles for characterizing the violation and addressing the size of penalties for environmental infractions are commonly based on the environmental harm or the level of danger for humans or the

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[6] By operating on non-compliant heavy fuel oil, a medium-sized container ship can save up to 150.000 USD on a return trip through the Northern European SECA. See e.g. 'Sulphur in Marine Fuels', Policy Paper, Danish Shipowners' Association, August 2016.

[7] See study prepared by the Swedish Transport Agency, Transportstyrelsen, Rapport: Tillsyn och efterlevnad av de skärpta reglerna för svavelhalt i marint bränsle', Slutrapport, Dnr TSS 2013–2085, juni 2014, at p. 50.

environment of the infringement, which is not suitable for air emission violations. The environmental and health risks and threats in this case lie in the collective effects of non-compliance, rather than in an individual infringement. The absence of significant environmental damage in the individual case also means that other liability mechanisms, such as civil liability, is not available for use as a complementary deterrent.

Such particularities place special demands on monitoring and enforcement, both at sea and in ports. Yet the differences between air emissions and other forms of ship-source pollution have not been given much attention in the relevant international rules. The jurisdictional framework for ship-source pollution as laid down in the United Nations Convention on the Law of the Sea (UNCLOS) was drafted at a time when ship-source air pollution was not a matter of significant concern. The convention focuses on *marine* pollution and neither the rules on 'discharges' nor the specific rules on 'pollution from or through the atmosphere' seem entirely suitable to govern jurisdictional matters relating to ships' air emissions. The technical rules, as laid down in the main body and in Annex VI of MARPOL, do not significantly distinguish the enforcement of air emissions violations from other types of violations regulated in the other annexes. The EU rules on the topic similarly include limited regulation on how non-compliances shall be enforced.

3 The technical rules

3.1 MARPOL Annex VI

The first global measures to limit the sulphur content in ships' fuels were introduced in 1997 through regulation 14 in MARPOL Annex VI. Those rules, which entered into force in 2005, established a maximum sulphur content limit at global level of 4.5%, with more stringent requirement for special areas (including the Baltic Sea), for which a maximum ceiling of 1.5% was established.

In 2008 a significant strengthening of the Annex VI was made, which is illustrated in 1 below. The revised Annex, which entered into force in 2010, introduced a progressive reduction of emissions of SO_x at global level and a further tightening of the standards within 'sulphur emission control areas' (SECAs), of which there are four: Baltic Sea, the North Sea, the North American and the United States Caribbean Sea SECAs. The worldwide sulphur cap was initially reduced to 3.5%, effective from 1 January 2012, then to 0.5%, effective from 1 January 2020.[8] The sulphur limits applicable in SECAs were reduced to 1.0%, beginning on 1 July 2010 and further to 0.1%, effective from 1 January 2015.

MARPOL Annex VI is widely ratified, including by all littoral states around the Northern European SECA. In January 2017, MARPOL Annex VI had 88 contracting parties, representing 96% of the World's total shipping tonnage.[9] Amendments to it, and to most other conventions adopted by the International Maritime Organization (IMO), are adopted through the 'tacit acceptance' procedure, which make them applicable to all parties without a need for formal acceptance of the amendment.[10]

In practice, the 0.1% limit amounts to a requirement to use either distillate fuel oils (Marine Diesel Oil or Marine Gas Oil) or other than petroleum-based fuels, such as LNG, in SECAs. Given that such fuels are significantly more expensive than heavy fuel oil (HFO, which may be low sulphur (0.5%–1.5%) or high sulphur (>1.5%) HFO), the new requirements will raise fuel costs for shipping within SECAs as from 1 January 2015.[11] The difference between compliant and non-compliant

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8 Under MARPOL Annex VI regulation 14(8) and (10), the time for introducing the global sulphur cap of 0.5% could be extended to 2025, subject to a feasibility review to be completed no later than 2018. However, IMO's Marine Environment Protection Committee decided in October 2016 that the global cap will enter into force already on 1 January 2020. The EU Sulphur Directive never included a corresponding possibility to postpone implementation beyond 2020.

9 See www.imo.org

10 MARPOL article 16(2)(f) and (g).

11 IMO figures indicate that the yearly average sulphur content of the residual fuels tested on board ships in 2015 was 2.45%. The worldwide average sulphur content for distillate fuel in 2015 was 0.11%. See www.imo.org/en/MediaCentre/HotTopics/GHG/Documents/sulphur%20limits%20FAQ_20-09-2016.pdf. A number of studies

fuel varies depending on what fuel qualities are compared and varies from day to day depending on market prices, but the difference is commonly estimated to be in the order of +50–75%. Based on prices in late December 2016 the difference between high sulphur HFO (IFO 380) (around 310 USD per ton) and <0.1% Marine Gas Oil (around 470 USD per ton) was around 50%.

Under regulation 4 of MARPOL Annex VI, flag state administrations may approve alternative compliance methods, if such systems "are at least as effective in terms of emissions reductions as that required by this Annex, including any of the standards set forth in regulations 13 and 14". In accepting such equivalents, administrations should take into account any relevant IMO guidelines. Specific guidelines have been adopted for the approval exhaust gas cleaning systems.[12]

3.2 EU law requirements

The air emission and fuel quality standards of MARPOL Annex VI have subsequently been implemented at EU level, in Directive 1999/32 on relating to a reduction in the sulphur content of certain liquid fuels, as amended by Directives 2005/33 and 2012/33. The requirements have recently been codified through Directive 2016/802[13] (hereafter referred to as 'the Sulphur Directive' or 'the Directive'), which did not change the substance of the instrument, but altered its numbering. The Directive reiterates the MARPOL requirements on maximum sulphur content ships' fuels, within and outside SECAs, and includes certain additional

have been performed to assess the economic impact of the SECA requirements. For an overview, see e.g. Finnish Government Bill HE 84/2014, pp. 13–14.

12 IMO Resolution MEPC.259(68) Guidelines for Exhaust Gas Cleaning Systems. The discharge of washwaters from such cleaning systems is prohibited in certain areas within the SECA, but the matter is not harmonized and may often be regulated individually by each port. For an overview in the Baltic Sea, see Annex 6 of HELCOM Doc. MARITIME 15-2015, 4-2.

13 Directive 2016/802 relating to a reduction in the sulphur content of certain liquid fuels, OJ 2016 L132, p. 58.

requirements that are not relevant for present purposes.[14] It also requires, since 2005, all ships at berth in an EU port to use fuel with a maximum sulphur content of 0.1%.[15]

The use of approved exhaust gas cleaning technologies, notably 'scrubbers', together with high-sulphur fuel, shall still be permitted under article 8 of the Directive, provided that the continuous reduction of sulphur content is at least equivalent to the fuel quality requirements of MARPOL Annex VI.[16] There are various types of scrubbers, but all of them represent a significant investment cost for ship operators who choose that compliance option. Their installations is not possible in all ships, however.[17]

3.3 Implementing and enforcing the rules

MARPOL Annex VI applies irrespective of the maritime zone concerned. The fuel quality requirements in SECAs accordingly apply in the entire SECA, irrespective of whether the violation takes place on the high seas, or in the coastal waters (exclusive economic zone (EEZ), territorial sea or internal waters) of a state. Under the convention's article 4(1), the flag

[14] A purely regional requirement in the Directive is the requirements on passenger vessels in article 6(5), which requires "passenger ships operating on regular services to or from any Union port" to use fuel with a sulphur content of 1.5% or less until 1 January 2020. In view of the more stringent requirements that apply for all ships in SECAs, this requirement finds no application in those areas.

[15] Article 7 of the Directive, which makes exception for ships which use shore-side electricity in ports only and for ships which, according to a published timetable, are due to at berth for less than two hours.

[16] The requirements in MARPOL Annex VI, regulation 14 do not mention this alternative method of compliance, but more generally flag state administrations are authorised to approve alternative methods for complying with the Annex (regulation 4). The use of scrubbers has been foreseen in various guidelines adopted by the IMO, including notably the guidelines referred to in note 10 above.

[17] See e.g. American Bureau of Shipping, 'Exhaust Gas Scrubber Systems, Status and Guidance, 2013, available at http://ww2.eagle.org/content/dam/eagle/publications/2013/Scrubber_Advisory.pdf

state administration shall accordingly prohibit violations and establish sanctions "wherever the violation occurs".[18]

The enforcement provisions of Annex VI, however, do not provide for any at-sea enforcement of the air pollution standards. Regulation 11 merely speaks about port state inspections and, even then, mainly refers to flag state enforcement measures on that basis.[19] However, a right for the port state to detain the ship until compliant fuel has been purchased is implicit in regulation 18(10)(2).[20] In any case, regulation 11(6),[21] like MARPOL article 9(2),[22] clarify that when it comes to jurisdictional matters, the convention is not intended to affect the application of general international law or law of the sea.[23] Those references to the law of the sea ensure that a broader jurisdiction is available to port states in particular than what a mere reading of the MARPOL provisions would suggest.

The Directive determines its prescriptive reach by reference to the maritime zones of the member states. The wording of article 6(2) requires EU member states to "take all necessary measures to ensure that [non-compliant] marine fuels are not used in the areas of their territorial seas, exclusive economic zones and pollution control zones falling within SO_x Emission Control Areas".[24] When it comes to enforcement, the Directive

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18 The relevant passage of MARPOL article 4(1) reads in full: "Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefor under the law of the Administration of the ship concerned wherever the violation occurs."

19 Regulation 11(2) provides that [i]f an inspection indicates a violation of this Annex, a report shall be forwarded to the Administration for any appropriate action."

20 The subparagraph provides that "[i]n connection with port State inspections carried out by Parties, the Parties further undertake to... ensure that remedial action as appropriate is taken to bring noncompliant fuel oil discovered into compliance."

21 Quoted in section 4.2 below.

22 This paragraph, which was drafted in 1973 and thus preceded UNCLOS provides: "Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to resolution 2750 C(XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction."

23 See also text at notes 121–124 below.

24 Both paragraphs specifically emphasize that ships whose journeys began outside the EU are covered within this scope.

emphasizes the obligations of flag and port states, the latter being given a more independent role in the enforcement than under MARPOL. For example, article 13(2)(b) of the Directive foresees that on-board sampling and analysis of fuel are undertaken by port states "as appropriate" and "where technically and economically feasible". These requirements have subsequently been further strengthened and quantified.[25] By contrast, coastal state enforcement is only optional under the second paragraph of the article 6(4), providing that "Member States may also take additional enforcement action in respect of other vessels in accordance with international maritime law."

In practical terms the ship is obliged to demonstrate the sulphur content of the fuel oil carried on board by means of two main documents. First, regulation 18(5) of MARPOL Annex VI requires that "details of fuel oil for combustion purposes delivered to and used on board shall be recorded by means of a bunker delivery note." The minimum requirements on the content of the bunker delivery note ('BDN') are specified in Appendix V to Annex VI and only include the name, quantity, density and sulphur content of the fuel oil delivered.[26] This document is among the documents to be inspected by port state control (PSC) in any state and shall be retained for a period of three years after the fuel oil has been delivered on board. Second, regulation 14(6) ships using separate fuel oils

[25] Commission Implementing Decision 2015/253 laying down the rules concerning the sampling and reporting under Council Directive 1999/32/EC as regards the sulphur content of marine fuel. Under article 3(2) of the decision the sulphur content of the marine fuel being used on board shall be checked by sampling or analysis or both on at least 40 per cent of the inspected ships referred fully bordering SECAs and 30% of the inspected ships in member states partly bordering SECAs. In article 5 it is explained that sampling and analysis include either analysis of the MARPOL samples or on-board spot sampling or both.

[26] Article 18(6) further specifies that "the bunker delivery note shall be kept on board the ship in such a place as to be readily available for inspection at all reasonable times. It shall be retained for a period of three years after the fuel oil has been delivered on board." See also para. 18(9)(3) requiring parties to "require local suppliers to retain a copy of the bunker delivery note for at least three years for inspection and verification by the port State as necessary".

to comply with the SECA requirements, "shall carry a written procedure showing how the fuel oil change-over is to be done."[27]

In addition, regulation 18(8)(1) requires a representative fuel oil sample (the so-called 'MARPOL sample') to be carried on board to determine whether the fuel oil delivered to and used on board ships complies with the Annex VI requirements. The sample shall be carried on board until the fuel oil concerned is consumed, but in any case for at least a year, and can be analysed by the flag state administration in accordance with a verification procedure outlined in Annex VI, appendix VI.

To assist officials inspecting ships for the purpose of verifying compliance with the requirements, the European Maritime Safety Agency (EMSA) has prepared sulphur inspection guidance.[28] More recently, IMO has adopted guidelines for on-board sampling methods to enable effective control and enforcement.[29]

In conclusion, while the material standards are more or less identical at global and EU level, the scope of the enforcement obligations include some differences. EU rules are somewhat broader when it comes to the role of port states, but the geographical reach is limited to member states' coastal waters and coastal state enforcement is purely optional. In practice port states are considerably more involved in the enforcement of the rules than what MARPOL suggests, but the practicalities relating to the enforcement have so far received more attention at EU-level than at IMO. The global 0.5% sulphur cap which will apply as from 1 January 2020 is expected to increase IMO's attention to implementation in the coming years.

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27 The same paragraph clarifies that "the volume of low sulphur fuel oils in each tank as well as the date, time, and position of the ship when any fuel-oil-change-over operation is completed prior to the entry into an Emission Control Area or commenced after exit from such an area, shall be recorded in such log-book as prescribed by the Administration."

28 European Maritime Safety Agency, Sulphur Inspection Guidance, 6th May, Version: 1st June 2015, available e.g. at www.emsa.europa.eu/work/jobs/download/3503/2407/23.html.

29 IMO Circular MEPC.1/Circ.864 entitled "Guidelines for Onboard Sampling for the Verification of the Sulphur Content of the Fuel Oil Used On Board Ships", adopted in October 2016.

4 Jurisdiction of states to regulate and enforce the air emission requirements

4.1 General

The jurisdictional framework for implementing and enforcing the air emission standards is found in the law of the sea. This body of law is currently authoritatively regulated in UNCLOS, which is commonly labelled 'the Constitution for the Oceans'. The convention is widely ratified world-wide, by 168 contracting parties, including all Northern European SECA States and the European Union.[30] Its provisions on vessel-source pollution are widely considered to represent customary international law and hence to be binding even for states that are not parties to it. To the extent questions relating to jurisdictional matters of the oceans are not addressed in the convention, the last paragraph of its preamble affirms that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

4.2 Pollution 'from or through the atmosphere'

An initial question that arises when seeking to analyse the jurisdictional rights and obligations relating to ships' air emissions is that UNCLOS is not drafted with this kind of pollution in mind. The convention's detailed provisions on ship-source pollution address 'pollution from vessels' which is not defined but broad enough to encompass any type of pollution from ships. However, the rules referred to are those aimed at preventing, reducing or controlling 'pollution of the marine environment', which is broadly defined in UNCLOS article 1(4), but still only encompass pollution that ends up in the marine environment. Apart from this, the convention includes two specific articles in Part XII which deal with 'pollution from or through the atmosphere'.

[30] See at www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm

A first issue is therefore to establish whether air emissions from ships is governed by the provisions on vessel-source marine pollution or by the rules on 'pollution from or through the atmosphere' in the convention's articles 212 and 222. In the latter case, the coastal state would have more liberty to exceed international rules, but jurisdiction would be limited to their territorial sea.[31]

For several reasons, however, articles 212 and 222 are unlikely to be relevant for governing the extent of states' jurisdiction with respect to MARPOL's air emissions and fuel quality requirements. The wording of the articles only refer to pollution of the *marine* environment, which is not the primary target of the MARPOL sulphur requirements. Substance-wise, too, the two articles seem incomplete. For example, in contrast to the more specific rules on at-sea enforcement against ships in UNCLOS Part XII, the enforcement regime outlined in article 222 contains no guidance as to how the enforcement jurisdiction is to be exercised, which in itself suggests that it is not apt for deciding the more precise jurisdictional limits of coastal State enforcement. Moreover, the drafting history illustrates that very little reference was made to ship-source air pollution when these articles were being drafted, the focus being mostly on pollution caused by air traffic.[32] Finally, the two articles have not been relevant in in practice when air emission rules have been developed. Both the international negotiations on MARPOL Annex VI as well as the European debate on the Directive have largely ignored the two articles when the jurisdictional limits on the regulation of ship emissions have been discussed.

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31 See e.g. E.J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Kluwer Law International, The Hague/Boston/London, 1998, pp. 501—504. A study prepared for the European Commission in 2000 has also addressed this relationship in some detail (BMT Murray Fenton Edon Liddiard Vince Limited, '*Study on the economic, legal, environmental and practical implications of a European Union System to reduce ship emissions of SO2 and NOx*', No. 3623, Final Report, August 2000, Appendix 4, paras. 76–87).

32 See *United Nations Convention on the Law of the Sea 1982 A Commentary*. Volume IV. Editor-in-chief: Myron H. Nordquist. Martinus Nijhoff Publishers, Dordrecht 1991, pp. 208—213.

In order to clarify the relationship of MARPOL Annex VI to UNCLOS, a specific provision was introduced to the Annex in 1997. Regulation 11(6) specifically ties the Annex to the jurisdictional regime for ship-source pollution rather than to that for atmospheric pollution:

> [t]he international law concerning the prevention, reduction or control of pollution of the marine environment from ships, including that law relating to enforcement and safeguards, in force at the time of application or interpretation of this Annex, applies, mutatis mutandis, to the rules and standards set forth in this Annex.

For these reasons, the remainder of the article will assess the law of the sea aspects of a prospective air emission fee through the 'regular' UNCLOS rules on coastal state jurisdiction over ship-source pollution.[33]

4.3 Flag state jurisdiction

International law does not limit a state's jurisdiction over ships flying its own flag. The flag state obligations provided in UNCLOS articles 94(5) and 211(2), with respect to, *inter alia*, the duty to ensure that its ships comply with "generally accepted" rules and standards on maritime safety and environmental protection, are laid down in the format of minimum requirements. Those international standards may accordingly be exceeded by flag states, e.g. by requiring their ships to use SECA-compliant fuel even beyond SECA areas. Flag states' jurisdiction over their ships is not limited in geographical terms, meaning that laws and standards laid down by the flag state as a rule apply wherever the ship is located, including in foreign states' ports and coastal waters (alongside applicable standards imposed by the coastal/port state).

It seems largely uncontested that the standards introduced in MARPOL Annex VI by now represent 'generally accepted' international

[33] See e.g. IMO Doc. MP/CONF.3/RD/3, para. 6, Molenaar note 29, p. 512 and the BMT Study, n 29, Appendix 4, paras. 108, 113—115.

rules for this purpose.[34] The significance of this lies in that *any* flag state, at least the ones that are parties to UNCLOS,[35] needs to implement the MARPOL Annex VI requirements, including the SECA requirements, irrespective of whether it has formally ratified the Annex. The more stringent sulphur in fuel requirement hence apply to all ships present in the SECA, irrespective of their flag state, destination or maritime zone concerned.

4.4 Coastal state jurisdiction

As opposed to flag states, coastal states are under no obligation in UNCLOS to implement maritime safety or environmental rules, but only have a right to do so. That right is significantly circumscribed by ships' navigational rights in the territorial sea, notably for rules relating to "the design, construction, manning and equipment of foreign ships"[36] and in the EEZ.[37]

However, in view of the international origin and widespread acceptance of the rules in question here, the jurisdiction of states to require compliance by foreign ships with the relevant fuel quality requirements in their coastal waters (including EEZ) is not in doubt. It is widely acknowledged that the fuel quality requirements of Marpol Annex VI, including those applying only in SECAs, meet the requirement of 'general

[34] See e.g. IMO Doc. LEG/MISC/8, pp. 9–12. The final report of the International Law Association's Committee on Coastal State Jurisdiction Relating to Marine Pollution (2000) concluded that the purpose of the reference to 'generally accepted' rules is "to make compulsory for all states certain rules which had not taken the form of an international convention in force for the states concerned, but which were nevertheless respected by most states" (Conclusion No. 2). See also Molenaar note 29, pp. 157–158 and L.S. Johnson: Coastal State Regulation of International Shipping, Oceana Publications, Inc., Dobbs Ferry, 2004, pp. 75–77.

[35] As was noted above at note 28 above, UNCLOS enjoys very widespread formal ratification. In addition, its provisions on vessel-source pollution widely considered to represent customary law, and hence represent binding international law even on the non-parties to UNCLOS.

[36] UNCLOS article 21(2)

[37] UNCLOS article 211(5)

acceptance',[38] and hence lie within the scope of coastal states' prescriptive jurisdiction.

The real limitations for coastal states lie in the realm of enforcement. States' rights to exercise enforcement jurisdiction over foreign ships that merely transit their waters is heavily circumscribed in UNCLOS in all sea areas except their internal waters. In the territorial sea, the coastal state may, if it has 'clear grounds for believing' that a ship navigating in the territorial sea has violated the rules, physically inspect the ship, which includes the right to stop the vessel and board it, and possibly the right to order it to port. The action must, however, be without prejudice to the application of the provisions of UNCLOS Part II on innocent passage. In the EEZ, enforcement is limited to cases where the pollution has already taken place and varies with the severity of the damage caused or likely to be caused. Jurisdiction for at-sea enforcement measures with respect to air emissions will generally be limited to certain basic information requests under article 220(3). Physical inspection under article 220(5) will normally be ruled out, as the air emission by an individual ship is unlikely to meet the requirement of 'substantial discharge' and 'significant pollution'.

In view of such legal constraints, and a number of more practical reasons,[39] it is assumed that the rules will mainly be enforced by port states with respect to ships that are voluntarily in their ports. The further analysis thus focuses on the rights of port states to take measures against non-complying ships.

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38 See note 32 above.

39 In-port enforcement represents a lesser interference with navigation and is also safer, less costly and more practical from the point of view of authorities. This is particularly the case as regards air emissions, as verification usually requires samples to be taken from the ship's fuels tanks and pipes for a subsequent detailed analysis of those samples by a laboratory.

4.5 Port state jurisdiction

4.5.1 Generally on port states' prescriptive and enforcement jurisdiction

In contrast to the rigid limitations of coastal state jurisdiction over foreign ships, port states are largely left outside the specific jurisdictional rules of UNCLOS. Yet it is well-established that internal waters for jurisdictional purposes may be assimilated to the land territory of the state. Ships, through their voluntary presence in the port or internal waters of another state, subject themselves to the (sovereign) territorial jurisdiction of that state.[40] As a starting point, a port state is hence free to impose its national rules on foreign ships and to enforce those rules by (reasonable) means of their choice, at least as far as they do not relate to matters which are completely internal to the ship.[41] Potential enforcement measures include the detention of the ships or the imposition of other conditions for departure[42] and the application of national laws by judicial or other process, including the imposition of various types of sanctions. It is also widely recognised that ships enjoy no general right of access to foreign ports under international law.[43] This implies, *a fortiori*, a right for the port state to make access to its ports conditional on compliance with specific requirements.[44]

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40 See also UNCLOS article 2, and, e.g., K. Hakapää, *Marine Pollution in International Law, Material Obligations and Jurisdiction with Special Reference to the Third United Nations Conference on the Law of the Sea*, Suomalainen Tiedeakatemia, Helsinki 1981, p. 169 and Churchill & Lowe (1999), p. 65.

41 See R.R. Churchill & A.V. Lowe, *The Law of the Sea*, Third Edition, Manchester University Press, Manchester, 1999, pp. 65–69.

42 The jurisdiction to close ports to inward traffic is widely understood to include the power to prohibit outward traffic. See e.g. Johnson (2004), pp. 35—36; and Churchill & Lowe (1999), p. 64.

43 *Case concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America), 27 June 1986, ICJ Reports 1986, para. 213. MARPOL article 5(3) specifically recognises the option of states not to allow access to their ports if ships fail to comply with its provisions. See also L. de la Fayette, 'Access to Ports in International Law' (1996) *International Journal of Marine and Coastal Law*, pp. 1–22.

44 This right is specifically recognised in UNCLOS articles 25(2) and 211(3).

The extent of port state's jurisdiction may differ depending on the character of the requirements at issue. On the one hand, there are rules relating to 'static' features of ships, such as its design, construction, equipment or manning. These features 'follow' the ship wherever it is; it either complies or not, irrespective of its geographical location. Failure to carry compliant fuel on board a ship is 'static' in this sense, as the violation takes place continuously, including while the ship is in the port. The presence of an exhaust gas cleaning system is another example.[45] Despite their intrusive effect on ships, static port state requirements are fairly straightforward in jurisdictional terms. If a ship fails to comply with a port state's requirement on static features it will be in violation even while present within the port or internal waters of the state, where the prescriptive jurisdiction of states is uncontested.

On the other hand, requirements of a 'non-static' nature, which relate to specific conduct or other operational requirements on foreign ships, such as the obligation to *use* a particular fuel on board or to *operate* the cleaning system, raise somewhat different questions. Compliance may change during the voyage of a ship which calls for a determination of the scope of the obligation in geographical terms. For these cases it cannot be assumed that a violation in the port has necessarily (also) persisted during the passage of the ships. In case the port state seeks to regulate conduct that takes place beyond the areas over which it has explicit prescriptive jurisdiction (in UNCLOS), the requirement has extra-territorial features, and the jurisdictional foundation for the requirement may be questioned.

The jurisdictional acceptability of the port state's requirement also depends on the enforcement measure taken. Enforcement measures which are unproblematic from a point of view of international law, such as denying the non-complying ship the right to certain services in port, or even the access to the port, may be justified even if the prescriptive

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

basis for extra-territoriality is weak, while punitive measures, such as sanctions, may require a firmer prescriptive jurisdictional basis.[46]

In the absence of specific limitations, thus, a port state enjoys a wide discretion to impose access conditions and other requirements on foreign ships that voluntarily enter its ports.[47] This discretion is not without limits, however. Limitations to this *a priori* unlimited jurisdiction of port states include, firstly, the restraints that may follow from treaty commitments, whether imposed by bilateral or multilateral, maritime, commercial or other treaties. For example, bilateral and multilateral treaties on trade and commerce commonly include a requirement of national treatment, limiting the rules of that (port) states may apply to ships of other contracting parties to those which are applied for ships flying their own flag.[48] The national treatment principle is also a key principle under the WTO agreements.[49]

Secondly, restraints may follow from the application of more general principles of general international law, such as the prohibition of discrimination or of abuse of rights.[50] Proportionality requirements may also place limitations on the enforcement measures which may reasonably be taken against ships that fail to comply with the port state's requirements, or if the sanction would be completely out of proportion with the aim it seeks to achieve.[51] This type of limitations, which may be grouped

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

47 Generally, see B. Marten (2014), *Port State Jurisdiction and the Regulation of International Merchant Shipping,* Springer, Dordrecht, 2014), Molenaar note 44 and H. Ringbom, *The EU Maritime Safety Policy and International Law*, Brill/Martinus Nijhoff, Leiden/Boston, 2008, Chapter 5.

48 For example, article 2(1) of the 1923 Statute of the International Régime for Maritime Ports.

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

50 See also UNCLOS article 300.

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

together under the general heading of 'reasonableness criteria', are clearly less specific and more dependent on the circumstances of the individual case than the relatively clear-cut, maximum limits imposed on coastal states for regulating ships transiting their maritime zones.

4.5.2 The special rules on vessel-source pollution

With respect to enforcing rules relating to ship-source pollution, Part XII of UNCLOS includes certain specific rules which clarify the geographical reach of port states' (prescriptive and enforcement) jurisdiction. First, article 220(1) provides that a port state may

> institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State.

This jurisdiction includes the jurisdiction to enforce national rules of the port states, i.e. including rules that do not have a counterpart in the international standards. On the other hand, the geographical extent of such requirements is limited to violations that have occurred in the territorial sea or the EEZ of the port state.

Where the rule has an international foundation, UNCLOS article 218(1) offers an additional, unusually broad, geographical basis for port states' jurisdiction, by including the right to penalise discharges even if the discharge took place in the high seas or in the maritime zones of other states, irrespective of whether the port state itself was affected by

it.[52] This provision, which represented one of the main innovations in UNCLOS in 1982,[53] reads:

> When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.

It seems clear that MARPOL, including its, Annex VI, meets the criteria for "applicable international rules and standards established through the competent international organization" as referred to in the paragraph.[54] The cross-reference in the other direction is equally clear. It was already noted above that MARPOL Annex VI itself declares that "the international law concerning ... pollution of the marine environment, including that law relating to enforcement and safeguards, in force at the time of application or interpretation of this Annex" applies *mutatis mutandis* to its requirements. There is no reason to exclude the jurisdiction under article 218 from this reference.[55] Even if the limited application of article 218 in practice could cast doubts on its status as customary law, its applicability as "international law in force at the time of application"

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[52] It is added in article 218(2) that proceedings should not be instituted with respect to discharges in other states' coastal waters, unless the port state is concerned by the spill or requested to act by that other state, the flag state or a state which is threatened by the discharge.

[53] Hakapää note 38, p. 178, UNCLOS Commentary, note 30, pp. 261–270.

[54] See at note 32 above.

[55] One potential reason could be doubts as to whether air emissions could be considered to be 'discharges' within the meaning of Article 218. However, this difference in terminology would be captured by the *mutatis mutandis* provision of MARPOL Annex VI regulation 11(6). Apart from that, it may also be noted that MARPOL article 2(3)(a)contains a very broad definition of the term 'discharge', covering "any release howsoever caused from a ship and includes any escape, … emitting or emptying".

cannot be disregarded as between parties to UNCLOS, which includes the overwhelming majority of states. On that basis, it must be assumed that the generous environmental jurisdiction of port states over foreign vessels which is granted in UNCLOS article 218 extends to violation of MARPOL Annex VI including its fuel quality requirements.[56] This, however, applies only to the extent that that the other conditions of article 218 are and UNCLOS safeguards are met, which calls for a close cooperation between the states involved.[57]

In practice, article 218(1) has been very sparingly used, but has gained some renewed prominence through its collective application by the EU member states through Directive 2005/35.[58] However, this Directive only covers discharges of oil and noxious liquid chemicals and does not authorise enforcement action against violations of MARPOL Annex VI.

In conclusion, it seems completely clear that a port state under UNCLOS article 220(1) has prescriptive jurisdiction over – and may impose penalties for – violations of the MARPOL requirements that have been committed in the port, and in its own territorial sea and EEZ. The Directive does not extend prescriptive jurisdiction over foreign ships beyond this area and the same seems to be true for many, though not all, national rules in the Northern European SECA states.[59] A limitation to

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[56] The most thorough analysis of this issue to date has been made by Molenaar in 1998, where he concluded that article 218(1), through regulation 11(6) of Annex VI, extends to ship-source air pollution, at least between the parties to MARPOL. See Molenaar, note 29, pp. 506–510.

[57] The second paragraph conditions legal action by a port state against violations in another state's coastal waters upon a specific request by that coastal state, the flag state or another state threatened by the discharge. Paragraph 4 gives precedence to the coastal state where the discharge violation has taken place, by providing that the port state proceedings shall be suspended at the request of the coastal state. See also section 4.6 below.

[58] Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements, OJ 2005, L255, p. 11.

[59] See e.g. the Finnish Act on Environmental Protection in Maritime Transport (Act 1672/2009, hereinafter 'the Finnish 2009 Act'), section 3. For a broader approach, see chapter 2 section 3 of the Swedish Act 1980:424 on Measures Against Water Pollution from Ships, which includes 'Baltic Sea areas' beyond Swedish coastal waters within its scope. Section 3(2) of the 2007 Norwegian Ship Safety and Security Act permits the

waters under national jurisdiction also corresponds to the enforcement obligation in MARPOL article 4(2).[60]

Should a need for it arise, however, the jurisdiction over violations in the port state's coastal waters could also be extended to cover violations outside this area, including the high seas and coastal waters of other states, on the basis of UNCLOS article 218 and, depending on the enforcement measures chosen, general principles on international law.

4.6 Safeguards

The most obvious limitations of the broad enforcement jurisdiction of port states over foreign ships are those that follow from UNCLOS Chapter XII section 7, which includes a variety of 'safeguards' to ensure that port and coastal states refrain from abusive enforcement measures. With respect to proceedings relating to penalties for non-compliance, the most important safeguards are the following:

1) Only monetary penalties shall be imposed. The only exceptions are violations that have taken place within the internal waters of the state and violations in the territorial sea that amount to "a wilful and serious act of pollution" (UNCLOS article 230).
2) Proceedings relating to pollution violations committed beyond the territorial sea of the state instituting them shall be suspended if the flag state takes proceeding to impose penalties in respect of corresponding charges against the ship within six months. This right of pre-emption by flag state is limited by certain exceptions, notably if the violation in question relates to a case of "major damage" to the coastal state or if the flag state "has repeatedly disregarded its obligations to enforce effectively the applicable international rules". It is also clarified that this does not prevent the port or coastal state from maintaining the financial security

King to adopt measures against foreign ships that extend beyond Norwegian coastal waters, "insofar as it is in compliance with international law".

[60] See note 70 below.

throughout the duration of the flag proceedings (article 228(1))

3) Proceedings to impose penalties shall not be instituted later than 3 years from the date of the violation (article 228(2)).
4) In such proceedings the "recognized rights" of the accused shall be observed (article 230(3))

In addition to these, UNCLOS reiterates some more general principles of international law, such as the obligation of states to act in good faith and to refrain from the abuse of rights granted in the convention (article 300). Article 227 adds that states "shall not discriminate or in fact against vessels of any other state."

4.7 Conclusion

Lawful enforcement presupposes that there is both prescriptive and enforcement jurisdiction. These two aspects of jurisdiction are considered separately in Part XII of UNCLOS. The prescriptive jurisdiction of states to require compliance by foreign ships with the MARPOL's fuel quality requirements in their territorial sea and EEZ is not in doubt. However, states' rights to exercise enforcement jurisdiction over foreign ships that merely transit their waters is heavily circumscribed in all sea areas except their internal waters.

For this and a number of practical reasons, enforcement of the sulphur in fuel requirement will primarily be exercised by states with respect to ships that are voluntarily present in their ports. Since enforcement takes place in port, the port states have wide enforcement powers, limited mainly by various safeguards enumerated in UNCLOS. A more complex question relates to the extent of port states' prescriptive jurisdiction, i.e. how far from the port state may the requirements to comply with the rules extend. Is the port state's enforcement limited to violations that have taken place in the state's own maritime zones or may its measures cover the entire SECA or even beyond?

The Sulphur Directive only requires application of the rules within the individual member states' coastal waters.[61] This scope is unproblematic for the port state to maintain in view of *inter alia* UNCLOS article 220(1) and the related prescriptive rules in article 211. However, thanks to close link to the internationally accepted MARPOL Annex VI standards, the obligation to comply with the rules can go beyond that to be extended to cover any part of the SECA.

The most obvious justification for such a broad geographical coverage of the port state requirements is UNCLOS article 218(1) which establishes jurisdiction for port states to prosecute ship-source pollution offences, almost wherever they occur, as long as there is a strong international foundation of the requirement in question. A question mark still relates to the reference to 'discharges' in that article, but that the drafters of MARPOL Annex VI seem to have settled that question by introducing regulation 11(6), which serves to ensure a close jurisdictional link air emissions and other forms of ship-source pollution and, hence a broad understanding of the term to include emissions.

More generally, too, a broad prescriptive jurisdiction may be argued on the basis of the general jurisdiction that port states have under general international law to impose requirements on ships that voluntarily visit their ports, even if the requirements in question extend beyond the coastal waters of the port state. This includes powerful enforcement measures such as denial of (future) access of the ship in question, limited only by more general principles of international law aimed at ensuring reasonable and proportionate enforcement. If enforcement takes the form of penalties, the requirements for a solid prescriptive jurisdiction are higher, but even there, jurisdiction may be found in the principles of extra-territorial jurisdiction in international law.

It may also be noted that even if the prescriptive jurisdiction was considered to prevent a geographic extension of the requirement, the hurdle could possibly be circumvented by means of drafting. By altering the way in which the violation is defined it may be quite possible to 'territorialize' the violation of the air emission and fuel quality standards.

[61] Article 6(2).

For example, a rule imposing an obligation on all ships entering ports to present a record in the port of the actual emissions levels throughout their presence in the SECA, or for the last 10 days, or otherwise face a fine, would technically be violated in the port even if it would in effect have a very widespread geographical coverage.[62]

Finally, even if the port state's jurisdiction to prescribe the sulphur in fuel requirements for the high seas or other states' coastal waters were in doubt, that would not in itself rule out that a penalty for any violation takes into account (supposed or real) non-compliances in such sea areas. UNCLOS and MARPOL leave considerable discretion for states to establish their own principles for penalties and taking into account violations beyond the own sea areas as a mechanism to ensure the effectiveness and dissuasiveness of the penalty would clearly appear to fall within this discretion.

Any final assessment on the legality of port states' enforcement measures, in the form of penalties or otherwise, is ultimately likely to boil down to questions relating the reasonableness and legitimacy of the state's claim to jurisdiction and the balancing of interests between the competing jurisdictions of the port state and the flag state. This matter is reverted to in section 8.

5 Establishing the violation

A first step in any type of enforcement measure for violations of the MARPOL Annex VI requirements is to verify that the ship in question

[62] Techniques for territorializing ship-source pollution offences have been particularly used in the United States, for example relating to sanctions concerning failure by the crew to provide adequate records of fuel consumption, inadequate or falsification of oil record books or bunker delivery notes, failure to co-operate with port State enforcement officials, etc. See also R.A. Udell, 'United States Criminal Enforcement of Deliberate Vessel Pollution: A Document-Based Approach to MARPOL', in: D. Vidas (ed.) Law, Technology and Science for Oceans in Globalisation—IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf, Martinus Nijhoff Publishers, The Hague, 2010, pp. 269–290.

has actually violated the rules. This is for the authorities to demonstrate and without the presence of proof that a violation has taken place, there will be no case for enforcement, independently of the procedure involved. Exactly what level of proof is required to demonstrate the violation varies from one state to another[63] and there is limited guidance on this matter in the international conventions.[64]

The enforcement chain for marine pollution violations consists of several links and many authorities may be involved in establishing whether a violation has taken place, including coast guard, police, port state control, environmental and judicial authorities.

This matter cannot be dealt with in detail here, but it should be noted that the first indications of violations of the fuel quality requirements may be brought to the authorities attention in several ways. Information of potential non-compliance may, for example, be obtained from crew members, pilots, port authorities etc.[65] New tools and technologies are increasingly being used for identifying suspected non-compliances by means of remote sensing, but the remote identification of a violation requires sophisticated technology.

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63 See e.g. EMSA Publication 'Addressing Illegal Discharges in the Marine Environment', 2013, available at www.emsa.europa.eu/publications/guidelines-manuals-and-inventories/item/1879-addressing-illegal-discharges-in-the-marine-environment.html p. 62: "In most legal systems, it is possible to present in court any type of evidence that is deemed useful to support the case. Depending on the legal system and practices, some types of evidence carry more weight, and some may have specific legal consequences such as reversing the burden of proof."

64 But see the MEPC Guidelines referred to in note 27 above, the objective of which is "to establish an agreed method for sampling to enable effective control and enforcement of liquid fuel oil being used on board ships under the provisions of MARPOL Annex VI" (para.1).

65 For an overview see e.g. EMSA Pollution Manual (note 62 above), pp. 51 See also MARPOL article 6(1) and the almost identical regulation 11(1) in Annex VI.: "Parties shall co-operate in the detection of violations and the enforcement of the provisions of this Annex, using all appropriate and practicable measures of detection and environmental monitoring, adequate procedures for reporting and accumulation of evidence." Under the PSC Directive, article 23(2), port authorities and pilots have obligations to report to the competent authorities if they discover that a ship "has apparent anomalies which may prejudice the safety of the ship or poses an unreasonable threat of harm to the marine environment".

While such indications may be helpful in targeting the ship for further inspections,[66] they will not in themselves provide proof of a violation. As of today, at least, further confirmation is needed to establish a violation and this will normally be obtained by onboard inspections while the ship is in port.

A standard PSC inspection will normally cover at least an inspection of the relevant documents discussed in section 3.3, i.e. the IAPP certificate, BDN, written procedures for fuel oil change-over, the ship's log books, and oil and other record books, tank plans and diagrams etc. However, if needed,[67] the PSC inspection may also go beyond documentary checks to include a physical investigation of fuel tanks and piping, including samples from the fuel oil supply lines or tanks and an examination of relevant equipment (including scrubbers).[68] On-board investigations may also cover enquiries into the actions taken, or not taken by the ship's crew, the procedures followed which requires formal statements by crew members to be recorded.

In case of suspicion, further investigations ashore are usually required to back up the onboard investigations, such as notably analyses of fuel samples by accredited laboratories. In certain cases it may also be necessary to undertake further interviews and recording of statement of land-based persons representing the ship's owner and charterer(s) or expert witnesses.

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66 EU port state control procedures already includes a procedure for this type of notifications, under which the identified ship becomes a priority for a 'more detailed inspection'. (See Annex I II.2.B of Directive 2009/16 ('unexpected factors')). The process could easily be further strengthened by including a notification on the basis of remote sensing information among the 'overriding factors' which entail mandatory inspection in the next port under ibid. Annex I II.2A.

67 In the words of article 13(3) of the PSC Directive, "more detailed inspection shall be carried out ... whenever there are clear grounds for believing, after the inspection (of the certificates and documents), that the condition of a ship or of its equipment or crew does not substantially meet the relevant requirements of a Convention. 'Clear grounds' shall exist when the inspector finds evidence which in his professional judgement warrants a more detailed inspection of the ship, its equipment or its crew."

68 See section 3.3 above on the technical inspection guidelines developed by IMO and EMSA for this purpose.

Finally, in some states, criminal proceedings call for separate investigations undertaken by the public prosecutor, once the case has been submitted to that authority. The purpose of such investigation is to establish more thoroughly the ramifications of the supposed violation by finding out what other fuels were on board, where they were purchased, whether the sample was taken according to applicable procedures and whether the crew member(s) actually knew what statements they gave or what documents they signed at the initial on-board inspection. Such a criminal investigation may sometimes occur with a significant delay, meaning that neither the ship nor the crew is longer available within the jurisdiction of the state concerned.[69]

It is the combined, overall outcome of these investigations which will form the basis for assessing whether or not an infringement of the rules has taken place. While there is little formal guidance for courts on how to prove MARPOL Annex VI infringements, and little experience to date, it must be assumed that a particular emphasis will normally be given to the fuel samples taken on board the ships as further analysed by the port state and expert statements relating to them.

6 Sanctions

6.1 General

Proof that a ship has violated the air emission standards is not necessarily enough for the coastal or port state to impose sanctions for the violation. For a sanction to be successfully imposed on a person who has infringed the rules, the national requirements on persons that can be held liable and the acts or omissions that count for the purpose also need to be satisfied, along with applicable exceptions and defences.

[69] According to a study prepared by the Swedish Transport Agency (note 6), it is not uncommon that a year has passed from the alleged infringement at the time the public prosecutor decides whether or not bring the case to court (p. 49).

With regard to the details of sanctions, international law offers very limited guidance. The UNCLOS enforcement provisions are laid down in permissive terms for coastal and port states in the sense that these states *may* institute proceedings with respect to violations by foreign ships of the international rules, but there is no obligation to do so.[70] MARPOL and EU law go somewhat further by obliging states to have a sanctions regime in place to deal with violations, but fall short of requiring states to use them.[71]

MARPOL and EU law are similarly open as to whether the sanction for violations of the fuel quality rules should be of a criminal or administrative nature,[72] though EU law requires there to be (at least) criminal sanctions in place for certain types of violations of the air emission standards.[73] This distinction is decisive for the procedures and evidence required to bring a case of non-compliance to conclusion.

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70 Articles 218(1) and 220(1)

71 MARPOL article 4(2) specifically provides that violations within their jurisdiction shall be prohibited in their legal systems and that sanctions shall be established for violations. Moreover, port and coastal states shall, whenever a violation occurs within their jurisdiction, either notify the flag state or "cause proceedings to be taken in accordance with its law". The Sulphur Directive requires member states to "determine the penalties applicable to breaches of the national provisions adopted pursuant to this Directive" and establishes certain main principles for such penalties. Directive 2008/99 on the protection of the environment through criminal law (OJ 2008 L 328/28) requires member states to ensure that certain conduct (including violation of the fuel quality requirements committed intentionally or with at least serious negligence) constitutes a criminal offence, and include certain main principles and requirements with respect to the penalties to be applied, but always leaves the decision on whether to prosecute in an individual case to the national authorities. See also para. 10 of its preamble.

72 An IMO publication which is specifically intended to provide guidance on the implementation of MARPOL for its contracting states confirms that this matter is left to individual states and adds that "[s]anctions, be they administrative or penal in nature, would, by and large, consist of fines." *MARPOL – How to do it*, IMO, 2013, para. 4.7. UNCLOS article 230 requires, as was noted above, that "monetary penalties only may be imposed" with respect to pollution violations by foreign ships (the only exception being pollution in internal waters and wilful and serious pollution in the territorial sea), but the more specific nature of the monetary penalties is not addressed. See also ILA Report, note 32, at p. 496.

73 Directive 2008/99 requires criminal procedures to be in place for a range of 'unlawful' acts, which includes violation of the air emission requirements of the sulphur directive. Under article 3(a), member states shall ensure that "the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water,

Traditionally, marine pollution offences have been subject to criminal penalties in Northern Europe, but states have increasingly begun to introduce tailor-made sanctions of administrative nature to overcome the procedural burdens linked to criminal penalties. This has not least been the case in the Nordic countries,[74] but to date only Norway applies administrative penalties for violations of the rules on air emissions from ships.[75]

Even if criminal fines represent the typical form of sanctions for violation of the air emission standards in the Northern European SECA states, there is not much practical experience of awarding criminal penalties for violations of the air emission standards. As far as is known, only one

which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants" constitutes a criminal offence, "when unlawful and committed intentionally or with at least serious negligence". Annex 1 of the directive includes the sulphur in fuel requirements, which means that infringements of the sulphur in fuel requirements are "unlawful" under article 2(1).

74 Two example are the Swedish water pollution fee, which was introduced in 1984 (Chapter 8 of Act 1980:424 on Measures Against Water Pollution from Ships) and the Finnish oil discharge fee from 2005 (Act 1163/2005 available in Finnish at www.finlex.fi/fi/laki/alkup/2005/20051163). Both sanctions were specifically introduced to improve the efficiency of sanctions for illegal oil spills, both in relation to the swift procedures for applying the penalties, the proof standards and the level of penalties. The two fees only apply to oil pollution and hence do not extend to air emission violations, though in both countries studies prepared for the governments have indicated benefits of applying a similar fee to those infringements. See the Swedish study referred to in note 6 above and H. Ringbom, 'Administrative Sanctions for Violations of Ships' Air Emissions and Fuel Quality Standards – International Law Considerations', Study prepared for the Finnish Ministry of Transport and Communications, BALEX, Finland, November 2014.

75 Sections 55 – 57 of the Act of 16 February 2007 No. 9 relating to ship safety and security introduce a 'violation fine' which may be imposed on natural as well as legal persons. On this basis five fines have been issued in 2015–2016, ranging from NOK 100.000 to 500.000 (corresponding to roughly € 11.000–55.000).
See also the recent Belgian 'Loi instituant des amendes administratives applicables en cas d'infractions aux lois sur la navigation' of 25 December 2016. The law introduces a speedy process for issuing a fine, based on the corresponding substantive rules of the criminal sanctions. The enforcement will be carried out by the Federal shipping directorate if the public prosecutor does not act within one month, which is expected to speed up the procedure considerably. In monetary terms, too, the new administrative fine matches the applicable criminal sentences, which in the case of air emissions may extend up to € 8 million.

criminal case on the fuel quality requirements that apply in the Northern European SECA has resulted in conviction to date.[76]

In the following, the regulatory framework for three aspects of the sanctions will be considered in some more detail. Section 6.2 discusses liable persons, section 6.3 addresses questions related to the threshold of negligence and section 6.4 discusses the level of the sanction. These questions have to be settled for any sanction regime, independently of the procedural framework involved and special solutions may be needed for sanctions relating to air emission violations in view of their specific character.

6.2 The liable person

As regards the person on whom the sanction or fee is to be imposed, MARPOL only requires that *any* violation shall be prohibited and subject to sanctions, without further clarification as to who the liable person should be.[77] The only provision which mentions specific persons in MARPOL Annex VI is regulation 3(1) which contains certain exceptions, where air emissions in violation of the specified requirements are allowed. This exception, however, concerns emissions "resulting from damage to a ship or its equipment" and includes a number of additional conditions and is therefore unlikely to be of relevance in the present context.[78]

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[76] This is the Costa neoRomantica, Hamburg, 2016 (n.y.r.), in which two chief engineers were fined EUR 23,500 each. The absence of successful prosecutions of violations of the fuel quality standards was subject to a study by the Swedish Transport Agency (note 6). Out of 31 notifications by maritime administration to the prosecutor between 2010 and May 2014, only one led to a decision to initiate a criminal investigation and not a single one ended up in prosecution. The main reasons for this, were either that it was not possible to investigate the alleged offence properly (since the ship had already left the country) or it was not possible to confirm criminal conduct.

[77] Article 4(2) referred to in note 70 above.

[78] The full text of MARPOL Annex VI, regulation 3(1)(2) reads as follows:
"Regulations of this Annex shall not apply to … any emission resulting from damage to a ship or its equipment: .2.1 provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the emission for the purpose of preventing or minimizing the emission; and .2.2 except if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result. "

The Sulphur Directive requires, flag coastal and port states to take all necessary measures to ensure that non-compliant marine fuels "are not used"[79] and places the corresponding obligations on "the ship", rather than individual persons.[80] In the sanctions part the Directive requires that fines are calculated in such a way that they "at least deprive those responsible of the economic benefits derived from the infringement", which indicates that at least the person who are making economic benefits should be among the liable persons.

For criminal sanctions, Directive 2008/99 is somewhat more precise. It does not specify the identity of the liable person either, but clarifies that that both natural and legal persons ("committed for their benefit by any person who has a leading position within the legal person"), shall be potentially subject to the penalty (article 6(1)), that penalties shall extend to the lack of supervision or control (article 6(2)), and that "inciting, aiding and abetting criminal conduct shall also be punishable as a criminal offence" (article 4). Article 6(4) clarifies that liability of legal persons on this basis does not exclude criminal proceedings against natural persons. The reference to the deprival of economic benefits in the Sulphur Directive, together with article 6 of Directive 2008/99, clearly calls for including companies among the potentially liable parties for air emission violations. The economic benefit of cheating with the fuel quality requirements will normally lie with the owner or charterer, rather than with individuals on-board or ashore. The corporate sanctions need not be of a criminal nature, however.[81]

The available examples of administrative sanctions for violations of the air emissions requirements indicate a somewhat broader approach to the liable person. The Norwegian Ship Safety and Security Act, 2007, includes separate sections for fines to be imposed on individuals and those imposed on the company (i.e. the managing company indicated in the

[79] Article 6(2).

[80] See article 6(8).

[81] See e.g. http://ec.europa.eu/environment/legal/crime/

Safety Management Certificate[82]) with somewhat different thresholds of negligence.[83] As to individuals, the administrative fines may be imposed on: a) "anyone who, on behalf of the company" commits a violation; b) the master; and c) other persons working on board.[84] If any of those persons acted on behalf of the company, the fine may also be imposed on the company as such, even where fines could not be imposed on any of those persons (e.g. in the absence of proof of negligence).[85] Section 56(3) provides that the company is also jointly and severally liable for fines imposed on the master or other persons working on board.

6.3 The level of negligence

Another relevant question relating to the penalty to be imposed for non-compliance with the MARPOL standards is the level of culpability required for the penalty to be activated. Must, in other words, the infringement be intentional or the result of some degree of negligence, or can sanctions be imposed on objective terms, on the basis that a violation has been confirmed?

Generally speaking, MARPOL regulates discharges and emissions in objective terms. Unless specifically permitted or exempted, any discharge of the substances concerned, or air emission exceeding the required standards is prohibited[86] and shall, as such, be subject to sanctions under article 4. The formulations chosen in the convention, together with the level of detail of regulation 14, suggest a regime of 'strict' liability, in which mere evidence of a violation suffices to trigger the sanction, without there being any need to analyse the subjective degree of fault or culpability on behalf of the person responsible. However, in practice MARPOL has

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82 While section 56 does not include a possibility to impose the corporate sanctions on other legal persons than the 'company', as defined in section 4 of the Act, the fourth paragraph provides that "the Ministry may issue regulations containing further provisions relating to violation fines against the company".

83 On the differences, see section 6.3 below.

84 Section 55(1–3).

85 Section 56(2)

86 MARPOL regulations I/15 and 34, II/13 and VI/14.

been considered to leave room for different national solutions in this respect.[87]

On this matter, too, differences apply between the procedures involved. While variations exist, the general position is that criminal law procedures require proof or intent or at least (gross – criminal) negligence of the responsible person while administrative penalties are more flexible and may even be based on a strict liability or a reversed burden of proof.

Under the criminal procedure it will usually be necessary to show that the alleged offender deliberately or negligently caused the pollution, or at least knew that the pollution was taking place and did nothing to prevent it. In other words, it is necessary to demonstrate the alleged offender's intentions and/or knowledge of the circumstances, which significantly extends the evidence that is needed to prove the offence.

The two EU directives of relevance for criminal penalties for ship-source pollution establish intent or (at least) 'serious negligence' as the relevant thresholds.[88] 'Serious negligence' has been discussed by the European Court of Justice and confirmed as "entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation."[89] The chosen threshold places a significant burden of proof on the authorities in view of the easy access to evidence to support the ship operator's innocence, such as the availability of a bunker delivery note (BDN) indicating that the purchased fuel was compliant. Crew members are similarly unlikely to confirm (seriously) negligent conduct in their statements and even if they did at the time of investigation, they may have retracted such statements at the time a trial begins.

A Swedish study from 2014 indicated that the main reasons for failing to impose criminal penalties for air emission violations is that the pros-

87 *MARPOL – How to do it* (2002), pp. 24–25.

88 Directive 2005/35 article 4(1) and Directive 2008/99, article 3

89 Case C-308/06, *Interanko and others*, para. 77. Se also the opinion by Advocate-General Kokott in the same case, where the concept is analysed in relation to the wording of MARPOL, at paras. 102–112 and 139–156.

ecutor has decided to discontinue the caser in view of the difficulties to properly investigate the alleged infringement and to prove the required negligence. Even in cases where the violation has been proved in objective terms, prosecutors had repeatedly decided not to proceed to prosecution in cases where the BDN indicates that the fuel is compliant. Divergences between the actual sulphur levels and those indicated in the BDN may be due to several reasons, including failure to empty tank before fuelling, subsequent switching between fuel tanks etc. In view of this uncertainty facing the prosecutor, proving a breach of the required duty of care would require further investigation with the crew, but at that time the ship has long since left the jurisdiction.[90]

Administrative penalties involve more flexibility in this respect. They permit linking the violation more closely to the existence of the violation rather than the potential reasons for it and hence allow simplified procedures and investigation routines. The existing examples indicate a tendency to do away with the subjective element of culpability.

The Norwegian 'violation fine' makes a difference between sanctions imposed on individuals and those imposed on companies. While the former still require intent or (simple) negligence, fines imposed on companies may be imposed without any such intent or negligence, provided only that the person who committed the violation "has acted on behalf of the company".[91] The selected wording suggests that it is not necessary to know exactly who committed the violation or even if anyone did, as long as there is cumulative behaviour leading up to a violation.[92] Instead the question of whether a fine shall be imposed, and its magnitude, shall be based on other specified criteria.[93]

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90 Swedish study referred to in note 6 above, pp. 49–51.

91 Section 56(1)

92 T.H. Pettersen & H.J. Bull, *Skipssikkerhetsloven – med kommentarer*, Fagbokforlaget, Bergen 2010, p. 746.

93 Section 56(2) reads in full:
"In deciding whether a violation fine shall be imposed on the company, and in assessing the fine, particular consideration shall be paid to:
a) the seriousness of the violation;
b) whether the company could have prevented the violation through the Safety Management System or by instruction, training, control or other measures;

6.4 The level of the sanction

6.4.1 General

UNCLOS, as was noted in section 4.6, includes its general safeguards in Part XII, section 7, which call for monetary penalties to be imposed in most cases, but does not address the level of these penalties.[94] Certain general principles of international law, including the requirement of non-discrimination, and proportionality, suggest that that there cannot be a difference between the sanctions on the basis of nationality of ships and that the sanction should not exceed what is reasonably required to achieve its aim.

MARPOL article 4(4) requires that penalties "shall be adequate in severity to discourage violations of the present Convention and shall be equally severe irrespective of where the violations occur." In an IMO guide for states parties implementing the provision it has been considered "reasonable to provide for a range with a minimum and maximum level, with the exact amount of the fine being dependent on the severity of the offence."[95]

EU laws relating to criminal sanctions are similarly general in their wording,[96] but article 11(2) of the Sulphur Directive is somewhat more concrete:

c) whether the offence was committed to promote the interests of the company;
d) whether the company has had or could have obtained any advantage by the offence;
e) whether this is a repeated offence; and
f) the company's financial capacity"

94 See also p. 2 of the dissenting opinion of ITLOS Judge Anderson in the *Monte Confurco* Case (ITLOS Case No. 6, 2000), relating to the prompt release of a fishing vessel and the reasonableness of the requested security: "The Convention does not limit the size of fines, although it does exclude generally imprisonment for fisheries offences. It is for the legislators and the courts of States Parties to lay down fines for illegal fishing. Where there is persistent non-observance of the law, deterrent fines serve a legitimate purpose." See also para. 7 of his dissenting opinion in the *Volga* Case (Case No. 11, 2002).

95 *MARPOL – How to do it*, IMO, 2013, para. 4.7.

96 Article 5 of Directive 2008/99 provides: "Member States shall take the necessary measures to ensure that the offences referred to in articles 3 and 4 are punishable by

> The penalties determined must be effective, proportionate and dissuasive and may include fines calculated in such a way as to ensure that the fines at least deprive those responsible of the economic benefits derived from their infringement and that those fines gradually increase for repeated infringements.

It is hence at least implicit in all instruments that the sanctions, in order to achieve their aims, should deprive the perpetrators of the economic benefit of non-compliance and even go beyond that in order to meet the requirement of dissuasiveness or discouraging violations. In view of the very important economic benefits of non-compliance with the sulphur in fuel requirements, it is clear that the sanction will have to be of a significant magnitude to meet those objectives.

Yet, the question remains as to *how* these fees should be calculated; on the basis of what criteria, for what period of time and at what amount. These issues will be addressed in turn below.

6.4.2 What criteria?

A straightforward and quick procedure for the imposition of the sanction requires a penalty system which is easy for the authorities to calculate and use. Similarly, the principle of legality calls for clear, transparent and predictable rules for the benefit of ship operators who may be subjected to such sanctions.[97]

In the Finnish oil discharge fee, these considerations have been met through a system in which the level of the fee is established on the basis of two parameters alone: the size of the ship and the size of the spill. A pre-made table which calculates the fees for various scenarios is annexed

effective, proportionate and dissuasive criminal penalties." See also article 8 of directive 2005/35 as amended.

97 See also 'Guide on Article 7 of the European Convention on Human Rights: No punishment without law: the principle that only the law can define a crime and prescribe a penalty', Council of Europe, 2016, available at http://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, in particular at pp. 10–14.

to the 2009 Act for an easy reference for both the authorities and ship operators.

In the case of air emissions, however, neither of these criteria seem relevant. The size of the ship is not determining the economic benefits of non-compliance, and it is difficult to speak in terms of an individual 'spill' or 'discharge' in case of air emissions, where the rationale of non-compliance is based on a continuous violation that stretches over a longer period of time.

Rather it would seem that the benefit of non-compliance is exclusively linked to the ship's fuel consumption. This is what determines how much is to be gained by using non-compliant rather than compliant fuel, irrespective of the size of the ship or any operational considerations. For enforcement purposes, this parameter may not always be easy to identify, however. The fuel record books filled in by the crew may not be sufficiently reliable for this purpose and there is currently no other international requirement for ships to have a fuel flow meter on board to register the consumption.[98] A somewhat less accurate, but more easily identifiable, indication of a ship's fuel consumption is the size of its engines.

Another element that should be taken into account when establishing the level of the sanction is the severity of the violation. It is a significant difference, both economically and from the point of view of the environment, if the violation consists of using a fuel oil with only marginally higher sulphur content than the required 0.1%, or a heavy fuel oil with, say, 3,5%. Finally, the Directive specifically suggests that repeated offences should be subject to more severe penalties.

6.4.3 What period?

Unlike discharges of oil or chemicals at sea, a violation of MARPOL's air emission and fuel standard requirements typically extends over a longer period of time. It is only through a continuous violation that the economic

[98] But see Regulation 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, referred to at note 145 below, in particular article 9 thereof, and the new regulation 22A is to MARPOL Annex VI adopted in October 2016.

benefits of non-compliance can be realised. Yet, with the exception of ships that only have non-compliant fuel on board, it is usually difficult to establish for how long a ship has infringed the rules. In view of this uncertainty, a certain period of time needs to be determined on which the basis of the economic benefits is to be calculated. The solution needs, on the one hand, to be effective and discourage non-compliance. This means that the economic benefit cannot be limited to the period for which the non-compliance is technically proven. On the other hand, the system needs to meet proportionality requirements. It is not clear, for example, if a randomly chosen entity of time, such as a certain number of days for which non-compliance is presumed,[99] would meet this requirement, as the link to the actual violation may be too weak and as the solution also involves risks of multiple sanctions (in different states) for the same violation.

While there is no obvious solution to this question, one proposal which seeks to balance the different considerations involved could be to limit the economic benefit calculation to the voyage preceding the ship's entry to the port in question. It is true that this solution, at least in theory, would promote making artificial stops in a nearby port or anchorage before entering the port, but this risk could be reduced by measuring the time in larger entities, such as for example 24 hours.[100]

6.4.4 What amount?

In order to be effective, the level of the sanction needs to be of a magnitude which makes an economic impact for the liable person. The significant benefits involved with non-compliance[101] accordingly call for penalties of quite considerable amounts. Not even matching the penalty with the

[99] An example of this is found in the Finnish law relating to sanctions for failing to comply with road fuel tax requirements, where the fees are based on a daily charge which depends on the type of vehicle, coupled with a maximum number of 20 days for each identified violation. See section 8 of the Fuel Fee Act (1280/2003) and www.trafi.fi/tieliikenne/verotus/polttoainemaksu/yleista_polttoainemaksusta

[100] An example of a penalty calculation scheme on this basis is provided in the annex to the CompMon study referred to in the first footnote.

[101] See example in note 5 above.

economic gains (for the chosen period) would amount to effective dissuasion. The text of the Sulphur Directive's article 11(2) accordingly refers to fines which "*at least* deprive those responsible of the economic benefits derived from their infringement".[102] There is no guidance as to what coefficient could be applied on top of economic benefits for achieving the required dissuasive effect. Presumably this matter is at least in part linked to the general state of the enforcement system and, thus, the likelihood of being caught: if the enforcement system is well developed and the risk of being fined big, a lower coefficient will suffice for the deterrent effect and *vice versa*. That consideration would favour a higher coefficient, at least in the early period of enforcement where at-sea monitoring techniques and international cooperation have not yet fully developed.

In addition, article 11(2) of the Sulphur Directive suggests that fines would "gradually increase for repeated infringements". Here again, a factor is needed and precedents are probably best looked for in comparable national laws.[103] Repeated infringements could, and arguably should, also trigger other types of sanctions, including administrative measures available under PSC.[104] The level of the fines, if pre-calculated in advance in a matrix, needs to be updated from time to time to actually reflect the difference in price between compliant and non-compliant fuels.

6.5 Assessment

UNCLOS, MARPOL and international law more generally leave significant discretion for states to establish their own system of penalties for violations of the MARPOL Annex VI standards in a way that best suits their internal legal system. This discretion is not without limits, however. In particular, the safeguards of UNCLOS provide that only monetary

[102] The wording chosen in this part of the sentence suggests that the this is not a strict obligation of member states, but MARPOL article 4(4) creates a clear obligation for states to ensure that the penalties "shall be adequate in severity to discourage violations of the present Convention".

[103] For example, section 10 of the Finnish Fuel Fee Act, referred to above in note 98 refers to a coefficient of 1.5 in case the non-compliance is repeated and a coefficient of 2 if it is particularly grave.

[104] See section 7 below.

sanctions may be imposed for most violations and provides for a flag state pre-emption in certain situations for violations that have been committed beyond the territorial sea of the state instituting the proceedings. Apart from that, limits are posed by more general principles of international law such as non-discrimination and proportionality requirements.

While international law does not take a stance on the nature of the penalty imposed, EU law specifically requires criminal sanctions to be in place for cases of intentional or seriously negligent infringements. The availability of criminal sanctions does not, however, amount to an obligation to impose such sanctions in individual cases of violations, nor does it rule out the parallel existence of sanctions of an administrative character. The most tangible obligations relating to penalties are the requirements laid down in article 11(2) of the Sulphur Directive, which apply irrespective of the nature of the penalty concerned.

The key criteria guiding sanctions, independently of their nature, are accordingly that they shall be effective, proportionate and dissuasive.[105] While vague, these criteria place some outer limits for the sanctions to be applied in the EU member states. Those limits are primarily be taken into account by member states at the legislative level, but could also be of relevance for national judges or authorities when deciding concrete cases.[106]

The experience in some of the Northern European SECA countries suggests that traditional criminal penalties may not satisfy those effectiveness criteria. It has been shown above that administrative penalties could provide a complement to enhance effectiveness. A different type of penalties do not do away with the duties of states to ensure a fair trial and ensure rights of the accused, but experience from other areas of marine pollution law indicates that concerns related to European human rights law can be accommodated through a careful design of the sanction regime.[107]

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[105] Case 68/88 *Commission* v *Greece* [1989] ECR 2965, at para. 24.

[106] See e.g. P. Asp, 'Harmonisation of Penalties and Sentencing within the EU', *Bergen Journal of Criminal Law and Criminal Justice,* Volume 1, Issue 1, 2013, p. 57.

[107] For more details, see the CompMon report referred to in the first footnote, section 4.3.5.

The effectiveness of the sanctions is closely related their dissuasiveness or deterrent effect. Both criteria have implications on the choice of liable party, as the penalty fails to promote compliance if it does not target the persons who are involved in the decisions relating to non-compliance and who benefit from it.[108] Unlike the 'standard' provision of penalties for violations of EU law, article 11(2) of the Sulphur Directive specifically refers to calculation of fines in a way that deprive those responsible of the economic benefits derived from their infringement. That, in turn, suggests that it is more relevant to target the companies operating the ship and responsible for the choice of fuel it uses than to address individual crew members.

Dissuasion and effectiveness also call for penalties to be of a certain level. The ceiling on how far penalties can go in this respect is placed by the principle of proportionality. In EU case law, proportionality considerations have, for example, ruled out a penalty system imposing a flat-rate fine for all offences, whatever their nature and gravity[109] or too weak a link between the person who has committed the infraction and the person who bears the effect of the penalty.[110]

As to the level of penalty, the principle of proportionality includes several elements. First, "measures imposing penalties must not ... exceed the limits of what is necessary in order to attain the objectives legitimately pursued by the legislation in question or be disproportionate to those aims."[111] In this regard, it seems obvious that a penalty that matches the financial benefits involved is required to attain the objective of the Directive as quoted above. The more difficult question is how far the sanction can extend beyond that and on what basis. Drawing the line between what is necessary for attaining the purpose and what is disproportionate

[108] See also Case C-501/14, EL-EM 2001, paras 45–49, where the deterrent effect of the enforcement measure (immobilisation of the vehicle) was questioned as it targeted the vehicle as such, and thereby the operating company, while it was only the driver who was been charged with committing the infringement.

[109] Joined Cases C–497/15 and C–498/15 *Euro-Team & Spirál-Gép* (EU:C:2017:229), para. 42.

[110] See note 130 below.

[111] *Ibid*., p. 58.

appears excessively difficult in an individual case, which favours prior establishment of the levels. Since the benefits are more or less the same irrespective of which of the SECA states the ship will use, establishment of those levels in the whole area, or at EU-level seems justified. Proportionality would also seem to require that the severity of the infringement (in terms of sulphur content in the fuel and in terms of duration) is taken into account when setting the penalty level.[112]

Second, the Court has considered that "when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".[113] As will be discussed below, there is a limited range of measures that could serve as alternatives to fines for penalizing violations of the air emission standards. Among those discussed in section 7 below, some seem too soft for being effective while others are too broad-brushed for creating the necessary link between the infringement and the penalty. Yet this aspect of proportionality might be relevant where other measures are introduced to complement sanctions in terms of punitive effect.

Finally, it follows from the EU's own Charter on Fundamental Rights that there must be proportionality between the level of the penalty and the offence in question, to exclude penalties which do not stand in any reasonable relation to the committed violation.[114] Air emissions may pose a particular challenge in this regard for judges and other authorities deciding on penalties, given that the individual offence may not be particularly significant in environmental or health terms. Rather, there are particularly strong arguments in this case to relate the penalty to the economic benefits of non-compliance, but such a preference does not follow automatically existing requirements, despite the acceptance of this method in principle in article 11(2) of the Sulphur Directive. The absence of harmful environmental or health impacts of the individual

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112 See note 108 above.

113 C–210/10 *Urbán*, (EU:C:2012:64), para. 24.

114 See also the general proportionality requirement in Article 49(3) of the Charter of Fundamental Rights of the European Union: "The severity of penalties must not be disproportionate to the criminal offence."

infringement of the air emissions requirements represent another argument in favour of closer *ex ante* harmonisation of the penalty levels at national or EU level.

In summary, existing international and EU laws do not entail significant restraints for states in the SECA region to develop a sufficiently stronger sanctions regime than what is currently in place. Rather to the contrary, while leaving important discretion for states to design their sanction system according to their own needs, the existing rules *require* effective and dissuasive penalties to support the objectives of the material rules. There is little to suggest that those requirements, however generic, are currently met when it comes to violations of the sulphur in fuel requirements in the Northern European SECA.

7 Other enforcement options

7.1 General

While fines is commonly regarded as the main sanction to be used for non-compliance with MARPOL Annex VI, a brief review of other available enforcement measures is justified. Other forms of criminal sanctions, such as imprisonment, confiscation of the ship etc. are generally ruled out by the nature of the air emission violation, but also through the requirement in UNCLOS article 230 that "monetary penalties only may be imposed" with respect to pollution violations by foreign ships (the only exception being pollution in internal waters and 'wilful and serious' pollution in the territorial sea[115]). It appears from the negotiation history of the article that its main purpose is to avoid the use of prison sentences, hence leaving the door open for other types of (administrative)

[115] Section 4.6 above.

enforcement measures.[116] In view of this, certain measures that could supplement or replace the penalties are briefly explored below.

7.2 PSC detention

The principal remedy applied to non-complying ships under PSC is detention. A detention targets the ship as such, without a need for singling out individual persons behind the violation, and affects those who are operating the ship at the time of the infraction. It is a relatively simple administrative measure which is highly coordinated at EU-level[117] and could hence be attractive for enforcing infringements of the MARPOL Annex VI requirements. This is not least so as failure to comply with the sulphur in fuel requirements of MARPOL Annex VI is specifically clarified as being a detainable deficiency in the Northern European SECA.[118] Detention is a very effective measure thanks to the important consequences it entails for the ship's operator. Apart from the time loss involved, which in itself is very costly, detentions may involve a wide range of other financial repercussions, for example in terms of trade interruptions, claims for damages by contractual partners, implications for insurance (hull & machinery and P&I Club) cover, class conditions and negative PR from the publicity that a detention entails.[119]

However, even if a detention under PSC is an effective method for bringing ships into compliance, and hence to prevent damage from occurring in the future, it is of limited use as a sanction for past infractions. The design of the measure is based on the premise that the deficiencies

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116 See UNCLOS Commentary Vol. IV, pp. 363–370. See also Ringbom note 45, p. 335 and Molenaar note 44, p. 237.

117 In Europe PSC is harmonised and coordinated through a specific EU Directive on the matter (Directive 2009/16 on port state control, OJ 2009 L 131/57), which is closely synchronized with the Paris MOU on port state control, which covers a broader range of parties, including the Baltic Sea ports of the Russian Federation (see www.parismou.org).

118 See at note 124 above.

119 See also the OECD Doc. OCDE/GD(96)4 (Competitive Advantages Obtained By Some Shipowners as a Result Of Non-Observance of Applicable International Rules and Standards), at pp. 20—21.

can be rectified during the detention and is thus better suited for infringements of a static nature that can be repaired, such as malfunctioning equipment. This starting point is also reflected in UNCLOS, where the right to prevent a ship from sailing is linked to the ship's seaworthiness and environmental risks.[120]

Some of UNCLOS' safeguards apply specifically to inspections and detentions:

1) Ships shall not be delayed more than is essential for the purpose of investigation under articles 218 and 220 (article 226(1)(a)).

2) Inspections of ships should be limited to an examination of documents. More detailed physical inspection should only be undertaken if an assessment of the documents is not sufficient or if there are 'clear grounds' for believing that the ship's condition or equipment does not correspond with what is stated in the documents (article 226(1)(a)).

3) Even if the investigations indicate violation, the ship shall be released promptly "subject to reasonable procedures such as bonding or other financial security" (article 226(1)(b)).

4) Release may be refused if the ship "would present an unreasonable threat of damage to the marine environment". If a ship is detained, the flag state shall be notified and the prompt release procedure under article 292 applies (article 226(1)(c)).[121]

To reinforce these safeguards, it is also provided that states shall be liable for damage or loss attributable to them arising from enforcement

[120] Articles 219 and 226(1)(c), which are the only ones that explicitly deal with (administrative) measures to prevent the ship from sailing, refer to violations of rules "relating to seaworthiness of vessels" and, more particularly, to cases where the release of the ship would present an (unreasonable) threat of damage to the marine environment. See also MARPOL article 5(2) and Molenaar note 29, pp. 189—190.

[121] This article applies "without prejudice to applicable international rules and standards relating to the seaworthiness of vessels", which indicates that further developments in IMO Conventions and port state control may affect the scope of this safeguard.

measures which are unlawful or exceed those reasonably required in the light of available information (article 232).

MARPOL Annex VI does not explicitly state that a ship can be detained on grounds of failing to comply with the air emissions standards. Instead, regulation 11 which deals with inspections and enforcement, highlights flag states' enforcement responsibilities. However, neither this nor any other provision of MARPOL is intended to affect the jurisdictional powers of states as laid down in UNCLOS and general international law.[122] Other provisions of the Annex include specific references to enforcement through PSC.[123] A port state's right to detain a ship follows from general international law, as outlined above, and it is established in practice that violation of MARPOL's fuel quality standards may be a ground for detention.[124] The guidelines issued by the Paris MOU on this matter are particularly clear on this point:

> The burning of non-compliant fuel in an ECA constitutes an unreasonable threat of harm to the environment and is of such a serious nature it may result in detention.[125]

However, it is uncertain how long the ship may be detained on this ground. Presumably, once the vessel has refuelled and can demonstrate it has sufficient compliant fuel to exit the SECA area, it no longer presents an "unreasonable threat" under UNCLOS article 226 and the Paris MOU guidelines, and should accordingly be released.[126] The detention of ships, as provided for in UNCLOS and subsequently elaborated in PSC

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122 See notes 19 and 20 above.

123 E.g. MARPOL Annex VI, regulations 10 and 18(7) and (10).

124 See e.g. the 2009 IMO Guidelines for Port State Control under the Revised MARPOL Annex VI (IMO Resolution MEPC.181(59)), which lists "non-compliance with the relevant requirements while operating within an Emission Control Area for SOx" among the detainable deficiencies (para. 2.3.2.5).

125 Paris MOU Guidelines on Application of MARPOL Annex VI regulation 18 in an Emission Control Area (ECA), available at https://www.parismou.org/sites/default/files/Guidelines%20on%20fuel%20availability.pdf. Similarly, the EU guidance on inspection referred to in note 23 above.

126 UNCLOS article 226(1), MARPOL article 7.

practice, is hence an essentially preventive tool, which is not designed for penalizing violations of an operational nature.[127]

7.3 Other forms of detentions

The detention of ships is not confined to PSC. It is perfectly possible for a port state to limit a ship's right to leave the port, even outside matters that are regulated in PSC. This follows from general international law, i.e. the port state's sovereignty over ships that are voluntary present in their ports, but is also specifically foreseen in UNCLOS. Article 226(1)(b), which deals with violations of applicable rules and standards more generally than those referred to in the previous section, implicitly recognises the possibility of detaining non-complying ships, but provides that the ship shall be promptly released "subject to reasonable procedures, such as bonding or other appropriate financial security". This article, together with article 220(1), which provides for the institution of proceedings in relation to ships which have violated (national and international) rules and standards adopted for the prevention, reduction or control of ship-source pollution in the port state's coastal waters, leaves the door open for detentions of a more punitive or compensatory nature, but provides certain additional safeguards to ensure that ships are not prevented from sailing once a reasonable amount of security has been posted by the flag State.[128]

In practice, various types of pre-departure conditions which are not PSC detentions have been implemented by the EU in a number of different circumstances, also with respect to requirement that are of regional origin and scope. Examples include prohibiting a ship from leaving the port

[127] MARPOL Annex VI regulation 10 includes specific provisions on port state control on violation of operational requirements, requiring the port state to "take such steps as will ensure that the ship shall not sail until the situation has been brought to order in accordance with the requirements of this Annex."

[128] Molenaar, note 29, at p. 462, notes that nothing in Article 226 prevents the two forms of detention being applied concurrently.

until it has fulfilled its waste delivery obligations,[129] or rested its crew.[130] Such measures do not amount to a detention of the ship in the meaning of the PSC Directive, although the practical consequences may be largely similar. Yet those measures do not trigger the transparency sanctions that are associated with detentions in article 26 of the PSC Directive nor do they affect the inspection priorities or count as a detention for the purposes of banning ships from EU ports under article 16.

If this type of 'non-PSC detention' were to be applied with respect to sulphur in fuel requirements, there is a need for a specified point in time by which the ship should be released. Since the main form of sanction will be a fine, this juncture should presumably be the payment of the fine.[131] However, detaining a ship until a fine has been paid would involve significantly longer time period than the examples above and therefore give rise to strains with respect to the obligation of states not to cause undue delay to ships. Only establishing *whether* a violation has taken place will normally take several days, to be added by the time needed for the procedures to impose the penalty.

7.4 Conditioning departure on provision of financial security

To avoid such strains between the need for time for proper enforcement procedures and the obligation to avoid undue delays, UNCLOS provides a solution under which the ship is allowed to sail subject to presenting appropriate financial security. In the words of article 226(1)(b), "if the

[129] Directive 2000/59 on port reception facilities for ship-generated waste and cargo residues, OJ 2000 L332/81, articles 7(2) and 11(2)(d).

[130] Directive 1999/95 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports OJ 2000 L 14/29, article 5.

[131] See also Case C-501/14, *EL-EM 2001*, as referred to in note 107. While finding in para. 45 that immobilisation of a vehicle as a precautionary measure, "is, in principle, appropriate and effective to achieve the objectives ..., the immobilisation of a vehicle belonging to a transport undertaking which has not been found liable in administrative proceedings goes beyond what is necessary to achieve those objectives." The case suggests that this type of detention is easier to justify under EU law in cases where the fine has been imposed on the ship operator rather than on individual crew members.

investigation indicates a violation of applicable laws and regulations, …. release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security." On this basis, the ship could be detained until the fine has been paid *or* an appropriate financial security for the fine has been issued.

The quoted wording suggests that the fine need not have been issued once the security is required. It suffices that the investigation *indicates* a violation. Still, a certain swiftness in the procedure to establish the fine is required for this enforcement method to work, which probably makes it more suitable for administrative fines than criminal ones.

The general considerations of reasonableness discussed in section 4.5 apply to this kind of detentions as well, as do the general safeguards of UNCLOS Part XII. Port states may also face liability for measures which are unlawful or "exceed those reasonably required in the light of available information" under UNCLOS article 232 and MARPOL article 7(2).

In addition to the other safeguards of UNCLOS Part XII, detentions on this basis are subject to the prompt release procedure under UNCLOS article 292. In view of this there is already some practice with regard to how the reasonableness of the security has been assessed by the International Tribunal for the Law of the Sea, which is interesting to study even if it is not comprehensive and has not dealt with penalties for violation of MARPOL discharge or emission standards as of yet.

In its practice comprising four cases, the Tribunal has elaborated four considerations for assessing the reasonableness of the bond or security required by the port state: 1) the gravity of the offence; 2) the penalties imposed or imposable under the laws of the detaining state; 3) the value of the detained vessel and cargo; and 4) the amount and form of the bond imposed by the detaining state.[132] The case law on these considerations has mostly concerned fishing vessels and is far from conclusive, but with regard to the second consideration it appears that calculating the

[132] See in particular *Camouco* (ITLOS Case No. 5, 2000), paragraph 67. The Tribunal has subsequently emphasized that this is not an exhaustive list and that (see *Monte Confurco*, ITLOS Case No 6 (2000), para 76 and *Volga*, ITLOS Case No. 11 (2002), para 64.

amount of the bond on the basis of the maximum imposable penalty is acceptable.[133] Whether the bond may cover purely punitive or deterrent elements of penalties has only been addressed in a couple of dissenting opinions to date.[134]

Neither MARPOL nor EU law specifically provide for enforcement based on detention, subject to provision of financial security, but neither rule them out. Such mechanisms do exist at national level, for both criminal and administrative penalties, and some of them are applicable to infringements of the air emissions standards. A pertinent example[135] is Norway's Ship Safety and Security Act, which allows authorities to "prohibit the ship departure from a port, order it to call at a port or stipulate other necessary measures until the ... fine is paid or sufficient security for the amount has been provided".[136] The measure covers both administrative and criminal fines by means of identical provisions, with the difference that the request in relation to criminal fines is to be made by the court, while in administrative procedures the prohibition will be ordered by the 'supervisory authority'.

The Norwegian example is also interesting as it permits the security to be required with respect to fines that have already been issued, but also

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133 See e.g. the *Camouco* case referred to in the previous note.

134 The dissenting opinion of Judge Anderson in the *Monte Confurco* Case, quoted above in note 93, supports the inclusion of deterrent elements. Conversely, Judge Ndiaye considered in a declaration in the same case that the bond should not take on a punitive or deterrent character. The (unconvincing) reason given was that "[o] therwise, the challenging of the amount of the bond would turn the Tribunal into a forum for appealing against the decisions of national authorities, which it is not."

135 See also the Finnish 2009 Act, where detention for the purpose of obtaining financial security is specifically authorised for implementing the oil pollution fee (chapter 3 subsection 6(2)), even with respect to suspected ships in that are merely transiting through the Finnish territorial sea and EEZ. In subsection 3 it is provided that the maximum duration of the detention is 14 days. Article 17 of the Belgian law referred to in note 73 also includes right for the authorities to detain a ship until a financial security that covers the entire fine has been issued. In this case there is no specific time limit.

136 Ship Safety and Security Act, sections 57(2) and 70(1). The Belgian law referred to in note 73 above similarly allows the authorities to detain a ship in case of serious suspicion ("présomptions sérieuses") of an infraction (article 17).

extends to cases of where they "are expected to be imposed".[137] The more precise level of expectation required is not specified in the preparatory documents, but it has been considered that a greater likelihood than not may suffice.[138] It is finally notable that the Norwegian detention measures may be applied even if the fine and related security only were imposed on the master or other persons working on board. In practice, the Norwegian guarantees are routinely required for foreign companies and the system has reportedly worked well in the sense that the fines have so far been paid by companies without a need use the guarantee.[139]

7.5 Refusing port entry

The measures discussed above have addressed enforcement measures that may be imposed on a ship which is present in the port, in the form of conditions that must be fulfilled for it to continue its voyage. In order to strengthen the enforcement regime further, those measures have sometimes been coupled with a refusal of (future) access to ports by ships which fail to comply with the requirements.

UNCLOS includes no provision on this enforcement option and the matter is accordingly governed by general international law, as discussed in section 4.5 above. Certain more recent IMO conventions have occasionally included references to denial of access as a means of enforcement,[140] but this is not the case with the main body of MARPOL or its Annex VI.[141]

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137 *Ibid*.

138 Pettersen & Bull, note 90, p. 874.

139 Personal communication with K.B. Sørensen, Senior Adviser at the Norwgian Shipping Directorate, April 2017.

140 See e.g. article 11(3) of the 2001 International Convention on the Control of Harmful Anti-fouling Systems on Ships; International Convention for the Safety of Life at Sea (SOLAS), Chapter XI-2 ('Special Measures to Enhance Maritime Security'), regulations 9(1)(3) and 9(2)(5). See also Article 4(1)(b) of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

141 But see MARPOL Annex I regulation 21(8)(2) (adopted in 2003): "Subject to the provisions of international law, a Party to the present Convention shall be entitled to deny entry of oil tankers operating in accordance with the provisions of paragraph 5 or 6 of this regulation into the ports or offshore terminals under its jurisdiction ...

Rather, this is a development in state practice that has been driven at regional level, notably by the EU (largely followed by the Paris MOU). While controversial in the beginning, this type of 'banning' of ships has become a key feature of the enforcement of the EU's maritime safety policy.[142]

Under current rules it is possible to ban all classes of ships, that have been subject to repeated detentions a minimum period for a ban (3, 12 or 24 months) is applied, differently depending on the performance of its flag state and certain other criteria, together with the introduction of a permanent ban in the case of repeated bans.[143] In the time-limited bans, the lifting of the access refusal is linked to compliance with a number of safety conditions, some of which extend beyond the matters that originally gave rise to the refusal of access.

This type of measure is obviously more powerful than a detention, but also more intrusive for ships and their owners.[144] In addition, refusal of access on this basis considerably magnifies the consequences of individual detentions. Through the close linkage of the refusal of access to the number of (but not necessarily the reasons for) detentions, the effects of a detention are extended well beyond the individual port call and are very closely linked to the ship's ability to continue trading in the whole region, further increasing the sanction's punitive character. In quantitative terms, the change of policy represents an increase from only a few banned ships in the first years following the introduction of the measure to some 80 ships at present.[145]

Refusal of access of ships has also been used as a mechanisms outside PSC. In EU Regulation 2015/757 on the monitoring, reporting and veri-

except when this is necessary for the purpose of securing the safety of a ship or saving life at sea".

142 See Ringbom, note 45, pp. 310–317.

143 PSC Directive, article 16, annex VIII.

144 As is noted by the Commission, in its Communication COM(2005), 588, p. 8, "[r]efusal of access is a very effective dissuasive tool in the campaign against substandard vessels."

145 See the list of banned ships at https://www.parismou.org/detentions-banning/current-bannings.

fication of carbon dioxide emissions from maritime transport,[146] which establishes obligations to monitoring and report CO_2 emissions from ships for all ships above a certain size bound for EU ports. Under article 20(3) of the Regulation ships that have failed to comply with the monitoring and reporting requirements for two or more consecutive reporting periods "where other enforcement measures have failed to ensure compliance", the port state may issue an 'expulsion order', as a result of which "every Member State shall refuse entry of the ship concerned into any of its ports until the company fulfils its monitoring and reporting obligations".

Prohibiting the access of ships to all ports of the region no doubts meets the requirements of dissuasiveness and effectiveness and may appear attractive as it can be implemented even without entering the complexities related to sanctions as discussed above. Indeed, even if banning of ships is among the harshest enforcement measures available, it is in many respects easier to justify from a legal point of view than the imposition of sanctions. By only targeting the access of ships to ports, the measure has its legal foundation in the absence of such a right under international law.[147] The absence of a right of ships to access foreign ports, which is not at dispute, *a fortiori* implies rights for the port state to place conditions on such access. By only addressing ships that are not present in the territory, the measure bypasses a number of safeguards which have been included into UNCLOS for securing the interests of ship operators.

Yet the use of banning as a tool for enforcing air emission violations may face issues regarding proportionality. Like the 'naming and shaming', its suitability may be questioned as it targets the individual ship for an (unspecified?) period of time without regard to whether the parties behind the original infringements are still involved. Moreover, in the absence of static matters that can be repaired for the ban to be lifted,[148] it is unclear how the ban could be motivated in preventive terms and

146 OJ 2015 L123/55.

147 See at note 41 above.

148 The procedure for lifting the ban is outlined in Annex VIII of the PSC Directive and includes in para. 3 evidence "showing that the ship fully conforms to the applicable provisions of the Conventions".

how the conditions for lifting the ban could be formulated in a way that establishes a link to the original infringement. The measure may therefore seem excessively imprecise for its purpose.

7.6 Conclusion

The review of potential alternatives to sanctions for enforcing the sulphur in fuel requirements indicates that there is no obvious alternative to monetary penalties. None of the measures addressed above is as precise as a fine and none of them is as open to accommodating the circumstances of the individual case.

All alternatives reviewed include shortcomings in terms of being either too ineffective for constituting a genuine deterrent or disproportionately punitive. Moreover, all alternatives represent broad-brushed measures that affect the whole range of players involved in the operation of the ship, for an extended but unspecified period of time, rather than only the one party responsible for the infringement at the time.

Non-legal measures such as flag state notification or 'naming and shaming' of non-complying ships are unlikely to meet the requirements of dissuasiveness and effectiveness. PSC detentions, in turn, are not suitable once the ship has refuelled. Prohibiting the access of, or 'banning', ships from ports in the state or region is a very powerful measure that avoids several of the complexities linked to sanctions, but is imprecise and raises questions of proportionality.

Yet, even if they may not be appropriate as an *alternative* to sanctions, such measures, which could well be applied cumulatively, may nevertheless provide a useful complement to sanctions which fail to meet the required standards of effectiveness, dissuasiveness and proportionality.[149] At least in an interim period, such alternatives offer a reinforcement of

[149] As was noted in note 130 above, complementing sanctions with measures of an administrative nature has been accepted by the Court of Justice of the EU as being "in principle, appropriate and effective" to achieve the objectives of the underlying regulation. However, such measures must not go beyond what is necessary to achieve those objectives.

the sanction regime which is procedurally light and easy to implement in practice.

In the longer run, the option of linking the departure of the ship to provision of a financial security for a potential fine would seem to be the most promising option, irrespective of the nature of the underlying sanction. This, however, requires that at least the initial procedure for imposing the sanctions is reasonably swift.

8 Concluding remarks

Enforcement of the air emission standards

A number of elements distinguish air emission violations from other forms of pollution. Firstly, detecting and establishing a violation of the air emission standards differs from other types of discharges. A ship that violates the SECA sulphur in fuel requirements is unlikely to be caught 'red-handed' in a sense that merely visual observations or photographs would suffice to detect the violation. Instead, more sophisticated technical methods are needed. Those methods all entail their own weaknesses and they all place significant strains on governments' resources, but are insufficient for verifying the violation. For verification, more comprehensive investigations, involving both on-board inspections and subsequent shore-based analyses are usually required. Moreover, since the illegal air pollution is typically continuous in nature in that it takes place over a period of time, rather than as an instant event, proof of violation at a given moment does not necessarily say much about the duration of the violation.

Secondly, proving the subjective element of the violation is generally quite demanding. In criminal proceedings in particular, which still represent the main form of sanctions in the SECA states, it has to be shown that the violation is caused intentionally or resulting from (serious) negligence on behalf of the liable person. Even identifying the person

responsible for the violation can be challenging, let alone to prove their negligence in view of the common availability of documentary evidence that compliant fuel has been purchased in good faith etc. Administrative penalties normally provide for more flexibility in this respect, but they are not widely in use for air emission violations and, even where applied, may face issues in relation to dissuasiveness.

Thirdly, in view of the large financial gains involved in non-compliance with the air emission s standards, the sanctions imposed on violations call for monetary penalties of a significant level in order to be effective and dissuasive, as required by both MARPOL and the Sulphur Directive. Yet the level of the penalty may be held down by the circumstance that air emissions represent environmental and health hazards at aggregated level rather than in the individual instance. Common principles for addressing the size of the penalty for environmental infractions, based on the environmental harm or the level of danger for humans or the environment, are therefore not suitable for this kind of violations. The absence of significant environmental damage in the individual case also means that other liability mechanisms, such as civil liability, is not available for use as a complementary deterrent in the case of air emissions. To meet their objectives, sanctions should therefore be linked to the economic benefits of non-compliance, which suggests that liable persons should be the corporations in charge of the decisions on fuel usage rather than crew members.

Such differences place special demands on the legal mechanisms for enforcing the rules. As of now, however, most Northern European SECA states have not introduced separate enforcement mechanisms to deal with violations of the air emission standards. They commonly rely on the 'regular' MARPOL enforcement procedures for dealing with these matters which, in turn, is reflected in the relative absence of successful application of penalties in practice.

If the enforcement fails to generate the required dissuasion, other efforts to promote compliance with the requirements will also be fruitless. Over time this risks to weaken implementation, which would not only undermine the international and EU fuel quality rules, but would also

be at odds with their requirements that non-compliance shall be met by effective and dissuasive sanctions. Apart from such legal considerations, incomplete application of the rules would also result in important competitive disadvantages for the operators who comply with the rules.

Sanctions

Monetary penalties probably represent the most appropriate enforcement measure for targeting the most relevant persons involved in the violation and taking the individual circumstances into account in each case. It is also specifically mandated in UNCLOS article 230.

There may not be a single ideal type of penalties that fits the legal systems of all Northern European SECA states. Already the very limited number of national laws that have been referred to in this article illustrate that several alternative solutions apply regarding all key aspects of the sanction. The most effective format of sanctions, in terms of successful application, appears to be the administrative penalties, acting as a complement to criminal penalties. In many states, however, the level of administrative penalties is too low to be effective in the present context.

In order to ensure the effectiveness, consistency and proportionality of sanctions, key principles should be established in advance, at national or regional level. It seems more important that such principles govern the main features of the sanctions, in terms of liable persons, proof, culpability thresholds and the mechanisms for calculating the penalty, than specifying their formal format. A key to successful enforcement of sanctions is that the process operates with a certain swiftness, which allows other measures to be taken to support the effective enforcement of the sanction. Swiftness, in turn, calls for simplified mechanisms for identifying the liable person and demonstrating the required level of negligence, as well as a pre-made scheme for the calculation of the penalty. Harmonisation at regional – or EU – level is supported by consistency arguments and by the fact that the economic benefit of non-compliance for ship operators does not differ from on port states to another. Pre-established principles for calculating the level of penalties would

also strengthen the argument that the sanctions, which will necessarily be sizable, are fairly calculated and proportionate with respect to the offence in question.

International and EU law do not stand in the way for more powerful sanctions. The jurisdictional rules provide certain safeguards to protect the interests of ships, notably by limiting sanctions to monetary penalties and by providing for a prompt release of ships that are held back during the investigations. In addition, the UNCLOS safeguards provide for a right of flag state pre-emption in the proceedings for violations that have been committed beyond the territorial sea of the state instituting the proceedings. Apart from such express limitations, it is clear that port states, through the principle of territorial sovereignty and the status of internal waters, have an in principle unlimited jurisdiction over foreign vessels, in terms of prescription as well as enforcement. This position is further reinforced by the absence of a right for commercial ships to access foreign ports in general international law, which *a fortiori* implies broad rights for port states to place conditions for access. UNCLOS is relatively silent on the balancing of the interests involved in the exercise of port state jurisdiction and apart from some generic rules on the prohibition of discrimination or abuse of rights, essentially leaves the matter to more general principles of international law that are not very helpful for establishing the limits for how onerous the penalties can be.

The relevant technical rules purposely leave significant discretion to states to adopt their own sanction system as they see most appropriate for the purpose. Yet they require that sanctions be effective, proportionate and sufficiently severe to discourage violations. Neither MARPOL nor the Directive, or subsequent guidance documents to support their implementation, offer much regulatory advice on the design of the penalties, but certain principles can nevertheless be inferred from the requirements of effectiveness, dissuasiveness and proportionality.

Effectiveness and dissuasiveness are closely related. They both imply that it should be the economic benefit of the infringement, rather than its effect on the port state or the environment, that should guide the size of the penalty. This in turn suggests that the target of the sanctions should

be the corporations who profit from the infringement. A high penalty is called for by the significant economic gains of non-compliance and supported by the absence of other mechanisms to deterrence, such as civil liability. Linking the penalty to the economic benefits also suggests that the size of the penalty should be linked to the severity of the violation, in geographical terms as well as in terms of actual sulphur content. Purely matching the financial gain would not amount to deterrence and the state has a large discretion to exceed this. It may also be noted that even if the obligation to comply with the air emission requirements only extended to the coastal waters of the port state, as is the requirement under the Sulphur Directive, a port state may still impose sanctions on non-complying ships in a manner that takes into account the ship's operations (and financial benefits) beyond those waters. The basis for calculating the economic benefit of the violation is, in other words, not limited to the area in which the obligation applies.

The limits for how onerous the sanctions can be will mainly placed by the requirement of proportionality, which features both in general international law and, in a somewhat more elaborated form, in EU law. This requirement entails several elements, but in essence boils down to the principle that enforcement should not exceed what is necessary to meet the objectives of the underlying measure. While the threshold of what is necessary to meet the objectives of the sulphur requirements, as was noted above, is quite high, proportionality suggests, *inter alia,* that the individual circumstances of the case should be taken into account. A flat fee sanction, which is imposed independently of severity, duration or level of negligence is, for example, unlikely to satisfy the proportionality requirement.

Other enforcement measures

Apart from sanctions, international law offers certain other mechanisms for port states to enforce the relevant rules to complement the sanctions. Some of these measures have been reviewed in section 7, concluding that the effectiveness of the sanctions could be improved relatively easily by

complementary measures of an administrative nature. A viable example, which is already in place in certain states in the region, is to condition the departure of the ship on payment of the fine or issuing a reasonable financial security. An even stronger measure would be to penalise confirmed violations by imposing limitations on the ship's right of (future) access to ports in the state or region as has been done in the case of (repeated) violations of safety standards under PSC.

The jurisdiction of the port state to impose sanctions or other enforcement measures on foreign ships is not unlimited, however. The main limitations of the enforcement measures are found in the general safeguards listed in UNCLOS Part XII section 7 and in certain key principles of general international law.

The eventual balancing of the reasonableness of a particular enforcement measure to deal with non-compliances with the sulphur in fuel requirements, it will be of relevance that the enforcement in this case is intimately linked to the effective application of international rules which are widely accepted in formal terms and in practice. There is accordingly no 'unilateralism' involved in the application of sizeable penalties or other enforcement measures for violations of the fuel quality standards. On the contrary, effective sanctions in this field aim at strengthening existing international regulation and arguably represent a necessary element to ensure their effectiveness. Enforcement measures in this area, even if adopted at regional level, do not add to the regulatory burden of flag states, even with regard to non-parties to MARPOL Annex VI,[150] nor do they question the authority of IMO or otherwise challenge the freedom of navigation as laid down in UNCLOS. Measures with important economic impact can easily be justified by the strong incentives for operators to defy the rules.

Here, too, the real test will presumably centre on the proportionality of the measure in question, in relation to whether the measures imposed

[150] See above at note 32. Note also that MARPOL article 5(4), like several other IMO conventions, provides that states, "shall apply the requirements of the present Convention as may be necessary to ensure that no more favourable treatment is given to [non-party] ships."

are proportional in relation to the objectives the rules seek to achieve and in relation to the infringement committed by the ship, and on the related question as to whether the measure might constitutes an abuse of right under UNCLOS article 300. Proportionality considerations could very well rule out measures that are very broad-brushed in that they affect a wide range of persons, including persons that are not involved in the infringement. In the availability of a more targeted and potentially very effective measure in the form of fines (if necessary coupled with detentions and financial security requirements), it is hence possible that a measure like the banning of the ship from the region's ports might overstep the limits of proportionality.

To date there is no known international or EU case law which would help to indicate where the borders of reasonableness might lie for air emission violations. Even national cases are very few, they have not so far addressed blatant cases of non-compliance and have remained relatively modest in size. In view of the wide variety of enforcement measures and sanctions that currently apply in different states, it is likely that the outcome of such judgments, too, will diverge within the Northern European SECA. What appears entirely clear, however, is that individual states in the region and the EU have considerable scope for implementing stronger enforcement measures to improve the effectiveness of the sulphur in fuel requirements than what they have done to date. A number of considerations highlighted in this article would favour the elaboration of common principles to this affect at EU-level.

EEA – a "distinct legal order of its own"?

By Finn Arnesen,
Professor, Center for European Law,
Scandinavian Institute of Maritime Law,
University of Oslo

Contents

Finn Arnesen, Professor, Center for European Law, Scandinavian Institute of Maritime Law, University of Oslo

1 Introduction

The development of European cooperation, from the EURATOM treaty of the early 1950s to today's European Union, may be characterised as an evolution from a co-operation between European states towards a federation of European states; already labelled by the European Court of Justice (ECJ) in 1963 as a "new order of international law" (in case 26/61, Van Gend en Loos).

The establishment of the European Communities, the enlargement from the original six to a community of twelve, and in particular the single market, established by the Single European Act of 1986, together necessitated a closer link both between European states who were not part of the (then) European Communities, as well as between those states and the European Communities. An early unilateral step in this direction was Norwegian Prime Minister Brundtland's letter to the Norwegian ministries in 1987, requiring that proposals for new legislation should consider relevant community law, and that departures from community law should be explained and justified. The dissolution of the Soviet Union, the fall of the Iron Curtain and the end of the Cold War provided a window of opportunity for the members of the European Free Trade Association (EFTA)[1] to link themselves to the development of the European Communities. The Agreement on the European Economic Area (the EEA Agreement) is one of these links,[2] or gateways, and constitutes a development from free trade between markets, to integration of markets.[3]

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1 EFTA was founded in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Finland joined in 1961, Iceland in 1970 and Liechtenstein in 1991. In 1973, the United Kingdom and Denmark left EFTA to join the EC. They were followed by Portugal in 1986 and by Austria, Finland and Sweden in 1995. Today the EFTA Member States are Iceland, Liechtenstein, Norway and Switzerland.

2 Oporto, 2nd May 1992.

3 See Peter-Christian Müller-Graff, EEA-Agreement and EC Law, in Peter-Christian Müller-Graff/Erling Selvig eds., The European Economic Area. Deutsch-Norwegisches Forum des Rechts, Band 1, page 17 et seq.

The EEA Agreement was negotiated and signed more or less in parallel with the Treaty on European Union (TEU).

A draft treaty was presented in 1991, and the treaty on European Union was signed in February 1992. The Treaty entered into force in November 1993. The negotiations on what was to be the EEA Agreement were opened in June 1990, and completed in April 1992. The EEA Agreement was signed in May 1992, and the agreement entered into force in January 1994.[4]

One of the features of the TEU was its three-pillar structure. The European Communities constituted one of these pillars. The substantive provisions of the EEA Agreement mirror provisions in this first pillar. The two other pillars – the Common Foreign and Security Policy, and Justice and Home Affairs – were not reflected in the EEA Agreement.

The institutional setup of the EEA Agreement reflects this structure. Since the completion of the EEA Agreement, the treaties constituting the European Communities have been changed a number of times, and from a EEA perspective there are two changes in particular that are worth reflecting on: the increase in the European Parliament's legislative role, and the removal of the three-pillar structure.[5] The main part of the EEA Agreement, however, remains unchanged. And because nothing – from the perspective of the EEA Agreement – has changed, it could be argued that a lot of things have.[6]

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[4] As for the implications of this for the interpretation of the EEA Agreement, see case E-1/01, Einarsson, para 43. Here the EFTA Court was invited to base its interpretation of art. 14 EEA on an analogous application of Article 6(3) TEU, now Article 4 (2) TEU. This provision stated that the Union respects the national identities of the Member States. The EFTA Court, however, rejected this invitation on the basis that the EEA Agreement contains no corresponding provision, and as the Treaty on European Union was negotiated before the conclusion of the EEA Agreement, it had to be assumed that this discrepancy was intentional.

[5] The three-pillar structure was abolished by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, effective from 1st December 2009.

[6] For a discussion of the impact of these changes on the EEA, see Peter-Christian Müller-Graff, The Treaty of Amsterdam: Content and implications for EEA-EU Relations, in Peter-Christian Müller-Graff/Erling Selvig eds., EEA-EU Relations. Deutsch-Norwegisches Forum des Rechts, Band 2, pp. 11 et seq. See also the excellent treatise by Halvard Haukeland Fredriksen and Christian K. Franklin, Of Pragmatism

In case E-9/97 Sveinbjörnsdóttir, the EFTA Court paraphrased the ECJs findings in case 26/62, Van Gend en Loos, and found that the EEA Agreement contains "a distinct legal order of its own", different both from the legal order of the European Union and from what is usual for agreements under public international law.[7] The task of this paper is to elaborate upon the characteristics of this legal order.

The EFTA Court has not so far had the opportunity to elaborate upon the features that separate the legal order contained in the EEA Agreement from what is usual for agreements under public international law, but a number can nonetheless be discerned. First, the EEA Agreement presupposes that the EFTA/EEA States will establish an independent surveillance authority to monitor the implementation of the agreement in those EFTA states which are parties, as well as a court to settle disputes over the interpretation of the EEA Agreement, both between the EFTA states and between the EFTA states and the surveillance authority.[8] Thus, the EEA Agreement establishes a dual surveillance and dispute resolution regime, whereas the European Commission and the ECJ monitor the EU parties to the Agreement, and the EFTA Surveillance Authority (ESA) and the EFTA Court monitor the EFTA parties.

Second, the EEA Agreement establishes a legislative body, the EEA Joint Committee, consisting of representatives of the Contracting Parties.[9] It is not uncommon under international agreements to set up bodies with legislative or quasi-legislative powers. However, as we will see, there are certain features of the legislative powers of the EEA Joint Committee that are both rather unique and of relevance when discussing the *sui generis* character of the EEA legal order.

Another feature that the EEA legal order shares with most agreements under public international law, is that the effects of the EEA Agreement within the domestic law of the Contracting Parties are determined by

and Principles: The EEA Agreement 20 years on, [2015] Common Market Law Review 52, pp 629–684.

7 Case E-9/97, para. 59.

8 See Article 108 EEA.

9 See Article 93 EEA

domestic law. Hence, even though individuals and undertakings are given – as in EU law – rights and obligations that can be invoked before national courts, the possibility of invoking these rights and obligations is contingent upon other legal orders. Thus, provisions of EEA law have direct effect in the EU Member States by virtue of European Union law. Whether the same provisions have direct effect in the EEA/EFTA States depends on the legal orders of those states. The EEA Agreement does not in itself establish either direct applicability or direct effect.[10] The same goes for supremacy and State liability.

2 The Architecture of the EEA

2.1 The institutional structure

One distinctive feature of the EEA legal order is its institutional structure, facilitating a dual, and parallel, international supervision and control regime, with what we may call trajectories from the legal orders of the EEA Member States to the EEA legal order.

Article 109 EEA provides that the European Commission, acting in conformity with the EU treaties, shall monitor the fulfillment of the obligations under the EEA Agreement as far as the European Union and its member states are concerned, while the ESA shall monitor the EFTA states, fulfillment of their obligations.

If the European Commission considers a EU Member State to be in breach of its obligations under the EEA Agreement, that state may be brought before the ECJ under the infringement procedures provided for by Article 258 of the Treaty on the Functioning of the European

[10] In case C-431/11, UK v Council, the ECJ held that it follows from Article 7 b EEA that regulations made part of the EEA Agreement have direct applicability in the EEA/EFTA States. This is impossible to reconcile with the ECJ's views in Opinion 1/91 on the EEA Agreement, the wording of Article 7 and the case law of the EFTA court, both prior to and after the decision in case C-431/11. On this point, the judgment in case C-431/11 is therefore to be disregarded.

Union (TFEU). Likewise, where the ESA considers an EFTA State to be in breach of its obligations under the EEA Agreement, that state may be brought before the EFTA Court. The procedures are found in Article 31 of the EFTA Surveillance and Court Agreement (SCA), and mirror Article 258 TFEU.

We find the same dual approach with regard to the application of the competition rules concerning undertakings and the provisions on state aid.[11]

In the context of European Union law, the EEA Agreement is an association agreement under Article 217 TFEU. Thus, within the EU pillar of the EEA Agreement, EEA-related issues are dealt with through the procedures and mechanisms set up by the EU Treaties. In the EFTA pillar, treaties entered into between the EEA-EFTA States regulate the handling of EEA-related issues. The most important of these treaties is the SCA.[12] EEA-related issues are also handled unilaterally within each EEA-EFTA State, in a way which resembles how EU-related issues are discussed and handled within each EU member state. However, as we will see, there are crucial differences as to the impact these discussions may have on the shaping of decisions.

The EU and EFTA pillars meet in four joint bodies. The most important of these is the EEA Joint Committee, established by Article 92 EEA. The EEA Joint Committee, according to Article 98 EEA, has the power to amend the Annexes and a number of the protocols to the EEA Agreement, which entrusts it with the herculean task of providing the legal basis for continuing homogeneity between EU and EEA law, within the areas covered by the EEA Agreement. Thus, the EEA Joint Committee can, to a certain degree, be compared to the EU's Council, in that the EEA Joint Committee has legislative powers. However, as the amendment of protocols and annexes to the EEA Agreement follows a simplified treaty procedure, it is not a legislative power in its truest sense.

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[11] See Articles 55 to 58 EEA concerning competition rules applicable to undertakings, and Article 62 EEA concerning state aid.

[12] The other agreements being Agreement on a Standing Committee of the EFTA States and the Agreement on a Committee of Members of Parliaments of the EFTA States.

The EEA Joint Committee is also the forum for resolving disputes between the EU and one or more EFTA states, concerning the interpretation or application of the EEA Agreement.[13]

The other body worth mentioning in this connection is the EEA Council.[14] According to Article 89 EEA, it is responsible for providing the political impetus in the implementation of the EEA Agreement, and also for laying down the general guidelines for the EEA Joint Committee. Thus, the EEA Council may, to a certain extent, be compared to the European Council.

When analyzing the EEA legal order, we see a number of different elements, having their legal basis either in the EEA legal order, in the legal order of the EFTA States, in agreements between the EFTA States, or in the EU legal order. Thus, the institutional aspects of the EEA legal order make it something truly distinct. This impression is confirmed by the other elements in the EEA architecture discussed below.

2.2 Written law

The EEA legal order is based upon the main part of the EEA Agreement. Here we find provisions concerning the institutions, dispute resolution, decision-making procedures and a number of other issues necessary to make the EEA work. More important, when discussing the elements that make the EEA legal order distinct, is the fact that the substantive provisions of the main part of the EEA Agreement mirror the provisions on the same subjects in another international legal order: the EU legal order. This is a rare instance of an international agreement in which some of the parties, the EEA-EFTA States, subordinate themselves to provisions of the legal order of another party to the agreement – in this case the EU legal order.

This becomes all the more evident when we turn our attention to the legislative acts referred to in the annexes to the main part of the EEA

[13] See Article 111 EEA.

[14] According to Article 90 EEA, the EEA Council shall consist of members of the Council of the European Union, members of the European Commission and one member of each of the governments of the EFTA States.

Agreement. These acts are regulations, directives and other legislative acts adopted within the framework of the EU legal order. By including them in the EEA Agreement, they also become EEA law.

In the EU legal order, the treaty provisions are often referred to as primary law, and regulations and directives are referred to as secondary law. In the context of EU law, this makes sense as the decisions made by the EU institutions, as well as general legislative acts, are subject to legal review. However, as we shall see, this is not the case in the EEA legal order. Thus, and in spite of the EFTA Court's use of the term «primary» EEA law when referring to provisions found in the main part of the EEA Agreement,[15] the use of the distinction between primary and secondary EEA law is neither necessary nor helpful. Rather, it is potentially misleading, as it gives the impression that regulations and directives included in the EEA Agreement are given pursuant to that agreement, which is not the case.

2.3 Legislative mechanism

2.3.1 The EEA "legislator"

The aim of the EEA Agreement, according to Article 1 no. 1 EEA, is to create a homogeneous European Economic Area by promoting a continuous and balanced strengthening of trade and economic relations between the parties to the agreement, with equal conditions of competition, and respect for the same rules. Thus, a basic principle in the EEA Agreement is that it shall be dynamic, in the sense that it shall develop in step with changes in EU law that lie within the scope of the EEA Agreement, creating homogeneity between the law of the EU and that of the EEA, within the field of application of the EEA Agreement.

In order to facilitate homogeneity, the basic substantive provisions are placed in the main part of the EEA Agreement, and EU secondary legislation in the annexes. The EEA Joint Committee is vested with the power to amend both a number of the protocols to the EEA Agreement

[15] See to that effect, for instance case E-9/14, Otto Kaufmann AG.

and all of the annexes, in order to make new EU secondary legislation a part of the EEA Agreement. The decisions of the EEA Joint Committee are made by unanimity between the EU on the one side, and the EFTA States, speaking with one voice, on the other.[16] This power to amend parts of the Agreement may be considered a legislative power. Strictly legally speaking, however, this is not the case, since each amendment to the EEA Agreement is made by the parties acting by consent in the EEA Joint Committee. Thus, the procedure by which protocols and annexes to the EEA Agreement is amended is a simplified treaty-making procedure, not a legislative procedure in the truest sense.

The discretion of the EEA Joint Committee is quite limited, since proposals for new legislation to be included in the EEA Agreement have to be treated in a rather binary manner. Either the proposal has to be adopted, as they always have been until now, or it has to be rejected. Admittedly, minor adjustments may be made, but this does not alter the main point.

Keeping the backlog as short as possible may seem to be a task comparable to Hercules' assignment of cleaning the Augean stables. The backlog is currently considerable and causing some concern on the EU side. Still, the inclusion of secondary legislation in the EEA Agreement is normally uncontroversial.

As mentioned, the EEA Agreement is connected to the «community pillar» of the then EC. With the dismantling of the pillar structure, the inclusion of new policy areas and a shift towards legislation covering more than one of the old pillars, the issue of EEA relevance, i.e. whether a legislative act adopted by the EU also falls within the ambit of the EEA Agreement, has become more pressing. This gives rise to the issue of whether the decision to add a legislative act to the annexes to the EEA Agreement can be made the subject of legal review.

[16] Article 93 (2) EEA.

2.3.2 Assessment of the legality of acts adopted

The legislative acts included in the EEA Agreement are all acts already adopted by the European Union. As such, they may be made subject to legality scrutiny according to EU law. Where an extension of a piece of EU legislation to the EEA Agreement entails more than technical adjustments, the EU's stance in the EEA Joint Committee to such adjustments is established by a decision of the EU Council.[17] This decision can be challenged before the ECJ under Article 263 TFEU.[18]

Article 108 EEA requires the EFTA States to establish the EFTA Court, but does not require that court to have jurisdiction over decisions establishing the stance which EFTA States are to take in the EEA Joint Committee on proposed amendments to annexes and protocols to the EEA Agreement. Neither does the SCA give the EFTA Court jurisdiction over this issue, something that underlines the political aspect of the decision of the EEA-EFTA States in these matters.

As far as the decisions of the EEA Joint Committee are concerned, the EEA Agreement does not provide for legal scrutiny of whether the decisions made are within the limits of the EEA Agreement. One could argue that there is no need for such mechanisms, since unanimity is required in the EEA Joint Committee. It is, however, not difficult to envisage situations where judicial control could be desirable. The consequences of not amending an annex to the EEA Agreement may be quite serious. Article 102 (5) EEA provides that where a decision has not been taken on amending an annex to the Agreement, the affected part of that annex is to be regarded as provisionally suspended. On the face of it, this does not seem very burdensome. However, the European Commission has stated that

> "In order to effectively oppose any attempt by an EEA EFTA partner to incorporate EEA-relevant EU legislation in a selective

[17] See regulation (EC) 2894/94 concerning arrangements for implementing the Agreement of the European Economic Area, art. 1.

[18] Case C-431/11, United Kingdom of Great Britain and Northern Ireland v Council of the European Union may serve as an example.

> manner, the EU side should, evidently, ensure that the part of the Annex to be ultimately suspended would impact negatively on the partner's interests, rather than merely suspend parts of the Agreement that the contravening partner wishes to ignore."[19]

Thus, one can envisage a situation in which the EEA EFTA States accept EU legislation that falls outside the scope of the Agreement, out of fear of the consequences of refusal. Some would therefore welcome the possibility of legal scrutiny of that decision. Another potential issue is that a legislative act may encroach upon fundamental rights. The judgment in Digital Rights Ireland may serve as an example.[20]As the EEA legal order does not offer judicial control on the EEA level of these issues, they have to be dealt with either in the EU pillar or in the EFTA pillar.

Turning to the EFTA pillar, the Surveillance and Court Agreement gives the EFTA Court the power to review the legality of decisions adopted by the EFTA Surveillance Authority, but not those of the EEA Joint Committee. Despite this, the EFTA Court has found that it has jurisdiction, under the advisory opinion procedure, to give advisory opinions on the interpretation of provisions of the EEA Agreement concerning the functioning of the EEA Joint Committee.[21] The same must apply in relation to the ECJ. There is thus the possibility for legal review to establish that the EEA Joint Committee has acted ultra vires when adjusting a legislative act of EU law for the EEA Agreement.

The EFTA Court has found that:

> "the provisions of the EEA Agreement as well as procedural provisions of the Surveillance and Court Agreement are to be interpreted in the light of fundamental rights. The provisions of the ECHR and the judgments of the European Court of Human Rights are impor-

[19] Commission Staff Working Document, A review of the functioning of the European Economic Area, SWD(2012) 425 final, page 9.

[20] Joined cases C-293/12 and C-594/12, Digital Rights Ireland Ltd. Judgment 8. April 2014.

[21] Case E-6/01, CIBA.

> tant sources for determining the scope of these fundamental rights".[22]

Thus, if the issue in Digital Rights Ireland had been put before the EFTA Court under an Article 34 SCA procedure,[23] it is rather unlikely that the EFTA Court would have found that it lacked jurisdiction to determine whether a directive or regulation included in the EEA Agreement encroaches upon fundamental rights, for instance rights also protected by the European Convention on Human Rights. This could have been seen as a challenge to the monopoly of the ECJ to assess the validity of legislative acts of EU institutions. However, it could be argued that the EFTA Court in such a case would only be assessing the compatibility of that legislative act with EEA law, leaving it to the ECJ to do the same with regard to EU law. It would, however, be near to impossible for the ECJ to find that the act is in accordance with EU law, while at the same time incompatible with EEA law, as determined by the EFTA Court.

In Digital Rights Ireland, the ECJ found that directive 2006/24/EC, the Data Retention Directive, was invalid, since it interfered with the rights laid down in the Charter of Fundamental Rights of the European Union. That directive was of EEA-relevance, but due to Icelandic concerns it had not yet been incorporated into the EEA Agreement. However, if the directive had been incorporated into the EEA Agreement, this would have raised the question as to the EEA implications of the judgment. One could argue that a judgment from the ECJ, declaring invalid a legislative act incorporated into the EEA Agreement, also implies EEA invalidity. As both the EU and the EU Member States are bound by the EEA Agreement, it seems impossible to accept that a legislative act can be found invalid as a matter of EU law, but can at the same time be binding as a matter of EEA law. On the other hand, it could be argued that the decision of the EEA Joint Committee to adopt a legislative act of the EU, which later turns out to be invalid, must be assessed on the basis of EEA law.

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22 See case E-18/11, Irish Bank Resolution Corporation Ltd., paragraph 63,

23 Joined cases C-293/12 and C-594/12, Digital Rights Ireland Ltd.

Whichever view is correct, the relevant point is that the law within one of the pillars of the EEA may have repercussions for the EEA legal order.

Looking at the EEA legal order, we see that there are no mechanisms for judicial control of the actions of the EEA institutions on the EEA level. Judicial control is handled in the pillars, and only indirectly. We have also seen that this gives rise to questions seldom relevant to other legal orders, making the EEA legal order distinct in this respect.

2.4 Dispute resolution and legal clarification

2.4.1 Introduction

In its Opinion 1/91, the ECJ found that establishing a court system with a common EEA Court would pose a threat to the autonomy of the Community legal order that conflicted with the very foundations of the Community. In its Opinion 1/92, the Court found that the new system for settlement of disputes, with an EFTA Court with jurisdiction only within the framework of EFTA and with no personal or functional links with the ECJ, and an EEA Joint Committee to settle disputes brought before it by the European Union or an EFTA state, was compatible with the EC Treaty.

Thus, under the EEA Agreement, we have a system where two international courts with no personal or functional links between them – the ECJ and the EFTA Court – have jurisdiction over the same body of provisions – the EEA Agreement.

Courts settle disputes. Their power to do so is either embedded in the constitution, or in the instrument establishing the court. Dispute resolution in court is usually mandatory in the sense that, if sued, a party to the dispute subject to the jurisdiction of the court must accept that the court will settle that dispute. A final judgment is usually respected, and if not it can be executed through public authorities. Thus, one element giving a final judgment authority is the fact that it acts as an order to the parties in the dispute, which can be executed by utilizing the powers of other public authorities. The judgments of international courts and

tribunals cannot rely to the same extent on the powers of other bodies, in order to be respected. Thus, the procedure under Article 267 TFEU is considered one of the main explanations for the effectiveness of EU law, and the impact of ECJ rulings, on the domestic legal orders of the EU member states. As stated by Weiler:

> "When European Community Law is spoken through the mouths of the national judiciary it will also have the teeth that can be found in such a mouth and will usually enjoy whatever enforcement value that national law will have on that occasion".[24]

We find a preliminary ruling mechanism in the EEA Agreement, as well as in the SCA. The preliminary ruling mechanism in the EEA Agreement, found in Article 107 EEA, which makes it possible for courts in the EFTA States to ask the ECJ to decide upon questions of interpretation of provisions of the EEA Agreement identical in substance to provisions of EU law, has so far not been activated. However, under Article 34 SCA, courts in the EFTA states may request the EFTA Court to give advisory opinions on the interpretation of the EEA Agreement and the SCA.

2.4.2 The EU Pillar

The EEA Agreement is, in the EU pillar, part of the EU legal order. Issues pertaining to the interpretation and application of EEA law in the EU pillar are therefore treated in the same fora as (other) issues pertaining to the interpretation and application of EU law.

Thus, EFTA citizens and undertakings can invoke EEA law, as a part of the EU legal order, in cases pending before national authorities and courts in the European Union, and the preliminary ruling procedure according to Article 267 TFEU also applies to questions on the interpretation of the EEA Agreement, included legislative acts originating from the EU legal order in their EEA guise.

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[24] *J.H.H. Weiler*, Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration, (1993) 31 Journal of Common Market Studies page 417, at page 422.

2.4.3 The EFTA Pillar

The EFTA Court has, like the ECJ, the power to settle disputes over the interpretation of the EEA agreement, and to give advisory opinions on its interpretation. Reflecting the advisory nature of these opinions, the referring court may, or may not, follow the advice given by the EFTA Court. There are also no provisions in the EEA Agreement or the EFTA Court Agreement obliging courts in the EFTA States to request an advisory opinion.[25]

The principle of homogeneity embedded in the EEA Agreement provides that the provisions of that agreement shall be interpreted in line with the provisions of EU law which they mirror. However, as only the ECJ has the power to decide the interpretation of these EU law provisions, we have two international courts with parallel jurisdiction, one of which also has jurisdiction over the provisions mirrored in the EEA Agreement. It is quite clear that this may cause problems where the EFTA Court has to rule on a question upon which the ECJ has not yet ruled. Illustrative in this respect is the decision of the EFTA Court in joined cases E-9/07 and E-10/07 *L'Oréal*, where the court deviated from its decision in case E-2/97 *Maglite* in order to maintain homogeneity between EEA law and EU law. Here the EFTA Court found that the principle of homogeneity implies that unless there are compelling grounds for diverging interpretations, EEA law shall be interpreted in line with new case law of the ECJ on EU law, regardless of whether the EFTA Court has previously ruled on the question in its EEA law guise. Having two courts on the international level interpreting a common set of rules is definitely not twice as good as having one, but still better than having none.

The Norwegian Supreme Court stated in the first *Finanger* case that although advisory opinions of the EFTA Court shall be accorded great weight, the Norwegian Supreme Court has both the power and the obligation to independently assess whether, and to what extent, an

[25] There are suggestions, both in the case law of the EFTA Court and in legal writings, that they are nevertheless obliged to do so in certain situations, see case E-18/11, Irish Bank Resolution Corporation Ltd., at paragraph 64 and *Skuli Magnusson*, On the Authority of Advisory Opinions, Europarättslig Tidskrift 2010 page 528 et seq., respectively.

advisory opinion shall be followed.[26] This is in accord with the principle of homogeneity embedded in the EEA Agreement, and has a later parallel in the EFTA Court's decision in *L'Oréal*, where the EFTA Court found that EEA law shall be interpreted in line with new case law from the ECJ. However, the ruling in *Finanger* has wider implications, as it also opens the door to departures from EFTA Court decisions in other situations. This was clearly demonstrated in *STX*, where the Norwegian Supreme Court went far in suggesting that the EFTA Court's interpretation of directive 96/71/EC in case E-2/11, *STX,* was not in accord with pre-existing case law from the ECJ. This situation is quite different from the one in *L'Oréal*, and the Supreme Court seemed prepared to depart from the EFTA Court's opinion on the point.[27] The statements obiter dictum found in case E-3/12, *Jonsson*, may be seen as a response from the EFTA Court.[28] Another response is the ESA's decision to initiate proceedings against Norway, submitting that the law as established by the Norwegian Supreme Court in *STX* violates the EEA Agreement.[29]

The authority of an advisory opinion of the EFTA Court may again be brought into question as the so-called Jabbi-case makes its way through the Norwegian court system. In this case, upon request for an advisory opinion from Oslo district Court, the EFTA Court found that Article 7 of directive 2004/38/EC applies "by analogy" where an EEA national returns to his home State.[30] This finding is at odds with the wording of that provision and with consistent case law from the ECJ. This was acknowledged by the EFTA Court, but the court found that the considerations pertaining to substantial homogeneity – married to a EU citizen, Jabbi would have had a derived right to residence in his spouse's home country by virtue of Articles 20 and 21 TFEU – mandated the Court's interpretation.[31] One consequence of the Court's ruling is that where a

[26] Rt. 2005 page 1811, on page 1820.

[27] Rt. 2013 page 258, para 76 to 103.

[28] See case E-3/12, para 55 to 61.

[29] See ESA Decision 191/16/COL, 25th October 2016, Letter of formal notice to Norway concerning posting of workers.

[30] The case is at the time of writing – February 2017 – still pending.

[31] See case E-28/15, para 68 et seq.

third country national marries an EU citizen residing in an EFTA-EEA State, this third country national will have derived rights under directive 2004/38/EC, which the directive does not provide when applied in an EU-context. Hence, the authority of the ruling in this case may not only be called into question by Norwegian courts, but also by national courts within the EU and even by the ECJ.

In the context of European Union Law, the mechanism established by Article 267 TFEU provided for rulings pronouncing seminal principles such as primacy, direct effect and state liability. Not all of these principles were received with great enthusiasm by all national courts,[32] but the judicial dialogue which Article 267 TFEU facilitates has, over the years, honed these principles in a way that has allowed them to be accepted and applied by the courts of the Member States.[33] The key elements in this dialogue are the option, and in some cases duty, for Member State Courts to refer questions concerning the interpretation of EU Law to the ECJ, and the binding effect of the ECJ's ruling on the issue. Through its binding effect on the court requesting the ruling, a preliminary ruling of the ECJ also becomes an order backed by public authorities. These characteristics are not present in the advisory opinion procedure according to Article 34 SCA. Thus, in order for the EFTA Courts' rulings to derive authority from the national legal system, the national court must find it worthwhile to refer questions to the EFTA Court. This is in turn dependent on the degree of goodwill which the EFTA Court enjoys in the national courts of the EFTA States.[34] Finally, the EFTA court's ruling on the questions referred has to be convincing. This, again, will depend on the quality of the reasoning.

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[32] For an account of national responses to these principles, see *TC Hartley*, The Foundations of European Union Law, 7th ed., Oxford 2010 chapter 8.

[33] The development in the rationale for direct effect of directives from van Duyn to Ratti, Becker and Marshall, may serve as an example, as may the ECJ's «Solange-jurisprudence».

[34] As Mancini has emphasised, goodwill is also an important element in the mechanism established through Article 267 TFEU, cf. *G.F. Mancini*, The Constitutional Challenges Facing the European Court of Justice, in Democracy & Constitutionalism in the European Union. Collected Essays, Oxford Portland, Oregon 2000, page 17.

2.5 Effect within the legal order of the signatories

The EEA Agreement is an agreement under international law. There are no express provisions in the Agreement providing that the law flowing from the agreement shall have legal effects within the legal orders of the signatories, regardless of what those legal orders provide. On the contrary, Article 7 EEA presupposes that the regulations and directives included in the EEA Agreement may have to be transposed into domestic, law in order to take effect within the legal orders of the contracting parties. The preamble to the Agreement is also quite unequivocal when it states that the Agreement "does not restrict the decision-making autonomy or the treaty-making power of the Contracting Parties", and Protocol 35 to the Agreement has, as its starting point, that the EEA Agreement does not require any of the contracting parties to transfer legislative powers to any of the EEA Institutions.

The case law of the EFTA Court is also unambiguous on this point: EEA law has neither direct applicability, nor direct effect, by virtue of EEA law.[35] A dissonant note is however found in the ECJ's decision in case C-431/11, UK v Council, in which it held that regulations adopted by the EEA Joint Committee have, by virtue of EEA law, direct applicability within the legal orders of the EFTA States. This dissonance should be treated as exactly that: a dissonance. The EFTA Court has made clear that it does not share the view of the ECJ on this issue. Thus, the EFTA Court has found it necessary to make it absolutely clear that neither direct effect nor direct applicability are features of EEA law:

> "Under Article 7 EEA, the Contracting Parties are obliged to implement into their legal order all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. The Court points out that the lack of direct legal effect in Iceland of acts referred to in decisions from the EEA Joint Com-

[35] See to this effect case E-4/01, Karlsson, pargraph 28.

> mittee, makes timely implementation crucial for the proper functioning also in Iceland of the EEA Agreement."[36]

In its seminal advisory opinion in Sveinbjörnsdóttir,[37] the EFTA Court found that the EEA Agreement requires that an EEA State –whether an EU member state or an EFTA state – is obliged to provide compensation for loss and damage caused to individuals as a result of breaches of obligations under the EEA Agreement that are deemed sufficiently serious. The EFTA Court also held that this principle must be seen as an integral part of the main part of the EEA Agreement, and that "it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State liability".[38] We see that while the principle is maintained that the EEA Agreement has to be implemented into domestic law in order to take effect there, principles based on quite innovative interpretations of the agreement are held as having been implemented through the implementation of the Agreement in the domestic legal order, thus blurring the edges of the principle that obligations under the EEA Agreement only take effect in the domestic legal orders of the parties to the agreement subject to the provisions of those legal orders.

Still, the principle remains that it is a matter for the legal orders of the parties to the EEA Agreement to decide how EEA law is to take effect in those legal orders.

Treaties concluded by the European Union are, by virtue of Article 216(2) TFEU, binding upon the institutions of the Union and on its Member States. It is established case law that individuals may rely on provisions in such agreements, on the condition that those provisions must «appear as regards their content to be unconditional and sufficiently precise and their nature and broad logic must not preclude their being so relied on».[39] Thus, it is fair to assume that provisions of EEA law that

[36] Case E-11/14, ESA v Iceland, paragraph 17. Judgment 28. January 2015. See also the other judgments delivered that date.

[37] Case E-9/97, Sveinbjörnsdóttir.

[38] Case E-9/97, Sveinbjörnsdóttir, paragraph 63.

[39] Cited from case C-135/10, SCF, paragraph 43.

mirror provisions found in the TFEU or EU secondary legislation will have the same effect in the legal orders of the EU member states as have the legislative acts which they mirror.

Turning to the EFTA-pillar, the effect of EEA law in the legal orders of the EEA-EFTA states depends on those legal orders, i.e. Icelandic, Liechtenstein and Norwegian law respectively. Thus, in respect of the effect within the legal orders of the EEA states, we will have four doctrines: one with regard to the EU-pillar, and one for each of the EFTA states party to the EEA Agreement.

3 The EEA – a distinct legal order, but not of its own

I have tried do demonstrate that the EEA legal order, distinct as it may be, is not a legal order of its own in the sense that that it exists more or less independently of other legal orders. The raison d'etre of the EEA legal order is to reproduce and extend outcomes of another legal order – the EU legal order. Moreover, the effects of the EEA legal order are totally dependent on characteristics of the legal orders of the signatories to the agreement which constitutes it.

If the EEA legal order, distinct as it may be, is to be given any label, it should probably be that of a reflective community of law: reflective both because it reflects the provisions of another legal order, the EU legal order, and because its effect within the legal orders of the signatories is a reflection of those legal orders.

Thus, the EEA may be a distinct legal order, but it is not a legal order of its own.

Abolishing Cabotage: Regulatory Framework in Coastal and Cruise Shipping. The Case of Greece

By Jonela Kuro,
LLM student, Scandinavian Institute
of Maritime Law, University of Oslo

Contents

1 Introduction

Shipping has become the most international of all the world's great industries. The European Commission highlights the importance of maritime transport services for the economy of the European Union. The Athens Declaration of the EU Member States acknowledges that 75% of the EU imports and exports depend on maritime transport.[1] Also, the EU underlines the need of maintaining the EU State Aid regime to support EU competition with non-EU countries and recognises the importance of a stable innovation-friendly regulatory framework for the competitiveness of the EU fleet in the context of liberalised international maritime services[2].

In order to achieve the aforementioned objectives, the European Commision took imperative steps towards integrating the maritime governance. Although, innumerous efforts had been made for the liberalisation of maritime cabotage services, the adoption of the Cabotage Regulation was finally adopted in 1992[3]. The essential characteristic of maritime cabotage is to serve the purpose of transporting passengers or goods by sea, between two places in the territory of a single Member State[4].

In the case of Greece this reform, has not been easily approved and implemented. Traditionally, the Greek coastal shipping has been a tightly closed market. Based on "public service" character of coastal shipping, the Greek government, relatively early, have had under control various aspects of coastal services, such as licensing, price-setting and the development of specifications for the quality of service[5]. Greece was slow in introducing regulations that would liberalize the market and enforce the competition.

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1 http://ec.europa.eu/transport/sites/transport/files/modes/maritime/studies/doc/2015-sept-study-internat-eu-shipping-final.pdf

2 ibid

3 Rosa Greaves, "The Application of the EC Common Rules on Competition to Cabotage, incdluding Island Cabotage in Competition and Regulation in Shipping and Shipping Related Industries Martinus Nijhoff Publishers (Brill), (2009).

4 ibid

5 Maria B. Lekakou, "The Eternal Conundrum of Greek Coastal Shipping", Chapter 8.

Changes of the national institutional framework happened simply after a long period of negotiations, which results from the implementation of a European Union Regulation 3577/92, which is aimed at the abolition of all cabotage restrictions in all EU member states.

In this context, the purpose of this paper is first to give an overview of the system of inland maritime transport in Greece; and second, to assess the impacts in the Greek shipping due to the liberalization of the sector with focus on the coastal shipping and cruise.

2 The process before the liberalisation of the market

Shipping for Greece has always been an essential means of transportation. From the geographical point of view, coastal transport connects the mainland with the islands and from an economic and social perspective sea ferries services influence the population levels of the islands, provide opportunities for economic development, and enhance islanders' quality of life[6]. The particularities of Greece, which is characterised by an extensive coastline (14,854 km) and an insular complex which includes 3,500 minor and major islands representing 19% of the Greek territory and 14% of the Greek population, have determined the historical course of coastal shipping. This has become a complex network of mainland-to-island, island-to-island and mainland-to-mainland connections[7].

Traditionally, the Greek market for shipping services was characterised by state monopoly[8]. This policy had been maintained for decades and was justified on the grounds of the protectionism of the internal market[9].

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6 Maria B. Lekakou, "The Eternal Conundrum of Greek Coastal Shipping", Chapter 8.

7 ibid

8 Michael Joseph Romanos, "Shipping, the State and the Market, The evolving role of the European Union in international & Greek shipping politics/Case study on coastal shipping in the 1990s, London School of Economics, (2005).

9 Simantiraki Thanai, "Europeanization of shipping policy in Greece: Evaluating the impact on the policy network", National University of Athens.

The Greek government took measures in order to secure its position and dominate in the coastal shipping market and in the meantime to satisfy the interest of third parties.

The ship-owners, for example, were protected through the right of cabotage, the trade unions by means of complimentary labour regulations, the passengers and the islanders via the maintenance of prices[10]. The issues related to coastal shipping such as market entrance, the number of regular lines, passenger fees, obligation of public service contracts, the amount of ships operating in each line etc. were determined and regulated by the minister of shipping[11]. The key interventionist policy of the Ministry was based on the ground that it sought to achieve a range of objectives with the most imperative being the promotion of "social policy[12]". Furthermore, the protection of the interests of the Greek coastal workforce was achieved via the prohibition of utilising EU personnel or through determining the composition the crew providing accommodation services on board. This governmental system, which was developed in many economic sectors and dates back to the end of the civil war, gained legitimisation from the forces of the market[13].

These practices produced a market that functioned under oligopolistic conditions, while at times even presented tendencies of monopolistic exploitation. The most popular shipping companies had created their own monopoly in concrete lines and none of them had any reasons to demonstrate elements of competition: ANEK and MINOAN LINES in Crete, DANE in Dodecanese, NEL in Mitiliny, and STRINTZIS Lines in Cephalonia.

Nevertheless, due to the European Commission's objective of eliminating restrictions on the freedom to provide maritime transport services within Member States, which is aimed at the economic growth and improving quality of coastal shipping service, a new chapter commenced

10 ibid

11 Psaraftis, H. N. "Coastal shipping and cabotage: Essays and analysis on the problems of the sector and their resolution", Evgenidou Publications, Athens 2006 [In Greek].

12 Economic bulletin Alpha Bank

13 Kazakos P., "Between State and Market, The Economy and economic policy in post-war Greece 1944–2000", Pataki editions, Athens 2001[In Greek]

for the Greek coastal shipping in 1992 with the adoption of Regulation No 3577/92/EEC. This initiative has affected the national shipping marketing of all the Member States, due to the obligation of national states to open the local markets to competition.

3 The effects of liberalization on coastal shipping and cruise

By virtue of Article 1 of Regulation 3577/1992, maritime cabotage is fully liberalized and the free circulation of maritime transport services was implemented for EU shipowners whose vessels are registered in and fly the flag of a Member State, provided that these vessels fulfill all conditions required to engage in cabotage activities within the flag State[14]. This Regulation revoked the privilege of coastal trading in vessels flying the Greek flag (cabotage) and imposed harmonisation of national law and order with the EU legislation during a transitional period, and no later than 1.1.2004[15].

At first glance, the Greek Government hesitated in the implementation of this Regulation presenting as the main argument the uniqueness of the Greek marine region, with numerous islands and hence several coastal lines, as well as, arguing that coastal shipping liberalization would threaten the social cohesion and imperair the national strategic and economic interests in the Aegean[16]. However, under the pressure of the tragic accident of the Express Samina in 2002, Greece enacted Law 2932/20012 in an effort to liberalize Greek coastal trading prior to the expiry of the exemption deadline Greece had been granted (on 1/11/2002). In this light, the law-maker liberalized the two services of maritime

[14] Regulation of 7.12.1992 for the free circulation of services in maritime cabotage within member-states, Official Gazette of European Communities L 364/12.12.1992.

[15] Alexandra P. Mikroulea, Competition and Public Service in Greek Cabotage

[16] Simantiraki Thanai, "Europeanization of shipping policy in Greece: Evaluating the impact on the policy network", National University of Athens.

cabotage between ports in the islands, i.e. regular lines of passenger transport and ferries and transport conducted by vessels under 650 gt.

3.1 Liberalisation of coastal shipping cabotage

The legislative framework for coastal shipping in Greece is based on domestic legislation such as: Law 2932/200, Order No. 187/1973, 364/1988, 684/1976, Law 5570/1932, Presidential Order 814/74 and the EU source: Regulation 3577/1992. The adoption of the Regulation in January 2004 brought changes in the structure of the industry and business practices of coastal shipowners. These changes had significant political implications resulted on a few large private actors that supported and promoted reform either individually or through their reconfigured industry associations[17]. Corporate restructuring, fleet modernisation and consolidation through mergers, acquisitions and joint ventures changed the coastal market scene[18].

In addition, the availability of capital through the growing equity market provided further opportunities for fleet expansion and market growth. By 2007, the market in coastal shipping was generally stable, registering a continuous increase of volume of goods and of passengers.[19] However, from 2008 onwards the market decreased significantly due to the economic crisis. The number of foreign vessels operating in national markets by vessels not flying the national flag increased in regards to freight though still limited in respect of passengers[20].

3.2 Liberalisation of cruise shipping cabotage

Up to 1991 the Greek cruise shipping's legal framework was similar to other Mediterranean States, with maritime cabotage offering a protected

[17] Michael Joseph Romanos, "Shipping, the State and the Market, The evolving role of the European Union in international & Greek shipping politics/Case study on coastal shipping in the 1990s, London School of Economics, (2005).

[18] ibid

[19] Simantiraki Thanai, "Europeanization of shipping policy in Greece: Evaluating the impact on the policy network", National University of Athens

[20] ibid

environment to Greek maritime capital, while exercising control of maritime transportation within territorial waters[21]. The 2004–2013 period is characterized by a greater extroversion to foreign shipping capital, achieving the overall compliance with the terms of the Regulation and also attempted an effective management of the cruise industry to maximize profits for local communities and the national economy alike[22].

More specifically, in 2003 three key Articles of the Public Maritime Law were amended No. 344/2003, extending the exclusive rights of Greek sailing ships to old and new EU flagged ships[23], although national maritime employment was indirectly protected by language skill requirements. The first attempt at lifting cabotage restrictions was made in 2010, when it became clear that prohibitions used to protect Greek-owned cruise ships, not only failed to prevent the contraction of the sector in a national scale, but resulted in the transfer of related activity to other countries. The 3872/2010 Law (along with 59/2010 Ministerial Decision and 117/2010 Joint Ministerial Decision arranging the specific terms of 3872/2010 Law) abolished the exclusive right of cruise ships operating under Greek (or EEA) flag s from operating Greek ports and conditionally extends it to third country vessels. These conditions include: that the ship's flag country also permits cruises by ships flying EU Member States (or EEA) flag, as long as these ships may carry more than 49 passengers, they perform at least 48 hour long circular leisure programmes with at least an 8 hour visiting time[24]. Most importantly the companies must have signed a contract with the Greek State (up to three years with the right of extension) that would regulate matters of employment/insurance of Greek seamen.

Although the 3872/2010 Law was progress, it showed limited success, triggering a 3 year long debate in relation to the interpretation of the

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21 Panagiotis. G. Eliopoulos, Spyros Troumpetas, Spyros E. Polykalas, "Evaluation of Greek Legal Framework Regarding Cruise Tourism and Development Prospects", Technological Educational Institute of Western Greece School of Business and Economics Department of Accounting and Finance Nea Ktiria, Messolonghi, Greece.

22 ibid

23 Presidential Order No. 344/2003 (ΠΡΟΕΔΡΙΚΟ ΔΙΑΤΑΓΜΑ 344/2003 ΦΕΚ 314/A/31.12.2003).

24 http://www.nee.gr/downloads/84N3872-2010.pdf (In Greek).

law by executive authorities and so it seemed urgent to amend it since it did not show the expected results. Many issues were raised relating to bureaucratic procedures that shipping companies had to comply in order to commence cyclical cruises starting from Greek Ports, but more significantly was the strict contract requirement of the Greek authorities for each ship to indicate the duration of the visit.[25] Therefore contracts with specified duration binding a company's freedom was an inhibitory growth factor for companies wishing to operate cruises using a Greek home port. In 2012 a new Law (Law 4072/2012, Explanatory Memorandum 4072/2012 Bill) removed: the bureaucratic obstacles and abolished the contract requirements that had had a deterrent effect to third country flag ships initiatives; the requirement of translation into Greek of all documents provided in accordance with the Hague Convention (Apostille); and the €3,95 tax per passenger[26].

The most important changes in the Greek legal framework regarding cruising came in the form of a new law (Law 4150/2013)[27] and two accompanying Decisions (D. 65627/2013, D. 65629/2013) in 2013. With the latter's framework, cruising activities are promoted, so as to address the shrinking of the sector in Greece, resulting from the transfer of shipping activities to other countries (Explanatory Memorandum of the 4150/2013 Bill). In order to achieve these goals, the terms of cruise operations were released for providing the passenger embarkation rights in intermediate Greek ports by emphasizing, that it is their final disembarkation port and that the length of the circular touring trip will last at least 48 hours by meanwhile expending the same rights to ships under third country flags[28]. From this standpoint, and also taking into account the development

25 Panagiotis. G. Eliopoulos, Spyros Troumpetas, Spyros E. Polykalas, "Evaluation of Greek Legal Framework Regarding Cruise Tourism and Development Prospects", Technological Educational Institute of Western Greece School of Business and Economics Department of Accounting and Finance Nea Ktiria, Messolonghi, Greece.

26 ibid

27 Law No. 4150/2013, ΝΟΜΟΣ 4150/2013/ΦΕΚ Α/102/29.04.2013 (In Greek).

28 Panagiotis. G. Eliopoulos, Spyros Troumpetas, Spyros E. Polykalas, "Evaluation of Greek Legal Framework Regarding Cruise Tourism and Development Prospects", Technological Educational Institute of Western Greece School of Business and Economics Department of Accounting and Finance Nea Ktiria, Messolonghi, Greece.

of international tourism competitiveness, Decisions 65627 and 65629 underline new development strategies and needs for organized cruises and particularly: the improvement and facilitation of ports of call, home ports and the enhancement of the cruise visitors' experiences.

4 Conclusion

The system of maritime transport in Greece was in a state of transition from a 'protectionist' state which Greek had been up to November 2002 to a liberalized one in which the provision of maritime transport services is open to all interested and eligible operators from other EU Member States. The shipping industry presumably would not have undergone any reform and the state would have remained the dominant actor, if the European Commission, on behalf of the EU, had not promoted the change in the sector. Greece's initial refusal was further rationalised on grounds that to acknowledge coastal shipping liberalization would threaten social cohesion and impair the national strategic and economic interests of the country. However, it was the pressure groups' interests the government sought to protect.

Nevertheless, liberalisation of maritime transport in Greece constitutes a substantial and vital progress not only in the maritime transport market in general, but also in influencing the development of island regions. Currently, the coastal shipping and the cruise environment have an international character, although much more should be done with focusing on the macroeconomic gains and keeping up this sector with international experience.

The Nordic Trustee: A Right to Sue and be Sued in its Own Name

By Benedicte Haavik Urrang,
Lawyer at Nordisk Legal Services, Oslo

Contents

1 The Norwegian Bond Market and the Nordic Trustee

The Norwegian bond market was booming for almost a decade until the oil price started plunging in 2014.[1] During this decade, the market appeared to have an endless supply of funds readily available to be invested in the high-yield oil and offshore services industry.[2] The issuers, for their part, did not mind the high interest demanded. Due to its lenient requirements on documentation, the Norwegian market was especially attractive. An investor would simply flip through a short investor presentation and term sheet before subscribing to the bond issue. The Nordic Trustee[3] as bond trustee took care of the rest and functioned as the only point of contact between the bondholders and the issuer. Currently, the Nordic Trustee acts in connection with 2,300 bond issues[4] by approximately 500 issuers, with an underlying face value exceeding NOK 1,200 billion.[5]

The time when the bond trustee was simply a connector in a bond issue is history, since the bond trustee has come to play a crucial role in any commercial bond issue, especially within the high-yield market. Nowadays, the bond trustee ensures the effective and co-ordinated administration and enforcements of bonds. Through the noaction clause contained in the Nordic Trustee's standard bond terms[6], the bondholders

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1 Oslo Stock Exchange, 'Brent Oil' <www.oslobors.no/markedsaktivitet/#/details/C:PBROUSDBR%5CSP.IDCENE/overview> accessed 24 April 2017

2 The number of all bond issues, not only high yield, listed on the Oslo Stock Exchange or Nordic ABM rose from 926 in 2006 to 1875 in 2014, see Oslo Stock Exchange, 'Den rekordhøye aktiviteten fortsetter i obligasjonsmarkedet' (6 March 2017) <www.oslobors.no/Oslo-Boers/Om-Oslo-Boers/Nyheter-fra-Oslo-Boers/Den-rekordhoeye-aktiviteten-fortsetter-i-obligasjonsmarkedet> accessed 16 March 2017. In addition, there is a substantial number of bond issues in the Norwegian high-yield market which are not listed or listed on foreign exchanges.

3 Previously named "Norsk Tillitsmann".

4 Including certificate loans.

5 Nordic Trustee, 'Company Information' <nordictrustee.com/company-information> accessed 16 May 2017

6 See clause 3.2 (a) of the Nordic Trustee's standard bond terms (NBT_All Nordic_final_March 2016) available at Nordic Trustee, 'Documents',<nordictrustee.com/documents> accessed 16 March 2017

waive their right of direct action against the issuer. Concurrently, the Nordic Trustee is conferred with powers to take any legal or enforcement action against the issuer on the bondholders' behalf.[7]

However, the Nordic Trustee is merely a representative of the bondholders. In principle, a representative does not have title to sue or be sued in its own name under Norwegian law. Nonetheless, it is particularly inconvenient for the bondholders to sue the issuer individually, and it is equally inconvenient for an issuer or a third party to sue all the bondholders. There is also the question of whether the Nordic Trustee can be sued in respect of its actions performed in its capacity as bond trustee on behalf of the bondholders.

The bond trustee is a foreign concept adopted from the Anglo-Saxon markets. When adopting foreign legal concepts, unexpected issues may arise when put to the test. That is what happened when the Nordic Trustee sought to enforce the rights of the bondholders through the Norwegian judicial system by relying on the no-action clause. Similarly, a party wishing to sue (i) the Nordic Trustee in respect of its actions performed as bond trustee on behalf of the bondholders, or (ii) the bondholders in the name of the Nordic Trustee, may face both legal and practical obstacles.[8]

This article aims to discuss the implications of conferring the Nordic Trustee with a right to sue and be sued in its own name. First, this article outlines the contractual framework – including its origin – governing the relationship between the Nordic Trustee, the bondholders and the issuer. The article then proceeds by explaining the main rule when it comes to legal actions brought by a representative under Norwegian law. Further, it assesses the Nordic Trustee's right to sue in its own name as established in recent case law and the practical implications following such rulings. Some guidance is then sought by comparing bond trustees in the UK and the US. The article advances by discussing whether (i) the Nordic

7 Refer to the Norwegian alternative of cl. 16.1 (a) of the Nordic Trustee's standard bond terms (n 6)

8 Note that this article does not discuss legal actions against the bond trustee itself for breach of its contractual or fiduciary duties owed towards the issuer or the class of bondholders. The focus of the article is on acts performed by the Nordic Trustee on the bondholders' behalf.

Trustee can be sued in its own name in respect of actions performed on behalf of the bondholders, and (ii) the bondholders can be sued in the name of the Nordic Trustee. Finally, this article concludes that the Nordic Trustee's right to sue and be sued in its own name should be subject to legal review and codification, and perhaps even a modest reform.

2 The Contractual Framework and its Anglo-Saxon Origin

The Norwegian authorities have not adopted any regulations pertaining to entities appointed as bond trustees. Nor is there any public supervision of trustee activities. As a result, the bond market and its contractual framework have been developed by commercial stakeholders, inspired by the model found in the Anglo-Saxon markets. As this article will explain further in section 6, the legal status of the bond trustee is quite clear in both the UK and the US, mainly due to the origin of the common law trusteeship in these countries. In Norway, however, the trusteeship is still a foreign concept without a definite legal status. Hence, the UK and US bond trustees and bond markets heavily influence the functions and legal status of the Nordic Trustee under Norwegian law.

Prior to setting out the main features of the Norwegian contractual framework, it is necessary to consider briefly the Anglo-Saxon model, which served as its inspiration. The bond trustee's responsibilities and obligations are typically enshrined in a trust deed in the UK or a trust indenture in the US, each of which confers certain powers to the trustee. Both the UK and the US have adopted regulations pertaining to the bond trustee, but most areas are left open to contractual negotiation.[9] The

[9] Note that there are differences in the regulation of the bond markets between the UK and the US. The US federal regulation is stricter than that found in the UK, but this mainly concerns the obligations of the bond trustee, see the US Trust Indenture Act of 1939 15 U.S.C. cf. the UK Trustee Act (2000). See also section 6 below for further differences concerning the discretional powers of the bond trustee and limitations on the application of the no-action clause in the US.

Anglo-Saxon market has established more or less standard provisions that make up the contractual framework.[10] Thus, the trust deed or indenture typically contains three categories of provisions: financial terms, protective covenants and miscellaneous provisions.[11] These categories of provisions are also found in the Nordic Trustee's standard bond terms. One major difference, however, is that the trust deed or trust indenture is only entered into between the issuer and the bond trustee in its capacity as such. The bondholders are not themselves party to the deed or indenture, whereas in Norway, the individual bondholders are, by subscription to the bond issue, agreeing to be bound by the bond terms, which are entered into on their behalf by the Nordic Trustee.

Bond issues subject to Norwegian law are, with few exceptions, based on the Nordic Trustee's standard templates.[12] Unlike conventional bank financing, the terms of the bond issue are agreed between the issuer and the lead manager,[13] subject to complying with the main terms of the Nordic Trustee's standard bond terms. The investors – future bondholders – do not take part in these negotiations, but the lead manager ensures that the terms are acceptable to the market in order to secure subscription to the bond issue.

Before subscribing, the investor is presented with a bundle consisting of an investor presentation, a term sheet and an application for subscription. The investor presentation, prepared by the lead manager, contains the main sales pitch with company information, accounts and expected revenue. The term sheet, on the other hand, sets out the main terms

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10 As observed by the Circuit Judge in *Sharon Steel Corp. v. Chase Manhattan Bank*, 691 F.2d 1039, 1048 (2d Cir. 1982)

11 Marcel Kahan, 'Rethinking Corporate Bonds: The Trade Off between Individual and Collective Rights' 77 New York University Law Review 1040–1058, 1044

12 This is due to the fact that the Nordic Trustee has monopoly as bond trustee in the Norwegian market, see Letter from the Nordic Trustee to the Ministry of Finance dated 27 October 2009 available at <www.regjeringen.no/contentassets/341240bc72f946ba80a76d169e873c41/brev_norsk_tillitsmann_27.10.09.pdf > accessed 31 March 2017

13 The lead manager, typically an investment bank, is engaged by the issuer to facilitate and secure subscription to the bond issue.

and conditions of the bond terms, including specific issuer covenants.[14] Subscription to the bond issue is made by completing the standard application, which *inter alia* authorises the Nordic Trustee to enter into the bond terms on behalf of the bondholder. When bonds are traded on the secondary market, each new bondholder is considered as acceding to the bond terms.[15]

If the bonds are secured, there will be an additional set of security documents, whereby the Nordic Trustee is the holder of security on behalf of the bondholders. In this way, the Nordic Trustee will be able to realise and enforce security if necessary upon an event of default.

After subscription to the bond issue, bonds are allocated to the bondholders through the central securities depository, Verdipapirsentralen ASA ("VPS"). VPS conduits payments of principal (if any) and interest to the bondholders, as well as distributing information and summons to bondholders' meetings. An up-to-date record of bondholders is also kept by VPS.[16] Despite this, only 20% of the bondholders are registered directly in VPS' records,[17] as bonds are commonly held by custodians.[18] About 80% of the bondholders can only be identified by access to the custodians' account books, which is not publically available.[19] Only national supervisory authorities have a right to inspect the custodians' records. Access to these records will therefore require a court ruling against the custodian in its local jurisdiction, and cannot be granted by Norwegian courts unless the custodian is domiciled in Norway.

The Nordic Trustee ensures that the bondholders' rights vis-à-vis the issuer are monitored and enforced.[20] All rights and obligations of the

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14 See the Nordic Trustee's standard term sheet (NBT_TS_All Nordic_final_March 2016) available at Nordic Trustee 'Documents',<nordictrustee.com/documents> accessed 16 March 2017

15 The Norwegian alternative of cl. 16.1 (a) of the Nordic Trustee's standard bond terms (n 6)

16 Letter from the Nordic Trustee to the Ministry of Finance dated 27 October 2009 (n 12)

17 ibid

18 For instance Euroclear or Clearstream.

19 Letter from the Nordic Trustee to the Ministry of Finance dated 27 October 2009 (n 12)

20 Nordic Trustee, 'Bond Trustee', <nordictrustee.com/bonds> accessed 16 March 2017

Nordic Trustee are set out in the bond terms. The bondholders are tied together through this agreement in an indissoluble creditor community. Although, the Nordic Trustee is in charge of the active management of the bond issue, the bondholders may nonetheless instruct the Nordic Trustee through decisions by a certain percentage of bondholders.[21]

Of specific interest to this article is the no-action clause contained in the term sheet[22] and the bond terms. This clause prohibits each individual bondholder from taking legal or enforcement action against the issuer, and is set out in cl. 3.2 (a) of the bond terms:

> No Bondholder is entitled to take any enforcement action, instigate any insolvency procedures, or take other action against the Issuer or any other party in relation to any of the liabilities of the Issuer or any other party under or in connection with the Finance Documents, other than through the Bond Trustee and in accordance with these Bond Terms, provided, however, that the Bondholders shall not be restricted from exercising any of their individual rights derived from these Bond Terms, including the right to exercise the Put Option.[23]

Concurrently, the Nordic Trustee's right of action is expressly set out in cl. 16.1 (a), which reads:

> The Bond Trustee has power and authority to act on behalf of, and/or represent, the Bondholders in all matters, including but not limited to taking any legal or other action, including enforcement of these Bond Terms, and the commencement of bankruptcy or other insolvency proceedings against the Issuer, or others.

Thus, the contractual arrangement between the Nordic Trustee, the bondholders and the issuer is clear. No individual bondholder may take

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21 Cl. 15 of the Nordic Trustee's standard bond terms (n 6)

22 Refer to the 'Bond Terms' section in the Nordic Trustee's standard term sheet (n 14)

23 Clause 10.3 of the Nordic Trustee's standard bond terms (n 6) sets out the bondholders' "Put Option"; whereby each bondholder, upon certain defined events (*i.e.* change of control), has the right to require that the issuer purchases all or some of the bonds held by that bondholder at a price equal to X per cent of the nominal amount.

legal or enforcement action against the issuer. Any and all actions shall be taken by the Nordic Trustee.[24]

Originally, the no-action clause was included to protect the issuer against frivolous and multiple lawsuits from individual bondholders.[25] Such lawsuits may potentially trigger cross default provisions contained in the financial agreements of the issuer, which may in turn have a detrimental effect on the issuer. These lawsuits might be filed in parallel in various jurisdictions, resulting in substantial costs on the part of the issuer attempting to fight off such lawsuits. Some investors even specialise in acquiring distressed debt to threaten the issuer with bankruptcy, in order to make a tidy profit when the other creditors eventually cave in and a restructuring agreement or the like is reached. If individual actions were permitted, the assets of the issuer could diminish at the expense of the issuer and the overall class of bondholders.[26] Furthermore, the no-action clause may protect the bondholders from repeated individual requests for amendments or waivers by the issuer. More importantly, the contractual agreement ensures a cost-effective method of enforcement if and when necessary.[27] Enforcement actions by the bond trustee further secures any proceeds being shared *pari passu*.

The introduction of the bond trusteeship in Norway is founded upon the underlying assumption that the Nordic Trustee may sue and be sued in its own name. As this article explores in section 3, that assumption was flawed according to pre-2010 case law. Consequently, a severe level of insecurity arose in the Norwegian market in 2009 after the District

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[24] This article does not discuss either the functionality of the no-action clause or the lack of incentive on the part of the bond trustee to act upon an event of default. The bond trustee is normally paid an annual fee and does not receive additional compensation if the bond issue requires substantial administration. However, the trustee is entitled to an indemnity covering expenses and certain liabilities etc. For an in-depth analysis of these issues, see Marcel Kahan, 'Rethinking Corporate Bonds: The Trade Off between Individual and Collective Rights' 77 New York University Law Review 1040–1058.

[25] *Elektrim S.A. v Vivendi Holdings 1 Corp and Law Debenture Trust Corporation PLC* [2008] EWCA Civ 1178 [4]

[26] ibid

[27] Letter from the Nordic Trustee to the Ministry of Finance dated 27 October 2009 (n 12)

Court[28] and the Court of Appeal[29] ruled that the Nordic Trustee did not have title to sue in its own name.

To the contrary, both English and US courts have interpreted the no-action clause as covering both contractual and non-contractual claims,[30] thereby vesting the bond trustee with powers to sue in its own name on behalf of the bondholders in contract and tort.[31] In these jurisdictions, the bond trustee's right to sue on behalf of the bondholders is undisputed, and there is also an example from the US where the bond trustee was sued in its own name concerning actions performed in its capacity as bond trustee.[32] The UK and US perspective will be subject to further analysis and comparison in section 6 below, after the legal battle of the Nordic Trustee, to establish its right to sue in its own name, has been thoroughly analysed in section 4. However, pre-2010 case law and the abovementioned rulings of the lower courts showed that the no-action clause would fail, unless the Supreme Court made an exception to the main rule pertaining to a representative's lack of title to sue in its own name.

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28 Ruling of 15 April 2009 by Oslo District Court (*Nw. 'Byfogden'*) (TOBYF-2009-44929). Note that (almost) no ruling of the District Court or the Court of Appeal includes numbered paragraphs or page numbers.

29 Ruling of 30 September 2009 by Borgarting Court of Appeal (LB-2009-96441)

30 See for instance *Elektrim S.A. v Vivendi Holdings 1 Corp and Law Debenture Trust Corporation PLC* [2008] EWCA Civ 1178 [101] and *Feldbaum v. McCrory*, 1992 WL 119095 *6 (Del.Ch. June 2, 1992).

31 Note that, in the US, an individual bondholder may sue the issuer for payment of overdue principal and interest on the bonds, ref. the US Trust Indenture Act, 15 U.S.C. § 77ppp(b). This right is supplemental to the bond trustee's right of action, see §§ 77aaa–77bbbb.

32 See for instance *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co*., N.A 773 F.3d 110 and Phillip R. Wood, *Principles of International Insolvency* (Sweet & Maxwell 2007) 12-046.

3 A Representative's Lack of Title to Sue and be Sued

Under Norwegian law, the main rule is that a representative cannot sue or be sued in its own name.[33] Consequently, a party can only sue or be sued in connection with his or her own private rights and obligations.[34] This rule was established in case law based on the predecessor to section 1-3 of the Civil Procedure Act of 2005,[35] although the courts have not been fully consistent.[36] Since 1989, the Supreme Court has regularly dismissed actions filed by a representative of the real party in interest. A brief analysis of the two central cases relating to this is necessary before turning to the long line of cases pertaining to the Nordic Trustee's right of action in the following section.

The first case, Rt. 1989 p. 338 (*Eviction*), concerned an application for eviction that was dismissed by the Supreme Court, because the party submitting the application was the manager of the property, *i.e.* only a representative.[37] The application would need to be submitted by the property owner itself, since the real party in interest is the only person or entity with title to sue.[38] The Supreme Court held that this principle formed a mandatory rule of law and that the courts would disregard any agreement on title to sue.[39] Any exception to this rule would require

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33 Jens Edvin A. Skoghøy, *Tvisteløsning* (3rd edn, Universitetsforlaget 2016) 444

34 For public law matters, the rule is not as stringent, see for instance Camilla B. Hamre, 'Tilknytningskravet for rettslig interesse i privatrettslige forhold – Tendenser til oppmykning i Høyesterettspraksis?' LOR-2011-142, 144

35 The Civil Procedure Act 1915 sections 53 and 54

36 Case law has not been entirely consistent on the issue of a representative's right of action. Rt.1971 p. 425 allowed an action in the name of the representative, but this case was expressly distinguished by Rt. 1989 s. 338. In Rt. 1989 s.1140 the Supreme Court left it undecided as to whether two French bankruptcy trustees could sue in their own names. The main rulings in Rt. 1989 s 338, Rt. 1994 p. 524 and Rt. 2006 s 238 have all dismissed lawsuits filed by a representative.

37 Rt. 1989 p. 338, 341 distinguishing Rt. 1971 p. 425

38 ibid

39 ibid

explicit legal authority.[40] Moreover, the court noted that allowing lawsuits from representatives would raise numerous concerns as to (i) the court's impartiality, (ii) the binding effect of a judgment upon the real party in interest, (iii) responsibility for case costs, and (iv) the consequences following the death, bankruptcy or loss of legal capacity on the part of the real party in interest.[41]

These four concerns were reiterated in the second case, Rt. 2006 p. 238 (*American receiver*).[42] In this case, the Supreme Court was faced with the question of whether an American receiver could sue in its own name on behalf of a group of creditors. An American attorney was appointed as receiver by a US District Court and was granted power of attorney to represent a group of creditors subject to fraud by a Norwegian entity. The Court of Appeal looked up the definition of "receiver" in Black's Law Dictionary and concluded that a receiver could be compared to a trustee in a bankruptcy estate, and allowed the suit.[43] The Supreme Court, on the other hand, bluntly dismissed the lawsuit, holding that the receiver did not have title to sue in its own name.[44]

Noting its judgment in Rt. 1989 p. 338 (*Eviction*), the Supreme Court emphasised that a bankruptcy trustee is not itself a party to the court proceedings, but that the bankruptcy estate is such a party.[45] The appointment as receiver and the power of attorney simply vested the receiver with authority *ad litem*; not a right to sue in its own name on behalf of the real creditors in interest.[46] Although there were certain practical considerations in favour of allowing the action, the court found that the four concerns mentioned, together with the uncertainty pertaining to

40 ibid

41 ibid

42 Post 2010-case law, it is at least arguable that the Supreme Court would have allowed the suit by the American receiver in Rt. 2006 p. 338 had it been faced with the case today.

43 Unpublished ruling of 12 December 2005 by Borgarting Court of Appeal referenced within Rt. 2006 p. 338 [4], [18]–[19]

44 Rt. 2006 p. 338 [20]–[23]

45 ibid [20]

46 ibid

a large group of unknown claimants and statutory limitation, had to prevail.[47]

Despite these two rulings, it appeared that the stakeholders in the Norwegian bond market considered it safe to rely on the no-action clause, paired with the Nordic Trustee's exclusive right of action. Prior to the emergence of the high-yield market, the role of the Nordic Trustee was perhaps not as fundamental. It was only when the Nordic Trustee's role changed into one requiring the active management of bond issues, that the no-action clause and the legal status of the Nordic Trustee were put to the test. As the next section will discuss in detail, the question of the Nordic Trustee's title to sue was not straightforward.

4 The Nordic Trustee's Legal Battle

4.1 The Thule Drilling Cases

The Nordic Trustee literally had to fight a legal battle to establish its right to sue in its own name on behalf of the bondholders. In the period from 2009 to 2014, the Norwegian judicial system dealt with the Nordic Trustee's right to sue in a line of cases, all arising from the same three bond issues.

Thule Drilling ASA, a rig owning company, had partly financed three drilling rigs by separate bond issues in the aggregate amount of USD 179m. The bonds were, *inter alia,* secured by mortgages over the rigs under construction. In connection with the refinancing of the bonds, the main shareholders issued guarantees as additional security. In January 2009, the Nordic Trustee called upon the guarantors to pay out under the guarantees. No payment was made and the Nordic Trustee sought an attachment order against one of the guarantors, Norinvest Ltd.

47 ibid [21]

4.2 Rt. 2010 p. 402 *(Attachment Order)*

Norinvest Ltd. challenged the petition, contending that the Nordic Trustee was not entitled to sue in its own name. Both the District Court[48] and the Court of Appeal[49] held that the Nordic Trustee did not have title to sue on behalf of the bondholders and dismissed the petition. These rulings were however overturned by the Supreme Court in its ruling of 7 April 2010.[50]

First, the Supreme Court noted that the right to sue, according to section 1-3 of the Civil Procedure Act, depends on the actual need of the claimant to sue and its connection to the claim.[51] Section 1-3 of the Civil Procedure Act reads:[52]

> 1) An action may be brought before the courts for legal claims.
>
> 2) The claimant must show a genuine need to have the claim determined against the defendant. This shall be determined based on a total assessment of the relevance of the claim and the parties' connection to the claim.

This provision sets out the main procedural requirements in order to bring a case to court. First, the claimant must have a legal claim, or at least an alleged one. Secondly, the claimant's connection to the claim must make him or her a natural claimant. Furthermore, the claimant must have a genuine need for clarification at that time, since one cannot sue to have hypothesises established.[53]

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48 TOBYF-2009-44929 (n 28)

49 LB-2009-96441 (n 29)

50 Rt. 2010 p. 402 [16]

51 ibid [17]–[20]

52 The quotation is from the University of Oslo's unofficial translation of the Civil Procedure Act of 2005 available at <app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf> accessed 20 March 2017

53 Tore Schei et al, *Tvisteloven kommentarutgave vol 1* (2nd edn, Universitetsforlaget 2013) 14

The court then observed that the preparatory works[54] to the Civil Procedure Act state that the right to sue is to be determined and developed by case law.[55] The main rule concerning a representative's title to sue in its own name was set out in Rt. 2006 p. 238 *(American Receiver)*.[56] However, a reservation was made in the event the circumstances were such that there were no other alternative than to allow an action by the representative.[57] In the present case, the Supreme Court stressed that the question of title to sue has to be assessed in light of the practical need, and is not to be based on whether the claimant is rightly characterised as a representative.[58] Thus, the court demonstrates a more pragmatic approach than that found in the case of the *American Receiver*.[59] This line of reasoning is still within the spirit of section 1-3 of the Civil Procedure Act, whereby the right of action is to be determined based on the genuine need of the claimant in each specific case.

Next, the court turned to consideration of the Norwegian bond market and the contractual regime governing it.[60] Each bondholder has, by virtue of the no-action clause, waived its right of action against the issuer. It was emphasised that the mechanism adopted by the bond terms aims to ensure both the equal treatment of bondholders and a fair allocation of costs when legal action to protect the bondholders' interests is initiated.[61] If the Nordic Trustee were to be denied a right of action, the court noted that the no-action clause would be deemed invalid, thus re-vesting the

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54 The main preparatory works to section 1-3 of the Civil Procedure Act are NOU 2001:32 'Rett på sak. Lov om tvisteløsning (tvisteloven)' 186–207, 652, Ot.prp.nr.51 (2004–2005) 'Om lov om mekling og rettergang i sivile tvister (tvisteloven)' 137–156, 363–366 and Innst.O.nr.110 'Innstilling fra justiskomiteen om lov om mekling og rettergang i sivile tvister (tvisteloven)' 28–31. Note that preparatory works have substantial authority in the Norwegian judicial system; thus, frequently relied upon by the courts, see Knut Bergo, *Høyesteretts forarbeidsbruk* (Cappelen Akademisk Forlag, 2000) ch 6, 327.

55 Rt. 2010 p. 402 [19]–[20]

56 Following the legal principle set out in Rt. 1989 p. 338.

57 Rt. 2006 p. 238 [21]

58 Rt. 2010 p. 402 [21]

59 Rt. 2006 p. 238

60 ibid [23]–[28]

61 ibid [27]

individual bondholders with title to sue.[62] This view stems from the main rule that one cannot make agreements on title to sue, since this right is determined by peremptory procedural rules.

Nonetheless, the alternative of invalidating the no-action clause did not sit well with the Supreme Court, which then addressed the arguments supporting the Nordic Trustee's right to sue in its own name.[63] As a starting point, it would be irrational to allow separate debt recovery proceedings from individual bondholders.[64] In the absence of authority requiring the bondholders to join forces, the only alternative, in the court's view, was to vest the Nordic Trustee with title to sue.[65] There are rules for consolidation of suits and stay of proceedings awaiting the outcome of a pending case, but these are not tailored to cater for the interests of the class of bondholders; especially not when it comes to an equal share of the proceeds, litigation risk and costs.[66]

As mentioned, a severe level of insecurity arose in the Norwegian bond market following the decisions of the lower courts, resulting in the main stakeholders petitioning for a bill securing the Nordic Trustee's right of action. One feared that the international market would lose its trust in the Norwegian market, if the Nordic Trustee were denied a right of action.[67] The Supreme Court took note of this and even quoted letters from financial institutions supporting the bill.[68] It further assumed that the no-action clause would be respected in other jurisdictions, allowing the Nordic Trustee to take legal action and to enforce security abroad.[69] As section 6 explains, the no-action clause is, for instance, strictly applied and enforced by both the English and US courts. According

62 ibid [30]

63 ibid [44]

64 ibid [40]

65 ibid

66 See sections 15-6 and 16-18 of the Civil Procedure Act. Note that a class action is not available for interlocutory orders.

67 Letter from the Nordic Trustee to Ministry of Finance dated 27 October 2009 (n 12)

68 Rt. 2010 p. 402 [29], [32]–[36]. The bill was supported by, amongst others, the Central Bank of Norway, the National Insurance Fund, the VPS and Finance Norway.

69 ibid

to the Supreme Court, the concerns of the international bond market had to be taken into account when interpreting section 13 of the Civil Procedure Act.[70]

The Supreme Court bluntly rejected the guarantor's counter-arguments, noting that the fact that one cannot foresee all practical consequences should not have the result of denying the Nordic Trustee a right of action.[71] Any uncertainty regarding the binding effect of a judgment upon the bondholders was partly remedied by the no-action clause and section 19-15 of the Civil Procedure Act. Section 19-15 provides for the extension of a judgment's binding effect upon third parties not party to the court proceedings in certain circumstances.[72] Even if section 19-15 did not make the judgment legally binding upon the class of bondholders, the Supreme Court still seemed inclined to allow the suit in the name of the Nordic Trustee.

Equally, the court did not approve any arguments concerning responsibility for case costs and damages for wrongful arrest; stating that only the Nordic Trustee would be directly responsible for the costs, while it was for the enforcement office to require adequate counter-security before attaching or arresting property.[73] However, the court failed to take into account the fact that the potential liability following a wrongful arrest in an oil rig or supply vessel under construction may exceed the counter-security. Thus, these counter-arguments will be discussed further in subsections 5.1 and 5.2 below.

Norinvest Ltd's objection concerning loss of any set-off rights was dismissed as already prohibited by the bond terms.[74] Nor did the court

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70 ibid

71 ibid [39]–[42]

72 ibid [39]. Pursuant to section 19-15 of the Civil Procedure Act, a judgment may have a binding effect upon third parties not party to the court proceedings provided that the third party "*would be bound by a corresponding agreement on the subject matter of the action due to their relationship with the party*" (University of Oslo's unofficial translation (n 52)).

73 ibid [40]

74 ibid. In this case, the provision prohibiting set off in the standard bond terms (cl. 8.6) was probably expressly set out in the guarantee or incorporated by reference to the bond terms.

accept any arguments to the effect that the bondholders' anonymity could affect the court's impartiality. Any underlying private interests, if known, would have to be disclosed by the judge.[75] If the judge or someone close to him or her has a financial interest in the case, then the judge will have to excuse him- or herself – from the case. Should such interest not be known to the judge due to the bondholder's anonymity, then there is no reason to question the court's impartiality.

Despite the fact that one – as a main rule – cannot contractually waive one's right of action and confer that right to a representative, the Supreme Court put great emphasis on the no-action clause.[76] The contractual framework developed by the market itself did professedly appear to cater for the best alternative when bearing in mind the interest of all parties concerned. Consequently, the Supreme Court held that there were no compelling reasons against vesting the Nordic Trustee with title to sue.[77]

4.3 Rt. 2010 p. 1089 *(Petition for Bankruptcy)*

Although the Nordic Trustee succeeded in the abovementioned case, its title to sue was yet again challenged when the Nordic Trustee petitioned for Thule Drilling ASA's bankruptcy in April 2010. The Nordic Trustee argued that if it could obtain an attachment order against the issuer or its guarantors, it could also file a petition for bankruptcy against the issuer.[78] On the contrary, the issuer contended that such a right was only vested with the issuer's creditors, of which the Nordic Trustee was not one.[79] The District Court dismissed the petition, holding that the Nordic Trustee was not a "creditor" within the meaning of section 60 of the Bankruptcy Act of 1984.[80] Considering the line of reasoning in Rt. 2010 p. 402 (*Attachment Order*), the Court of Appeal overturned

75 ibid [42]
76 ibid [44]
77 ibid
78 Rt. 2010 p. 1089 [12]
79 ibid [7]
80 Unpublished ruling of 25 May 2010 by Asker and Baerum District Court (TAHER-2010-69810) referred to within Rt. 2010 p. 1089 [3]–[4]

this ruling, noting that the noaction clause also applied to enforcement actions, including a bankruptcy petition.[81]

The case was in turn heard by the Supreme Court, which confirmed that the Nordic Trustee was to be considered a creditor within the meaning of section 60 of the Bankruptcy Act, and thus entitled to file a petition for bankruptcy.[82] The court referred to its reasoning in Rt. 2010 p. 402 *(Attachment Order)*, which was equally applicable to the present case.[83] One could not have a situation where the Nordic Trustee has title to sue when securing the bondholders' claim through an attachment order, but no right to enforce by petitioning for bankruptcy.[84] To ensure a coherent set of rules, the Nordic Trustee was treated as a creditor of the issuer, although no monies would ever be owed to it.[85]

This second ruling was short and concise. Following the ruling in Rt. 2010 p. 402 *(Attachment Order),* the conclusion should, in the author's view, be quite obvious. The concerns raised against allowing legal actions by the Nordic Trustee, as a representative of the bondholders, did not convince the Supreme Court to dismiss the suit in the first case. Therefore, it would be legally incomprehensible if the Nordic Trustee – as security holder – could not enforce security or file a bankruptcy petition, when vested with a right to sue to obtain security. In the UK, for instance, the bond trustee's authority to enforce security and to distribute proceeds is not questioned.[86]

4.4 Rt. 2014 p. 577 *(Damages in Tort)*

The story of Thule Drilling ASA does not, however, end here. Thule Drilling prevented the pledged assets from falling within the Nordic Trustee's control by selling the rigs to a third party, thereby leaving the

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81 Ruling of 14 July 2010 by Borgarting Court of Appeal (LB-2010-99187)

82 ibid [19]

83 ibid [15]

84 ibid [16]

85 ibid

86 Philip Rawlings, *The changing role of the trustee in international bond issues,* JBL 2007 43–66, 47

main security without any value. In 2011, the Nordic Trustee sued the management and board members of Thule Drilling in tort. Thule Drilling argued once again that the Nordic Trustee lacked title to sue in its own name, as the claim was founded in tort and not contract. Both the District Court[87] and the Court of Appeal[88] ruled in favour of Thule Drilling and dismissed the action. The Supreme Court, on the other hand, overturned these rulings.[89]

4.4.1 The rulings of the lower courts

Before discussing the final ruling of the Supreme Court, it is worth identifying the arguments that convinced the lower courts. The Nordic Trustee contended that the practical need for allowing the suit was the same as in the two previous cases, but the lower courts found that one had to distinguish between claims in contract and claims in tort.[90] Thule Drilling successfully argued that the reasoning in Rt. 2010 p. 402 (*Attachment Order*) was not applicable to tortious claims.[91]

The lower courts held that the bondholders had not contractually agreed to refrain from a legal action for claims in tort against the defendants, *i.e.* that the no-action clause was inapplicable.[92] It is to be noted that the defendants were not party to the bond terms, the guarantee or any other security document. Moreover, the courts found that one must distinguish between the individual bondholders with regards to: (i) calculation of loss, (ii) set off, and (iii) contributory negligence.[93] In order to ensure proper disclosure of the disputed matter, including items

87 Ruling of 30 January 2013 by Oslo District Court (TOSLO-2011-164647)

88 Ruling of 7 October 2013 by Borgarting Court of Appeal (LB-2013-68997)

89 Rt. 2014 p. 577

90 TOSLO-2011-164647 (n 87) and LB-2013-68997 (n 88).

91 ibid

92 ibid. Had the claim in tort been brought against the issuer or any of its guarantors, the no-action clause would arguably have applied. In the UK and the US, the no-action clause is interpreted as covering both claims in contract and in tort, see for instance *Elektrim S.A. v Vivendi Holdings 1 Corp and Law Debenture Trust Corporation PLC* [2008] EWCA Civ 1178 [101] and *Feldbaum v. McCrory*, 1992 WL 119095 *6 (Del.Ch. June 2, 1992).

93 TOSLO-2011-164647 (n 87) and LB-2013-68997 (n 88)

(i) to (iii), the adversarial judicial system requires that the bondholders are themselves parties to the proceedings.[94] The fact that the bill initiated by the Nordic Trustee, at least on the face of it, only dealt with claims in contract was taken by the lower courts to indicate that claims in tort were never anticipated as being comprised by the Nordic Trustee's title to sue.[95] It is likely that the bill did not expressly cater for suits in tort against third parties since such a suit was not envisaged when the bill was drafted.

Prior to the expansion of the bond market into a separate high yield market, the need to take legal action on the basis of the bond terms had barely occurred, even less a need to sue in tort. The lower courts assumed that a suit in tort would be a rare phenomenon. Liability due to evasion of secured assets is uncommon, but with today's distressed issuers, directors are more likely to face liability if they have not been prudent when conducting business or if they fail to file for bankruptcy when the company has no real prospects of survival.[96]

In light of its reasoning, the lower courts held that a statutory amendment of the law would be necessary, in order to allow the suit by the Nordic Trustee in its own name.[97] All the concerns raised by the Supreme Court in Rt. 1989 s. 338 *(Eviction)* were equally applicable to the present case. It was merely a question of convenience, rather than an actual need for the Nordic Trustee to be vested with a right of action in this case.[98] The trust of the international market was not threatened when it came to claims in tort.[99] Thus, the lower courts did not acknowledge the Nordic Trustee's argument that it would facilitate a coordinated action, in addition to distribution of damages *pari passu*.

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94 ibid

95 ibid

96 Although directors' liability is codified in the Limited Liability Companies Act of 1997, the liability is found in tort.

97 TOSLO-2011-164647 (n 87) and LB-2013-68997 (n 88)

98 ibid

99 ibid

4.4.2 Digression: Rt. 2010 p. 646 *(IPR Manager)*

A brief digression is appropriate before turning to the Supreme Court's ruling on the title to sue for damages in tort. Shortly after its ruling in Rt. 2010 p. 402 *(Attachment Order)*, the Supreme Court was yet again faced with the question of a representative's title to sue; this time through a suit filed by a private company managing intellectual property rights (IPR) on behalf of media companies organised through a trade organisation.[100]

The Supreme Court noted that recent case law allowed an independent custodian to sue in its own name on behalf of the real party in interest, *provided* the custodian is free to manage the claims and thereby bind the beneficiary claimant to its decisions.[101] Similar to its reasoning in Rt. 2010 s. 402 *(Attachment Order)*, the court highlighted the contractual agreement between the manager and the IPR holders.[102] The manager was responsible for the monitoring of potential IPR violations and vested with powers to take action on behalf of the IPR holders. Accordingly, the court ruled that the manager had title to sue in its own name.[103]

This ruling is another example of the Supreme Court's pragmatic approach. Its focus was on the genuine need for vesting the manager with a right to sue in its own name, rather than reaching a conclusion based on the fact that the manager was merely a representative of the IPR holders.

Both Rt. 2010 p. 402 *(Attachment Order)* and Rt. 2010 p. 646 *(IPR Manager)* show a development in a representative's right to sue in its own name on behalf of the real party in interest. Constituting an exception from the main rule, these rulings are not to be interpreted too liberally. The underpinning reasoning for allowing these suits in the name of the representative was the conferment of authority on the representative, including authority to independently manage any claims with binding effect upon the beneficial claimant. A judgment in favour of the representative would normally be binding upon the real party in interest by virtue of section 19-15 of the Civil Procedure Act, due to the contractual

[100] Rt. 2010 p. 646
[101] ibid [24]
[102] ibid [25]
[103] ibid [25]–[26]

agreement between the representative and the real party in interest.[104] These rulings do not, however, establish a general right of a representative to sue in its own name.

4.4.3 Final ruling of the Supreme Court

Returning to the third Thule Drilling case, the Supreme Court reiterated that section 1-3 of the Civil Procedure Act formed the basis for assessing title to sue.[105] Noting its reasoning in Rt. 2010 s. 402 *(Attachment Order),* the court questioned whether the genuine need to allow the Nordic Trustee a right of action had changed when the claim was made in tort and against other parties than the issuer and/or its guarantor(s).[106] The defendants raised several counter arguments, which the court dealt with in turn.

First, it was contended that each bondholder's loss would have to be calculated individually, as such loss would not necessarily amount to the nominal value of the bonds.[107] On the contrary, the court found that the loss would, in principle, be the same even though the bonds were traded.[108] The loss would amount to the estimated return had the security not been violated, less the actual return received.[109] A reservation was, however, made in respect of (i) any contributory negligence on the part of a bondholder or a group thereof, and (ii) the loss of claim following divestment of the bonds.[110] This article disagrees with the Supreme Court's reasoning on this point. Establishing a bondholder's actual loss is a much more complex exercise than the court envisaged. Hence, the calculation of loss is subject to a more detailed examination in sub-section 5.4 below.

Furthermore, the court emphasised the importance of equal treatment of the bondholders.[111] In the eyes of the court, this could only be

[104] Refer to the explanation of section 19-15 in note 72.
[105] Rt. 2014 p. 577 [29]
[106] ibid [31], [33]
[107] ibid [34]
[108] ibid [35]
[109] ibid
[110] ibid
[111] ibid [36]

achieved by allowing the Nordic Trustee to sue in its own name.[112] If the bondholders' claim were to be dealt with in parallel or successive proceedings, it would not only be irrational, but the risk of an unfair distribution of costs was immense.[113] In theory, a class action[114] would ensure an adequate process and a fair allocation of costs, but due to the shifting and anonymous nature of the class of bondholders, the court found that a class action was not, after all, a viable alternative.[115]

Despite the court's finding that tortious claims were not barred by the noaction clause in this case,[116] the court noted that the contractual framework – entitling the Nordic Trustee to take all necessary actions in order to recover any amount outstanding[117] – supported the Nordic Trustee's title to sue even for tortious claims against third parties.[118] With this interpretation of the bond terms, the bondholders are likely to be bound by a judgment obtained by the Nordic Trustee by virtue of section 19-15 of the Civil Procedure Act, although this was not a determining factor according to the Supreme Court.[119]

The opponents also argued that the identity of the bondholders – the real parties in interest – had to be known in order to secure proper disclosure. As previously mentioned, the identity of the bondholders is not publically available and a court ruling against VPS would be necessary to obtain access to the record of bondholders.[120] Even a court order would not reveal the identity of the bondholders registered with a custodian, only the name of the custodian.[121] The Supreme Court simply remarked that individuals or entities not party to the proceedings are under a

112 ibid [37]

113 ibid

114 A class action is not available for interlocutory orders, which was the case in Rt. 2010 p. 402.

115 Rt. 2014 p. 577 [38]

116 ibid [43]

117 See cl. 14.2 (c) of the standard bond terms (n 6)

118 Rt. 2014 p. 577 [41]

119 ibid [42]. Refer to the explanation of section 19-15 in note 72.

120 cf. the Securities Trading Act 2007 section 8-1.

121 For instance Euroclear or Clearstream.

general obligation to testify in court.[122] In any event, it was deemed unlikely that unknown bondholders would have information of substantial nature; such was presumably in the possession of the Nordic Trustee.[123]

Finally, the court concluded that there were no compelling reasons against vesting the Nordic Trustee with a right of action for tortious claims against third parties.[124]

4.5 Summary of the Thule Drilling Cases

When dealing with the Nordic Trustee's title to sue, the Supreme Court found such compelling reasons that it saw no other option than to make an exception from the main rule concerning a representative's lack of title to sue in its own name. The main line of reasoning was that: (i) the bondholders had no other viable alternative than to unite in a legal action via the Nordic Trustee, be it for claims in contract or tort, (ii) the parties have established a contractual framework to cater for the former, (iii) this framework is well regarded within the financial market nationally and internationally, and (iv) an action by the Nordic Trustee secured the equal treatment of the bondholders as well as a fair allocation of litigation costs.

It can be deduced from these rulings that the concerns raised in Rt. 1989 p. 338 *(Eviction)* and Rt. 2006 p. 238 *(American Receiver)* were considered less present when it came to an action by the Nordic Trustee, or even the IPR manager in Rt. 2010 p. 646. The need for allowing these suits was stronger than those of an ordinary representative. An ordinary representative lacks (i) the acknowledged contractual framework, and (ii) the authority to independently make dispositions with binding effect upon the principal. Nonetheless, the main rule concerning a representative's lack of a right of action still applies, as the Thule Drilling cases only constitute an exception.

Surprisingly, the Supreme Court did not consider the Financial Collateral Act of 2004, although the Nordic Trustee presumably relied upon it

[122] Rt. 2014 p. 577 [40]
[123] ibid
[124] ibid [44]

in its pleadings.[125] By virtue of section 1 of this Act, a trustee – as security holder – may initiate enforcement proceedings based on the procedure agreed in the bond terms. It would be pointless to authorise the Nordic Trustee as a security holder, if it did not have title to sue or be sued in respect of that security or to file a petition for bankruptcy against the issuer or another obligor. Perhaps the Supreme Court did not find it necessary to point this out, or it sought to avoid having to deal with the EEA-regulation incorporated by the Financial Collateral Act.[126]

5 Implications following the Nordic Trustee's Title to Sue

In the three cases conferring the Nordic Trustee with title to sue, the Supreme Court dismissed several arguments pertaining to the practical implications and consequences of such a right. The ones of general interest are subject to further analysis in this section, before this article concludes in subsection 5.5 that – despite these objections – there was no viable alternative other than vesting the Nordic Trustee with title to sue in its own name on behalf of the bondholders.

5.1 Liability for Case Costs

One obvious objection against the Nordic Trustee's title to sue in its own name concerns the liability for case costs. Despite the Nordic Trustee being formally party to the court proceedings, the court will not decide on the rights and obligations of the Nordic Trustee itself. Nevertheless, the Nordic Trustee will be liable for the case costs pursuant to section 202 of the Civil Procedure Act. Reimbursements from the bondholders will have

[125] The Nordic Trustee made this argument in the Court of Appeal case, LB-2009-96441 (n 29)

[126] Directive 2002/47/EF

to be sought by the Nordic Trustee in due course.[127] In theory, the Nordic Trustee may become short of funds, which gives rise to the question of whether the issuer may claim the excess from the bondholders.[128]

Noting that the bondholders are the real parties in interest, the issuer is likely to succeed with an argument that the bondholders are jointly and severally liable for these rather limited costs under Norwegian law. After all, the legal action is initiated by the Nordic Trustee on the bondholders' behalf in order to preserve their collective interests. As further explained in sub-section 5.3 below, the ruling on cost will however not be enforceable against the bondholders as if the judgment were obtained against them directly.[129]

5.2 Liability for Wrongful Arrest

A similar objection was made in relation to liability for wrongful attachment or arrest. When put to the Supreme Court, the court simply noted that the enforcement officer must ensure that adequate countersecurity is put up, before the attachment or arrest order is made. However, the court fails to take into account that the claim for damages may substantially exceed the countersecurity. Arrest in, for instance, rigs or vessels under construction, will cause expensive delays and, potentially, cancellation of drilling contracts or charter parties. This could result in a substantial claim for damages if the arrest order was wrongful. Both the countersecurity and the indemnity,[130] which the Nordic Trustee is likely to have sought from the bondholders prior to initiating any action, may be insufficient to cover such liability.

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[127] The Nordic Trustee may require an indemnity from the bondholders before taking certain actions, see clause 16.4 (h) of the standard bond terms (n 6).

[128] The last published accounts of the Nordic Trustee from 2015 show an equity of NOK 9,331,000 compared to approximately NOK 25,000,000 at the time of the first suit in 2010; refer to the accounts publically available at <www.proff.no/regnskap/nordic-trustee-asa/oslo/finansiering/Z0I3KQH8/> accessed 30 March 2017

[129] See section 4-7 of the Enforcement Act of 1992, which states that enforcement can only be sought against the named claimant or respondent.

[130] See clause 16.4 (h) of the standard bond terms (n 6).

Again, the Nordic Trustee is the only party directly liable.[131] Due to the possibly sky-high claims, it is more than likely that the Nordic Trustee will have insufficient funds to cover a potential liability. It is questionable whether the bondholders can be held jointly and severally liable, which may in turn depend on whether the Nordic Trustee was instructed by the bondholders' meeting to take action or if the Nordic Trustee acted on its own initiative. In general, it may be contended that the bondholders must be identified with the actions of the Nordic Trustee, save for cases of wilful misconduct. Nonetheless, the issuer may expect great difficulties in obtaining settlement. Similar to the ruling on case costs, a judgment against the Nordic Trustee is not likely to be accepted as the basis for direct enforcement against the bondholders in Norway or abroad.[132]

5.3 Troubles with Enforcement: The Anonymous and Shifting Class of Bondholders

Pursuant to Norwegian law, a ruling on case costs or a decision on liability for wrongful arrest will, as mentioned, only serve as grounds for direct enforcement against the Nordic Trustee. Thus, enforcement proceedings will have to be initiated against the individual bondholders, if the Nordic Trustee fails to settle its liability. However, the bondholders are spread across various jurisdictions, and they are numerous and largely anonymous. The issuer will therefore face a wide range of challenges should such enforcement proceedings prove necessary in Norway or abroad.

First, the issuer will have to overcome the obstacles relating to the bondholders' anonymity. The difficulties of establishing the identity of the bondholders are explained in section 2 above. In addition, the bonds are traded on the open market,[133] rendering the class of bondholders a shifting group. Divestment of and investment in bonds may affect the individual bondholder's liability, but these questions are too complex to be adequately dealt with within the limits of this article.

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131 See section 32-11 of the Civil Procedure Act.

132 See section 4-7 of the Enforcement Act (n 129).

133 E.g. the stock exchange, OTC or other regulated market place.

Furthermore, foreign jurisdictions may not accept that the individual bondholders are liable for any costs or damages in excess of the amount settled by the Nordic Trustee and the enforcement proceeding would fail even though a bondholder's identity and jurisdiction have been identified. It is needless to say that the litigation costs and risk on the part of the issuer are immense.

5.4 Calculation of Claims and Set-Off

In addition to the objections above, the defendants, in Rt. 2014 p. 577 (*Damages in tort*), made several arguments in respect of the calculation of each bondholder's claim, but these were rather quickly dismissed by the Supreme Court. This article questions whether the Supreme Court was right when dismissing these without thorough consideration. Among the questions that need to be answered, when calculating the total loss of the class of bondholders, are:

(i) How to calculate each bondholder's claim?
(ii) How to treat bondholders that have suffered a loss but have divested their bonds?
(iii) How to factor in new bondholders that have not suffered any loss?
(iv) How to differentiate between the bondholders who have lost and gained on the bonds?
(v) How to factor in that the largely anonymous class of bondholders is constantly changing through trades on the secondary market?
(vi) How to adjust the compensation payable by the issuer when some or a group of bondholders have contributed negligently to the loss?[134]
(vii) How to adjust for set-off (if any) against some bondholders if the claim is founded in tort?
(viii) At what point in time does one take a snapshot of the current bondholders, in order to calculate the claim?

[134] The class of bondholders or group thereof could for instance through bondholders' meetings block certain required actions of a distressed issuer or otherwise force the issuer into settlements that fail or only benefit a few bondholders or creditors.

(ix) How to take into account bondholders who divest the bonds after the snapshot is taken?

It would certainly break the limits of this article, if these questions were to be adequately examined. Thus, only a few principal remarks shall be made in this respect.

The Supreme Court briefly noted that the loss pertaining to the bonds would be the same regardless of the above questions, but made certain reservations in respect of (ii) and (vi).[135] In theory, as the court noted, the loss could be the same for all bondholders; however, it is an established rule of law that the actual loss needs to be calculated individually. Consequently, the total loss of the class of bondholders in Rt. 2014 p. 577 *(Damages in tort)* would not amount to the estimated return, had the security not been violated, less the actual return received.[136]

In the high yield market, there are, as previously mentioned, professional investors specialising in purchasing bonds of distressed issuers and who threaten the issuers with bankruptcy to make a tidy profit when the other creditors cave in. A new bondholder purchasing bonds when the price is already low and who might not have suffered any loss, must not be entitled to compensation although other bondholders are entitled to such.

By allowing the Nordic Trustee to sue for damages, either in contract or in tort, the court overlooked the fact that these calculations will in practice prove rather difficult. It is nonetheless for the Nordic Trustee to prove the loss of each bondholder and the total amount claimed. Consequently, the Nordic Trustee will have to be put to strict proof as to the quantum of damages. Still, the issuer may have difficulties with challenging the calculations of the Nordic Trustee, when not knowing the identities of the bondholders.

Following the first Supreme Court ruling, the Court of Appeal dealt with the liability of the other guarantors of Thule Drilling ASA and their objections as to contributory negligence or bad faith on the part of the

[135] Rt. 2014 p. 577 [35]

[136] ibid

bondholders.[137] The Court of Appeal noted that that each bondholder's claim and potential liability had to be assessed individually.[138] A bondholder could not be identified with other bondholders and/or the class of bondholders, or vice versa.[139] As a result, the issuer, its guarantors or other parties with a liability towards the bondholders, will have to raise and prove their objections against each relevant bondholder or group thereof. This may in turn prove difficult, and shows the complexity of calculating or challenging the claim. In the present case, however, the Court of Appeal found, after an overall assessment, that the objections were unsuccessful.[140]

5.5 Summary: Striking a Fair Balance

The above objections constitute reasonable counter-arguments against vesting the Nordic Trustee with a right to sue in its own name on behalf of the bondholders. Nevertheless, the Supreme Court's reasoning is convincing, due to the lack of a viable alternative. As properly noted by the court: one cannot deny the Nordic Trustee a right of action due to lacking insight into all the possible consequences of doing so. The objections above, save for the difficulties of calculating a claim, are likely to only apply to a very limited number of cases; thus the weight of these counter-arguments is reduced.

One may however argue that we have simply adopted the Anglo-Saxon bond trusteeship without consideration of our peremptory civil procedure rules, whereby a representative does not have a right to sue or be sued in its own name. On the other hand, when introducing the bond market to Norway, especially the high yield market, we needed a mechanism and a contractual framework to cater for its complexity. What better way to do this, than to adopt the well-developed mechanisms of the Anglo-Saxon markets?

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137 Judgment of 19 May 2015 by Borgarting Court of Appeal (LB-2015-137094)

138 ibid

139 ibid. A possible exception could be identification through decisions by the bondholder's meetings pursuant to cl. 15 of the standard bond terms (n 6).

140 LB-2015-137094 (n 137)

Despite not being at the centre of the Supreme Court's reasoning in the Thule Drilling cases, the noaction clause is designed to provide equal protection to *both* the issuer and the bondholders. The issuer has one entity, the Nordic Trustee, to relate to when it comes to reporting and discussing minor amendments to the bond terms,[141] as well as a professional counterpart when considering restructuring of the bond issue(s). Only the Nordic Trustee is entitled to declare an event of default, although a certain percentage of bondholders may instruct the Nordic Trustee to do so.[142]

Enforcement proceedings by the Nordic Trustee secure the best outcome and limit the costs. A class action by the bondholders is not possible when seeking an interlocutory order, if the immediate need to secure assets arises. Nor is a class action easy to establish, due to the anonymous and shifting nature of the bondholders. As such, the no-action clause protects the issuer against frivolous or multiple lawsuits from individual bondholders, including bondholders with interests contrary to those of the class of bondholders. The noaction clause does not expressly apply to claims in tort against third parties not privy to the bond terms. However, the no-action clause, read in light of the powers vested with the trustee to recover any amount outstanding, can certainly serve as a supporting argument when suing third parties in close proximity to the issuer.[143]

The Nordic Trustee is responsible for the active management and supervision of the bond terms. Without a right to sue or to secure and enforce security, much of the legal and economic basis for appointing a bond trustee would disappear. It is thus likely that the bond market, as it is today, would have collapsed awaiting an alternative regulation in order to cater for the functions currently held by the Nordic Trustee. The Nordic Trustee may therefore help to secure financial stability in a distressed bond market, as we have seen today. As a result, this article

141 Pursuant to cl. 17.1 (a) of the standard bond terms (n 6), the Nordic Trustee has authority to waive or agree to minor amendments to the finance documents.

142 Cl. 15 of the Nordic Trustee's standard bond terms (n 6)

143 See clause 14.2 (c) of the standard bond terms (n 6) and the Supreme Court's reasoning in Rt. 2010 s. 402 [32], [41]–[43].

argues that the no-action clause does strike a fair and proper balance, and that the Supreme Court – despite the mentioned objections – was right in vesting the Nordic Trustee with title to sue in its own name.

6 The Bond Trustee's Right to Sue and be Sued in the UK and the US[144]

When discussing the Nordic Trustee's title to sue and be sued in its own name, one cannot avoid comparing it to that of the bond trustees in the UK and the US. In these countries, the trusteeship is an advanced legal institute, stemming from the original family trusts,[145] though to date there are few distinct similarities between these. For instance, the bond trustee is not a trustee in the traditional common law sense, since it does not have legal ownership to the trust property; it merely holds delegated authority from the bondholders.[146] A family trust, on the other hand, typically involves the transfer of land or funds by a settlor to the trustee,

[144] One might expect there to be similar issues concerning the trustee's title to sue in Norway's neighbouring countries, but the bond markets in these countries are not as commercially developed. In both Sweden and Denmark, bonds are mainly issued by the government or within the housing market, see Letter from the Nordic Trustee dated 27 October 2009 (n 12) and Daniel Wenne, 'Hinging on Trust', JP 2015 235–253, 237. Thus, there is little guidance to be obtained from there. In Sweden it is however debated whether the bond trustee has title to sue on behalf of the bondholders, see Magnus Wieslander, '*Om avtal om talerätt och taleförbud på företagsobligasjonsmarknaden i Sverige*', JP 2012 263–287. The Nordic Trustee is now present in Sweden, Denmark and Finland, which may give rise to a more commercial bond market in these countries; see Nordic Trustee, 'Company Information' <nordictrustee.com/company-information> accessed 16 March 2017

[145] A trust is commonly defined as "*[a]n equitable or beneficial right or title to land or other property, held for the beneficiary by another person, in whom resides the legal title or ownership, recognised and enforced by courts of chancery*", see Black's Law Dictionary, <thelawdictionary.org/trust/> accessed 1 April 2017.

[146] Roy Goode, *Commercial law* (3edn LexisNexis Butterworths 2004) 166 and Philip Rawlings, 'The changing role of the trustee in international bond issues', JBL 2007 43–66, 48

which holds such property for the beneficiary.[147] The trusteeship is also largely the reason why the Anglo-Saxon bond markets have been more advanced than those found in civil law countries.[148] In addition to bond issues, the trustee plays a significant role when structuring financial deals such as project finance and collective investment schemes.[149]

As mentioned, the bond trustee has title to sue on behalf of the bondholders in the UK and the US. The no-action clause is strictly applied[150] by the courts in both jurisdictions for claims in contract and in tort.[151] In the case of *Elektrim SA v Vivendi Holdings Corp.*,[152] the Court of Appeal held that the noaction clause precluded actions by the bondholders against the issuer, and upheld an antisuit injunction against a bondholder in Florida.[153] The court noted that the commercial reasoning underpinning bonds was that the bondholders should only act through the trustee.[154]

A customary no-action clause found in a UK trust deed may read:

> At any time after the Bonds become due and repayable, the Bond Trustee may, at its discretion and without further notice, institute such proceedings against [the issuer] or [the guarantor] as it may think fit to enforce the Bonds and the provisions of the [Trust Deed], but it need not take any such proceedings unless (i) it shall have been so directed by an Extraordinary Resolution of the Bondholders or so requested in writing by holders of at least thirty percent in principal amount outstanding of the Bonds and (ii) it shall have been indemnified to its satisfaction. No Bondholder

147 Philip Rawlings, 'The changing role of the trustee in international bond issues', JBL 2007 43–66, 43

148 ibid

149 ibid

150 E.g. *Cruden v. Bank of New York*, 957 F.2d 961, 968 (2d Cir.1992)

151 See for instance *Elektrim S.A. v Vivendi Holdings 1 Corp and Law Debenture Trust Corporation PLC* [2008] EWCA Civ 1178 [101] and *Feldbaum v. McCrory,* 1992 WL 119095 *6 (Del.Ch. June 2, 1992).

152 [2008] EWCA Civ 1178

153 ibid [162]

154 ibid [100]

> may proceed directly against [the issuer] or [the guarantor] unless the Bond Trustee, having become bound to proceed, fails to do so within a reasonable time and such failure is continuing.[155]

The wording of this clause differs from the Norwegian no-action clause, but both clauses aim to prevent any action by individual bondholders. In the UK, the individual bondholder has to pass several obstacles in order to take direct action against the issuer. First, the bond trustee must fail to take action, and then a certain percentage of the bondholders has to adopt a resolution instructing the bond trustee to do so.[156] If the bond trustee still refuses or fails to take appropriate action, the individual bondholder will be permitted to take direct action against the issuer.[157]

Comparing the example above to the standard Norwegian no-action clause, one notes that the right of the bondholders to take action, if the Nordic Trustee fails to do so within a reasonable time, is not included in the Norwegian clause. Nonetheless, such a right is likely to be implied by the Norwegian courts should the Nordic Trustee fail to take adequate and timely action. It is also worth noting that the Norwegian Supreme Court has not explicitly ruled on the validity of the no-action clause if it were to be challenged by an individual bondholder.

A similar no-action clause to the one above is found in the US trust indenture. The US federal Trust Indenture Act of 1939 15 U.S.C. §§ 77aaa-77bbbb allows the bond trustee to sue in its own name in order to recover unpaid interest and/or principal on the bonds. A key difference between the US and the UK, however, is that an individual bondholder, despite the no-action clause, can also sue to recover principal and interest due on his or her bonds.[158] Consequently, the US trustee does not have the same authority and discretion as the trustee in the UK (or in Norway),

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155 The clause is found in the case of *Elektrim S.A. v Vivendi Holdings 1 Corp and Law Debenture Trust Corporation PLC* [2008] EWCA Civ 1178 [87].

156 ibid 49–50

157 ibid

158 See the US Trust Indenture Act, 15 U.S.C. § 77ppp(b).

and the trust indenture is not as far reaching in limiting the rights of the individual bondholder as the trust deed.[159] Still, the no-action clause is strictly applied to the extent it complies with the US Trust Indenture Act. In *Feldbaum v. McCrory,*[160] the court noted that purpose of the no-action clause is:

> to deter individual debentureholders from bringing independent law suits for unworthy or unjustifiable reasons, causing expense to the Company and diminishing its assets. The theory is that if the suit is worthwhile, [a significant percent] of the debentureholders would be willing to join in sponsoring it.... An additional purpose is the expression of the principle of law that would otherwise be implied that all rights and remedies of the indenture are for the equal and ratable benefit of all holders.

In the Thule Drilling cases, the Norwegian Supreme Court's main focus was, as mentioned, on the additional purpose: namely, that all remedies are for the equal benefit of the class of bondholders. The other aspects of the no-action clause protecting the issuer were, somewhat surprisingly, not given attention by the court.

Most English and US case law relating to the bond trustee's title to sue concerns the no-action clause. There are few cases whereby the bond trustee has been sued in its own name.[161] In this respect, one must distinguish between a suit against the bond trustee for actions performed in its capacity as trustee, and suits against the bondholders in the name of the bond trustee. The latter is likely to be impossible under English

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159 Philip Rawlings, 'The changing role of the trustee in international bond issues', JBL 2007 43–66, 64

160 1992 WL 119095, *6 (Del.Ch. June 2, 1992)

161 In the UK, disputes were generally settled amicably with the help of certain institutes in the City of London. It was only when American vulture funds started utilising the mechanisms of the legal system, that such cases started appearing before the English courts, see Philip Rawlings, 'The changing role of the trustee in international bond issues', JBL 2007 43–66, 44, 46.

and US law, considering the fact that the trust deed/indenture is only entered into between the issuer and the bond trustee in such a capacity. Thus, the bondholders are not party to the deed/indenture, and there is no contractual agreement to the effect of allowing the bondholders to be sued in the name of the bond trustee.

On the other hand, it is clear the bond trustee can be sued in its own name for actions performed in its capacity as trustee.[162] An example from the US is the case of *Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A*,[163] whereby the issuer, Chesapeake Energy Corp, sued the bond trustee in a dispute concerning the timeliness of a notice of special early redemption of the bonds at par plus. Neither the parties nor the court contested the bond trustee's right to be sued in its own name.

While the UK and US bond trustees are rooted in the common law trusteeship, the Nordic Trustee is a contractual establishment, which renders its functions and legal status under Norwegian law more uncertain. It was probably due to the influence of the Anglo-Saxon contractual framework and legal tradition, that the Nordic Trustee was vested with powers to sue in its own name under Norwegian law. This article will now proceed by assessing the possibility, pursuant to Norwegian law, of suing the Nordic Trustee in its own name.

7 The Right of the Nordic Trustee to be Sued in its Own Name

7.1 Introduction: Two Separate Questions

After discussing the Nordic Trustee's right to sue in its own name on behalf of the bondholders, it is time to explore the Nordic Trustee's right to be sued in its own name. The right to be sued must be split into two

[162] Phillip R. Wood, *Principles of International Insolvency* (Sweet & Maxwell 2007) 12-046.
[163] 773 F.3d 110

separate questions. First, there is the question of whether the Nordic Trustee can be sued in its own name in respect of actions performed in its capacity as bond trustee on behalf of the bondholders.[164] The issuer could, for instance, dispute a notice of an event of default or enforcement actions commenced by the Nordic Trustee. Furthermore, a third party creditor may file a suit seeking to have security interests, held by the Nordic Trustee on behalf of the bondholders, invalidated due to errors with the perfection or to dispute the priority ranking.

The second question is whether the issuer or other parties can sue the bondholders in the name of the Nordic Trustee. It would, *prima facie*, seem easier and more convenient to sue the bondholders in the name of the Nordic Trustee than to sue the individual bondholders themselves. For instance, the issuer may wish either to sue the bondholders for breach of the bond terms[165] or to bring a cross action against the bondholders in a suit initiated by the Nordic Trustee.[166] In addition, the issuer's bankruptcy estate or individual creditors may want to bring avoidance actions[167] against pre-bankruptcy transactions favouring the class of bondholders or a group thereof.

There are no clear answers to these two questions in the Civil Procedure Act or in case law. Section 1-3 of the Civil Procedure Act and its preparatory works[168] require a genuine need to sue the Nordic Trustee in its own name in order to allow the two categories of legal actions. Nonetheless, the starting point is yet again the main rule, as established by case law, that a representative cannot sue or be sued in its own name

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164 Note that the bond trustee can become liable due to breach of its contractual or fiduciary duties owed towards the issuer or the bondholders, but this topic is not within the ambit of this article.

165 The bondholder's meeting could for instance instruct the Nordic Trustee to act in violation of one of the provisions of the bond terms.

166 A cross action could have been the case in LB-2015-137094 (n 137), whereby the defendants argued that the bondholders had contributed to the loss by negligence or bad faith. In order to gain some leverage in the subsequent settlement discussions, the defendants could have sought to obtain a declaratory judgment to that effect. See subsection 5.4 for a summary of the case.

167 E.g. fraudulent transfers and preferences (*Nw. omstøtelse).*

168 Refer to note 54 for a list of these works.

on behalf of the real party in interest. Neither can such a right, in principle, be agreed through contracting. However, the complexity of and the answers to the two questions, as set out below, differ significantly.

7.2 Legal Action against the Nordic Trustee concerning Actions Performed in its Capacity as Bond Trustee

An exception to the abovementioned main rule is required in order to allow a legal action against the Nordic Trustee in respect of actions performed in its capacity as bond trustee (or security holder) on behalf of the bondholders. Both Rt. 1989 p. 338 *(Eviction)* and Rt. 2006 p. 238 *(American Receiver)* made it clear that explicit legal authority is necessary if one were to make such an exception. However, there has been some development in case law, as evidenced by the three Thule Drilling cases and Rt. 2010 p. 646 *(IPR Manager),* pertaining to a representative's right of action, provided that it has authority to make dispositions independently with binding effect upon the real party in interest. This development may make it easier to establish a right to sue the Nordic Trustee in its own name in respect of actions carried out in its capacity as bond trustee.

As to the requirements of section 1-3 of the Civil Procedure Act, there is undoubtedly a genuine need to allow suits against the Nordic Trustee in respect of actions performed on behalf of the bondholders. The alternative – having to sue the bondholders individually and thereby obliging them to instruct the Nordic Trustee to refrain from or to carry out certain actions – would be virtually impossible due to the anonymous and shifting nature of the class of bondholders.

The preparatory works to section 1 of the Financial Collateral Act, referred to above in sub-section 4.5, presume – although indirectly – that the Nordic Trustee can be sued in its own name by a creditor challenging the commercial outcome of the enforcement of secured assets.[169] In the midst of the Thule Drilling cases, the Nordic Trustee even voiced

[169] Ot. Prp. Nr. 22 (2003–2004) 'Om lov om finansiell sikkerhetsstillelse' 28, 53

a similar assumption.[170] The functionality of the role as bond trustee requires that the bond trustee can be sued in its own name in respect of its actions performed as bond trustee (or as security holder) on behalf of the bondholders.

In both the UK and the US, the bond trustee can be sued in respect of actions performed in this capacity. A trustee's right to sue and be sued in its own name is undisputed in those jurisdictions. This fact may serve as an argument in favour of allowing the Nordic Trustee to be sued in its own name in respect of actions performed in its capacity as bond trustee on behalf of the bondholders; especially when the Supreme Court has vested the Nordic Trustee with a right to sue in its own name. If an exception is made to the main rule and a representative is allowed to sue in its own name, one must – in order to ensure symmetry – accept that an action can be taken against that representative in respect of its acts performed on behalf of the real party in interest.

Although, there is no Supreme Court case dealing with this question, some guidance can be sought from a District Court case from 2009,[171] where the issuer sought an interlocutory order against the Nordic Trustee. The issuer aimed to reinstate the dismissed board of directors and to have the notice of an event of default withdrawn, together with seeking an injunction to prevent the Nordic Trustee from exercising any remedies due to an alleged event of default. Neither the parties nor the court discussed the Nordic Trustee's right to be sued in its own name. This is probably because the Nordic Trustee was the entity performing the challenged actions. It was the Nordic Trustee that had declared an event of default and dismissed the board of directors. Consequently, the legal action had to be filed against the Nordic Trustee, although it acted on behalf of the bondholders.

In light of the above arguments, the requirement of section 1-3 of the Civil Procedure Act as to a genuine need on the part of the claimant to sue the Nordic Trustee in its own name is evidently fulfilled in this regard. Hence, there are sufficiently strong arguments in favour of another

[170] Letter form the Nordic Trustee to the Ministry of Finance dated 27 March 2009 (n 12)

[171] Ruling of 4 April 2009 by Oslo District Court (*Nw. 'Byfogden'*) (TOBFY-2009-62739)

exception from the main rule. Consequently, the Supreme Court – if faced with this question – is likely to allow the Nordic Trustee to be sued in its own name in respect of actions performed on behalf of the bondholders in its capacity as bond trustee (or security holder).

7.3 Legal Action against the Bondholders in the Name of the Nordic Trustee

7.3.1 Why the need to sue the bondholders in the name of the Nordic Trustee?

The scenarios outlined, in sub-section 7.1 above, are examples, some more practical than others, of situations that can give rise to a need to bring a legal action against the bondholders. If the need to sue the bondholders arises, there are in theory two options: (a) the suit is brought against individual bondholders or a group thereof, or (b) the suit is brought against the class of bondholders in the name of the Nordic Trustee. Due to the anonymous and shifting nature of the class of bondholders, a suit may only be brought against the main known bondholders if alternative (a) is pursued.

However, the main bondholders are not likely to be in the same jurisdiction. Consequently, multiple lawsuits in different jurisdictions may be anticipated if one cannot establish jurisdiction in Norway.[172] A claimant suing the bondholders in one or several foreign jurisdictions faces great litigation risk and costs. Should the identity of the main bondholders be unknown or their jurisdiction too exotic to engage in, the claimant is effectively left without any remedy. This is arguably a risk that the issuer must be taken to have assumed, but the same cannot be said about other creditors or the bankruptcy estate of the issuer. Nonetheless, if the legal

[172] Bondholders resident in a state party to the Lugano Convention of 2007 may pursuant to art. 5 no. 6 be sued in the state where the trustee resides. Section 4-3 of the Civil Procedure Act further provides that: "*Disputes in international matters may only be brought before the Norwegian courts if the facts of the case have a sufficiently strong connection to Norway.*" (University of Oslo's unofficial translation (n 52))

action is to be aimed at the class of bondholders, the claimant will have to sue the bondholders in the name of the Nordic Trustee.

7.3.2 Is it possible to sue the bondholders in the name of the Nordic Trustee?

The practical need to sue the bondholders in the name of the Nordic Trustee is quite clear if the need to sue the bondholders should arise in the first place. This question is however more complex than the one in sub-section 7.2 above. Accordingly, this article will seek to identify the relevant factors the courts are likely to take into account if faced with this issue.

Absence of legal authority. As mentioned, there is no answer to this question in case law, and one will yet again have to establish an exception from the main rule that the real party in interest cannot be sued in the name of a representative.

The starting point is, as always, section 1-3 of the Civil Procedure Act, which requires a genuine need on the part of the claimant in order for the bondholders to be sued in the name of the Nordic Trustee. This article argues that a party who is wanting to sue the class of bondholders, has a genuine need to do so in the name of the Nordic Trustee. Due to the anonymous and shifting nature of the class of bondholders, there is no other way of securing that the action is filed against all bondholders. If such an action were to be allowed by the courts, it would be more efficient in the sense that it is likely to be legally binding upon the class of bondholders under Norwegian law,[173] although one may face subsequent challenges with enforcement abroad. This genuine and practical need itself may however be insufficient in this scenario.

No contractual basis. Despite the fact that parties cannot in principle make contractual arrangements concerning title to sue or be sued, one of the main arguments in favour of the Nordic Trustee's title to sue was in

[173] By virtue of section 19-15 of the Civil Procedure Act, a judgment may become binding upon third parties not party to the court proceedings provided that the third party "*would be bound by a corresponding agreement on the subject matter of the action due to their relationship with the party.*" (University of Oslo's unofficial translation (n 52))

fact the contractual framework and the no-action clause. This framework was even relied upon to some extent by the Supreme Court in respect of tortious claims against parties not privy to the bond terms.[174] The main purposes of the no-action clause are: (i) to protect the issuer from multiple (and frivolous) lawsuits, and (ii) to cater for a rational mechanism through which the bondholders can take legal action with an equal share of the profit and costs.

Contrary to the clear language of the no-action clause, whereby the bondholders waive any right of action, it is questionable whether the bondholders have contractually agreed to be sued in the name of the Nordic Trustee. Without an express or implied term to that effect, there is no contractual basis for suing the bondholders in the name of the Nordic Trustee. One would also need to distinguish between suits by the issuer and third parties. According to cl. 16 (1)(a) of the bond terms, the bondholders have not expressly agreed to be sued in the name of the Nordic Trustee by either the issuer or a third party:

> The Bond Trustee has power and authority to act on behalf of, and/or represent, the Bondholders in all matters, including but not limited to taking any legal or other action, including enforcement of these Bond Terms, and the commencement of bankruptcy or other insolvency proceedings against the Issuer, or others.[175]

Conferment of powers to sue or be sued would in general require clear wording, which the no-action clause, together with cl. 16(1)(a), do provide when it comes to barring suits from the bondholders and vesting title to sue with the Nordic Trustee. However, the wording "*power and authority to act on behalf of, and/or represent, the Bondholders in all matters*" *(emphasis added)* may be interpreted to also include a suit against the bondholders in the name of the Nordic Trustee. In particular, when the Nordic Trustee has title to sue on behalf of the bondholders, a right

[174] Rt. 2014 p. 577 [41], [43]

[175] Nordic Trustee's standard bond terms (n 6)

to sue the bondholders in the name of the trustee would ensure a fully symmetric procedural rule.

One the other hand, if that was the intention, conferral of such a significant right should have been expressly stated in the bond terms. The ability to be sued in the name of the Nordic Trustee is not going to sit well with the bondholders. The bondholders are investors who will accept losing their investment but not incurring liability. If this had been an identified risk, the bond terms would arguably have included a general disclaimer of liability, or at least a cap on liability, in favour of the bondholders. In the UK and US, the bondholders are not party to the bond terms, and thus there is no contractual basis for suing the bondholders in the name of the bond trustee. For that reason, such a right was arguably not contemplated when the Nordic Trustee's standard bond terms were drafted.

It is to be noted in this respect that there are differences with regards to the legal status of a bond trustee under Norwegian law, compared to that of the UK and the US. In Norway, the bond trustee is merely a representative of the bondholders without a defined legal status, while in the UK and US, the bond trustee is a definite legal entity, which allows the bond trustee to sue and be sued in its own name.[176] However, there is no legal authority or contractual arrangement in those jurisdictions for suing the bondholders in the name of the bond trustee.

Considering the vague wording contained in the bond terms and the UK and US stance, the Norwegian contractual framework is not a strong argument in favour of a right to sue the bondholders in the name of the Nordic Trustee. Consequently, the bondholders would be likely to challenge such a suit on the basis that they can only be sued in their own names.

No mirroring of the reasons supporting title to sue. One may seek to find arguments in support of the right to sue the bondholders in the

[176] A trustee may be defined as "[t]he person appointed, or required by law, to execute a trust; one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another", see Black's Law Dictionary, <thelawdictionary.org/trustee/> accessed 27 May 2017.

name of the Nordic Trustee by mirroring the reasons supporting the Nordic Trustee's title to sue on behalf of the bondholders. However, it is difficult to mirror the Supreme Court's reasoning in the Thule Drilling cases, since, as summarised in sub-section 4.5 above, it was unilaterally focused on the title to sue. Thus, it appears that the Thule Drilling cases have established an asymmetric procedural rule, whereby the Nordic Trustee has title to sue on behalf of the bondholders, but the issuer or another party cannot sue the bondholders in the name of the Nordic Trustee.

It is therefore prudent to question whether the Supreme Court was wrong in its unilateral approach. At first, it seems odd to have vested the Nordic Trustee with title to sue on behalf of the bondholders without having considered the opposite scenario. The Supreme Court accepted that the market has adopted a foreign legal concept – the bond trustee – and vested it with title to sue, without having properly considered the implications of such a vesting. As mentioned, the bond trustee is not a definite legal entity in Norway, like it is in the US and the UK. However, as contended in subsection 5.5 above, the Supreme Court's reasoning was pragmatic and necessary, if one were to preserve the Norwegian bond market in its present form. Nonetheless, there is not much support in favour of a right to sue the bondholders in the name of the Nordic Trustee, to be found in the Supreme Court's reasoning on the title to sue.

Symmetry. An argument resting on ensuring symmetry, when it comes to the possibility of suing the bondholders in the name of the Nordic Trustee, may however have some bearing on its own. If the genuine need for the bondholders to unite and sue the issuer via the Nordic Trustee is considered strong enough to allow such an action, then why would the genuine need to sue the bondholders in the name of the Nordic Trustee not be regarded as equally pressing? First, it is to be stressed that the need to sue the issuer or an obligor is significantly more likely to arise, than the need to sue the bondholders. Moreover, some of the asymmetry is averted by the fact that one is likely to be allowed to sue the Nordic Trustee in its own name in respect of actions performed

in its capacity as bond trustee (or security holder) as outlined above in sub-section 7.2.

Noting that the Supreme Court has reiterated that an exception from the main rule requires explicit legal authority in both Rt. 1989 p. 338 *(Eviction)* and Rt. 2006 p. 238 *(American Receiver),* it is unlikely that an argument resting on symmetry will be sufficient in the absence of a contractual framework catering for such an approach; especially when this is not the case in the UK or the US.

Troubles at the enforcement stage. Assuming that the bondholders could in fact be sued in the name of the Nordic Trustee, this does not necessarily mean that the claimant will be successful if a judgement is obtained in its favour. The Nordic Trustee has never been in possession of the funds stemming from the bond issue, nor will it be liable towards the claimant, save for case costs and damages for wrongful arrest. If a judgment is obtained against the bondholders in the name of the Nordic Trustee, it will in turn have to be enforced against the bondholders, unless payment is made voluntarily. Enforcement against bondholders in foreign jurisdictions is likely to prove difficult and may weaken the purpose of suing the bondholders in the name of the Nordic Trustee.

The jurisdiction of the individual bondholder may not accept a judgment against the Nordic Trustee as binding upon the individual bondholder. Given that it is not possible to sue the bondholders in the name of the bond trustee in the UK or the US – the origins of the bond market – enforcement of such a judgment abroad is likely to prove challenging. Obviously, the bondholder will argue that it was not properly notified of the legal action and/or that it was not a party to the legal proceedings.[177]

Moreover, the bonds are traded on the open market,[178] rendering the class of bondholders a shifting group. Divestment of and investment in bonds may affect the bondholder's individual responsibility. If the issuer

[177] Notification of a suit against the bondholders in the name of the Nordic Trustee could be communicated through VPS or published on www.stamdata.no, where the Nordic Trustee publishes important information.

[178] E.g. the stock exchange, OTC or other regulated market place.

sues the class of bondholders for breach of the bond terms, a question arises as to whether the issuer can hold bondholders liable, where they become holders of bonds after the time of breach. Another question is whether such a responsibility is joint and severable.

If an action in the name of the Nordic Trustee were to be allowed, it is evident that one may face prolonged discussions or even further court cases regarding the nature of liability and which bondholders are to be held liable. Nonetheless, these challenges are likely to further convince the Norwegian courts that the bondholders cannot be sued in the name of the Nordic Trustee.

7.3.3 The conclusion and possible consequences thereof

The above sub-sections show that there is no contractual framework allowing the bondholders to be sued in the name of the Nordic Trustee. Nor is there any legal authority to that effect, and the practical and legal obstacles are likely to prevent any attempt at suing the bondholders in the name of the Nordic Trustee. As a result, the main rule – that a representative cannot be sued on behalf of the real party in interest – applies. The practical need which supports a right to sue the bondholders in the name of the Nordic Trustee is arguably insufficient and the courts are likely to see no other option than to dismiss such a legal action. Any party wishing to sue the bondholders is left with the option of suing the main known bondholders in accessible jurisdictions, which in itself is not a simple exercise.

One of the main differences between legal actions against the bondholders themselves and an action in the name of the Nordic Trustee, apart from the increase of litigation costs and risk, is the difficulties of establishing the identity of the main bondholders that need to be overcome before the legal action is initiated, rather than at the stage of enforcement. Another substantial difference is that the claimant may need to file suits in several jurisdictions in parallel. However, if an action against the individual bondholder is successful, then the chances of a successful enforcement increase significantly.

The conclusion that one cannot sue the bondholders in the name of the Nordic Trustee does, however, have some undesired effects. Bearing in mind that the Nordic Trustee does have a right to sue in its own name on the bondholders' behalf, this conclusion entails an element of imbalance to the disfavour of a claimant seeking to sue the bondholders. An action concerning liability for excess damages for wrongful arrest, as discussed in sub-section 5.2 above, cannot be filed against the individual bondholders in the name of the Nordic Trustee. Such an action will have to be brought against the individual bondholders themselves, despite the fact that the loss on the part of the issuer, was in fact caused by the bondholders through the action filed by the Nordic Trustee.

Furthermore, the challenges arising from the anonymous, shifting class of bondholders and enforcement in foreign jurisdictions are also likely to prevent a bankruptcy estate from pursuing claims against the bondholders. As a result, the class of bondholders may *de facto* be safe from avoidance actions by the issuer's bankruptcy estate.[179]

Nonetheless, there is no legal authority supporting another exception to the main rule that a representative cannot be sued in its own name on behalf of the real party in interest. In any event, the legal and practical implications pertaining to such an exception are likely to be too great to overcome.

8 The Need for Legal Codification Revisited

This article has explored the Nordic Trustee's right to sue and be sued in its own name, and especially the challenges pertaining to a legal action against the class of bondholders. In the wake of the rulings of the lower courts in the first Thule Drilling case,[180] the government prepared – on the initiative of the Nordic Trustee – a bill to cater for the Nordic Trustee's

[179] This would not be the case with traditional bank financing, whereby the participating banks in the loan syndicates are more easily identified.

[180] TOBYF-2009-44929 (n 28) and LB-2009-96441 (n 29)

right to sue and be sued in its own name. Due to the changes in the Nordic Trustee's functions following the rise of the high-yield market in Norway, a legal codification of its right to sue and be sued should perhaps be revisited.

Although the Supreme Court was arguably right in allowing the legal actions by the Nordic Trustee in its own name in the Thule Drilling cases, there are still certain challenges arising from the legal status of the Nordic Trustee. The Norwegian bond market has adopted, and the Thule Drilling cases accepted, certain features of the Anglo-Saxon bond markets and bond trustees, while other aspects are still uncertain due to the fact that the Nordic Trustee is a contractual establishment, rather than a legal one.

Section 5 pinpoints certain shortcomings of the Supreme Courts' reasoning concerning the Nordic Trustee's title to sue, which could benefit from legal review and possibly codification. Furthermore, a bill could assist in determining whether the legal action against the Nordic Trustee falls within the first or second category as set out above in sub-section 7.1. There are probably some scenarios where one would need to determine whether the legal action is correctly aimed at the Nordic Trustee in its capacity as such or if it should have been filed against the individual bondholders or a group thereof.[181] Additionally, a codification could also seek to avert some of the imbalance pertaining to the lack of a right to sue the bondholders in the name of the Nordic Trustee.

A natural starting point for this discussion is the draft bill prepared in connection with the first Thule Drilling case. It aimed to regulate the Nordic Trustee's right to sue and be sued in its own name. The draft provision was to be included in a new chapter, being 5a, to the Securities Trading Act:

[181] For example where the Nordic Trustee has acted upon an instruction by the bondholders' meeting.

§ 5-1a *Bond trustees' title to sue etc.*[182]
An entity, which in the agreement with the borrower is appointed as a representative of the lenders (bond trustee etc), has title to sue and to be sued with binding effect upon the lenders being party to the bond terms in cases concerning the bond terms and ancillary agreements provided that:

1) the lenders are prohibited from pursuing any claims on their own pursuant to the bond terms, and
2) the bond terms concerns the issuance of negotiable securities within the meaning of section 2-2 second paragraph no. 2 of the this Act and that are registered in a securities register subject to supervision by an EEA-state.

The above provision intended to accommodate legal actions by and against the Nordic Trustee, provided that: (i) the action concerns a dispute arising from the bond terms or ancillary agreements, (ii) the bond terms contain a no-action clause, and (iii) the bonds are registered in a securities register under supervision by an EEA-state. The draft provision does not distinguish between suits against the Nordic Trustee in respect of its actions performed in its capacity as bond trustee and suits against the bondholders in the name of the Nordic Trustee. However, the bill did seem only to contemplate the former, but it is to be noted that the bill did not pay much attention to the Nordic Trustee's right to *be sued* in its own name.[183]

The bill, however, was long forgotten when the Supreme Court ruled that the Nordic Trustee did have a right of action in Rt. 2010 p. 402 (*Attachment Order*). Nonetheless, the Nordic Trustee had to argue two additional cases in front of the Supreme Court before it was allowed a right to file for bankruptcy and to sue for damages in tort against parties

[182] Author's unofficial translation of the draft provision contained in the letter from the Financial Supervisory Authority of Norway to the Ministry of Finance dated 24 November 2009 available at <www.regjeringen.no/contentassets/341240bc72f946ba80a76d169e873c41/brev_kredittilsynet_24.11.09.pdf> accessed 31 March 2017

[183] Refer to the letter from the Financial Supervisory Authority of Norway to the Ministry of Finance dated 24 November 2009 (n 182) and the letter from the Nordic Trustee to Ministry of Finance dated 27 October 2009 (n 12)

not privy to the bond terms. Thus, there may be further challenges to the Nordic Trustee's title to sue or enforce in the future.

In an attempt to avert the imbalance pertaining to the fact that the bondholders cannot be sued in the name of the Nordic Trustee, the bill could for instance provide that the class of bondholders is jointly and severally liable for case costs and damages for wrongful arrest in excess of the amount settled by the Nordic Trustee. Such a potential liability would however not sit well with the investors.[184] In order to still make the bond issue acceptable to the market, one would potentially have to cap such a liability at the level of each bondholder's investment. In theory, one could also allow a cross action against the bondholders in the name of the Nordic Trustee in direct connection to an action filed by the Nordic Trustee. The latter is likely to be deemed unacceptable by the market, although it will only be relevant in a very few cases.[185] It is certainly a balancing act to secure the attractiveness of the Norwegian bond market and at the same time avert some of the imbalance in respect of the inability to sue the bondholders in the name of the Nordic Trustee.

A legal codification of the Nordic Trustee's right to sue and be sued in its own name should perhaps be subject to more scrutiny than the ad-hoc bill. Among the issues that may benefit from regulation are: (i) specification of categories of contractual and tortious claims that the Nordic Trustee can sue and be sued in respect of, (ii) a judgment's binding effect upon the real parties in interest (*i.e.* the bondholders), (iii) liability for case costs and damages for wrongful arrest or similar, (iv) set-off (when relevant), (v) the effect of secondary trading on an ongoing lawsuit by the Nordic Trustee on behalf the bondholders, including extinction of rights and claims, and (vi) the question of which entities may act as bond trustees, and possibly some core rights and obligations of bond trustees.

In order to cater for items (i)–(vi) above, a more extensive bill will need to be prepared. However, the draft bill does cover the most crucial elements, which are the Nordic Trustee's right to sue on behalf of the

[184] Pension funds, for instance, are large investors in bonds, and this type of risk is likely to be unacceptable.

[185] Like for instance in LB-2015-137094 (n 137).

bondholders and to be sued in its own name (arguably only in respect of acts performed in its capacity as bond trustee), together with the binding effect of a judgment upon the real parties in interest. When the draft bill was published, it was stressed that it was not the time to consider regulation of which entities that can act as bond trustees, as it was feared that this would significantly delay the process. Now, however, it may be worthwhile to at least look into this issue.[186]

Due to EEA-regulations, there are some regulations pertaining to bond trustees in Norway; *e.g.* the Financial Collateral Act. The regulations are, however, fragmented and inconsistent; especially when bearing in mind that the bond trustee is only a contractual establishment in Norway. Thus, a legal codification and to some extent a reform may prove useful to clarify the legal status of the Nordic Trustee, whose existence is crucial to the Norwegian high yield bond market.

9 Concluding Remarks

As this article has explored, there is some asymmetry pertaining to the Nordic Trustee's right to sue and be sued in its own name on behalf of the bondholders. A party wishing to sue the bondholders cannot do so in the name of the Nordic Trustee, whereas the Nordic Trustee, on behalf of the bondholders, does have a right to sue both the issuer and third parties in close proximity to the issuer. On the other hand, the Norwegian courts are likely to allow the Nordic Trustee to be sued in its own name in respect of actions performed in its capacity as bond trustee.

Due to the current set-up of the Norwegian bond market, the Supreme Court's reasoning and conclusions in the Thule Drilling cases were necessary to preserve this source of financing and investment in its present form. In general, the contractual framework ensures a fair balance of rights among the parties to the bond terms, as well as securing equality

[186] Such regulations are for instance in place in the US, see the Trust Indenture Act of 1939 (TIA) 15 U.S.C. §§ 77jjj 'Eligibility and disqualification of trustee'.

amongst the bondholders. The no-action clause and the authority of the bond trustee to sue on behalf of the bondholders are wellknown features of the Anglo-Saxon markets and accepted by the judicial systems in both England and the US.

The only substantial imbalance relates to the fact that it is significantly more difficult for the issuer to sue the bondholders than vice versa. Nonetheless, the need to sue the issuer is more pronounced than the need to sue the bondholders. Moreover, a right to sue the bondholders in the name of the Nordic Trustee would certainly result in the end of the Norwegian bond market, because the investors would regard this as an unacceptable risk. As such, this article argues that, in the interest of preserving the Norwegian bond market, the mentioned imbalance has to be accepted.

In the spirit of enhancing legal clarity and as a concluding remark, this article argues that the Nordic Trustee's right to sue and be sued in its own name should to be subject to legal review and codification. With the rising number of issuers defaulting in the high yield bond market, it is unlikely that we have seen the end of cases concerning the Nordic Trustee's right to sue and be sued in its own name.

Suing oil and mining companies for environmental damage – procedural barriers and opportunities in a comparative context[1]

By Vibe Ulfbeck,
Professor, University of Copenhagen
and Professor II, Scandinavian Institute of
Maritime Law, University of Oslo

[1] The article is a contribution to the project "Private/public enterprise liability" funded by the FSE.

Contents

1 Introduction

Many large oil companies and mining companies are based in the EU or the US, but operate via subsidiaries in the developing world. If such operations lead to environmental damage, the question arises of to what extent the subsidiary and the parent company can be held liable for the losses. As a starting point, a parent company and its subsidiary are regarded as two separate entities. This means that prima facie, the parent company cannot be held liable for the wrongful acts of the subsidiary. Consequently, suits for damages suffered by third parties must be brought against the subsidiary in the jurisdiction in which it is based, most often a country in the developing world. For several reasons, this may not be an attractive option for the third party. Consequently, until recently, suits for environmental damage caused in the developing world have, in practice, been more or less barred. However, recent developments in substantive law in Europe seem to have changed this, so that parent companies are now being sued in Europe for environmental damage caused by their subsidiaries in the developing world. Moreover, subsidiaries are also being sued in Europe. By focusing on three recent examples from Dutch law and UK law, this article examines the extent to which it is possible for European courts to dismiss such claims and the extent to which the substance of the case impacts on this.

Briefly about relevant substantive law

In Europe, a recent breakthrough came with the Chandler case (Chandler v. Cape (2012) EWCA Civ. 525), decided by the English Supreme Court.

> The case concerned a worker, Mr. Chandler, who for years had been exposed to asbestos at his workplace and ended up becoming ill. Mr. Chandler sued the parent company, claiming damages, alleging that it had been the parent company's responsibility to ensure a safe working environment in the factory, owned by the subsidiary. The court agreed and awarded damages to Mr. Chandler.

The reasoning in the case is highly interesting.[2] Thus, the court found that a parent company could be held liable for wrongs of the subsidiary in situations where: a) the parent and the subsidiary are in the same business, b) the parent company has superior knowledge, c) the parent knew or ought to have known that the subsidiary's work system was unsafe, d) the employee had relied on the parent company using its superior knowledge for the employee's protection.

The case did not involve foreign direct liability, since both the parent company and the subsidiary were based in the UK. However, it cannot really be ruled out that the above requirements could also be fulfilled in a foreign direct liability case, where damage has been caused in the developing world.[3] Moreover, the Chandler case has already been relied on as the leading case in several pending foreign direct liability cases.[4] One of the reasons why the case has become central is that, even if according to private international law rules a case must be decided on the basis of the local law applicable in a jurisdiction in the developing world, this law will, for historical reasons going back to colonial times, often be based on English law.

Whereas Chandler concerned workers' injuries, several cases pending today concern environmental liability, raising the question of to what extent the criteria set out in Chandler can be regarded as also being applicable in an environmental law case, and if so, how. This is uncertain.[5]

As will be shown in the following, it seems that this uncertainty at the substantial level also spills over, to some extent, into the procedural level, when it needs to be decided where there is jurisdiction for claims relating to foreign direct liability cases. There are two basic questions: 1) to what extent can the parent company be sued in its home state when

[2] For an analysis, see Rott and Ulfbeck, Supply Chain Liability of Multinational Corporations, ERPL 3-2015 (414–436), p. 431 ff.

[3] This was pointed out at an early stage in A. Sanger "Crossing the corporate veil: The duty of care owed by a parent company to the employee of its subsidiary", CLJ (2012), 478, at p. 481.

[4] See further below. The Chandler case has also been relied on in the Bodo litigation and in the KIK case which is now pending in Germany.

[5] It is not the purpose of this article to analyse further the substantive law aspects of the case, rather it is the procedural aspect that is in focus.

the case concerns the possible tort liability of the parent company for wrongs committed by a subsidiary in the third world?, and 2) to what extent can the subsidiary be sued together with the parent company in the home state of the parent company?

2 The Brussels Regulation Regime

2.1 Claims against the parent company

It is a basic rule under the Brussels Regulation Regime that a person can always be sued where the person is domiciled. Today, this follows from article 4 (1) of the Brussels I Regulation[6], which has the following wording: "Subject to the Regulation, persons domiciled in a member State shall, whatever their nationality, be sued in the courts of that member State".[7] A company is domiciled where it has its a) statutory seat, b) central administration, or c) principal place of business.[8]

Thus, it follows from these provisions that parent companies based in an EU member state can be sued in this state by any plaintiff, regardless of where the plaintiff is domiciled. Thus, plaintiffs from the third world can – as a starting point – sue a parent company in the EU based on this provision.

As to the background to the rule, the following is stated in the preamble (para 15):

> "The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well- defined situations in which the

6 Regulation no. 1215/202, previously Regulation 44/2001/EC

7 The provision is a successor to the former article 2 with the same wording

8 See article 63. For an interpretation of this rule under UK case law, see A. Sanger, Corporations and transnational litigation: Comparing KIOBEL with the jurisprudence of English Courts, Ajil Unbound (2014), e-23 ff, at e-25.

> subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor… ".

Thus, the aim of predictability is central with regard to the understanding and interpretation of the provision.

2.2 Claims against the subsidiary

With regard to claims brought against defendants not domiciled in an EU member state, it follows from art. 6(1) of the Brussels I Regulation that the question of jurisdiction is left for the member state to decide. In other words, the extent to which a subsidiary based in the developing world can be sued in a court in an EU member state will depend on national procedural law.[9]

As will be apparent in the following, some national legal systems provide for the opportunity to bring claims against defendants based outside of the EU in a court in an EU member state. Moreover, some jurisdictions allow for claims being brought against a subsidiary based in the developing world in an EU member state, to the extent the claim against the subsidiary is sufficiently connected to the claim against the parent company, turning the claim against the parent company into what has been called an "anchor claim" for the claim against the subsidiary.

2.3 The inapplicability of the forum non conveniens doctrine

Finally, it should be mentioned that it seems to have become generally accepted that, since the CJEU (ECJ) decision in Andrew Owususu v. NB Jackson and Others[10], it is not possible to dismiss a claim on the

[9] Article 8(1) in the Brussels I Regulation also provides for the possible joinder of cases, provided there is a sufficient connection between the claims. However, this provision only applies to claims brought against defendants based in EU member states. According to the provision, the relevant criterion is whether "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments".

[10] C-281/02

basis of the "forum non conveniens" doctrine.[11] This means that claims against the parent company cannot be dismissed on the basis that it is not convenient to hear the case in an EU member state court, or rather more convenient to hear it in a court in the developing world where the damage has occurred. Thus, if a case is to be dismissed it must be on other grounds than forum non conveniens.[12]

3 The Dutch experience

3.1 Shell (Nigeria), ECLI: NL: GHDHA: 2015:3586 (December 2015)

In this case, the department of environmental affairs in Nigeria sued the oil company on behalf of a local Nigerian community. The case concerned environmental damage caused by a leak from an oil tank. The plaintiff sued both the parent companies, one of which (Shell Petroleum) was based in the Netherlands, as well as the subsidiary, SPDC, based in Nigeria as operator of the pipeline, in a Dutch court.

With regard to the claims against the parent companies, the court notes first focused on the claim against Shell Petroleum, and noted that the company has a registered office in The Netherlands. For this reason there is jurisdiction under art 2(1) of the (former) Brussels I Regulation.[13] As regards RDS and Shell T&T, the court commentsedthat there were no registered offices in the Netherlands, but found that the court had jurisdiction according to art 2(1) in conjunction with art. 60(1) and according to art 6(1) and /or art. 24 in the Brussels I Regulation. These issues were not in dispute in the case[14].

[11] See Rott and Ulfbeck, Supply Chain Liability of Multinational Corporations, ERPL 3-2015 (414–436), at p. 417 with further references.

[12] Nevertheless, the doctrine is still mentioned and there is attempted reliance on it by claimants in current cases, including some of the cases that will be dealt with below.

[13] Now article 4(1)

[14] Para 3.1. in the ruling

With regard to the claim against the subsidiary (SPDC), the court noted that according to the Dutch CCP (Code of Civil Procedure) art 7(1), there would be jurisdiction for a claim against the subsidiary as a related claim, "provided the claims against the various defendants are connected to the extent that reasons of efficiency justify a joint hearing".

The subsidiary argued that in the end the test should be whether the claims against the parent companies could possibly be awarded. In this regard, the court noted that: "If it is clear in advance that claims against RDS (the so called anchor claims) are *obviously bound to fail and for that reason cannot possibly be allowed*, [author's italics] it is hard to imagine that reasons of efficiency nonetheless justify a joint hearing". In this way, the court by way of implication accepted that the likelihood of the success of the claim against the parent company is indirectly also relevant when determining whether the court has jurisdiction to hear the claim against the subsidiary. However, after having made rather brief references to the Chandler case and related cases, the court found that the possibility could not be ruled out in advance that a parent company could become liable for the acts of a subsidiary.

The court therefore moved on to consider whether there was a *sufficient connection* between the claim raised against the parent company and the claim raised against the subsidiary. In making this assessment, the court found that the following criteria were relevant: i) the acts and omissions of SPDC as a group company played an important role in the assessment of the possible liability of RDS as top holding, ii) the claims were identical, iii) the facts in the two cases were identical, iv) the questions of facts primarily concerned the question what caused the spill, v) further investigations with regard to the facts were required, vi) these investigations should be carried out by a single court to avoid divergent findings.

Based on these criteria, the court reached the conclusion that the claims were connected to the extent that reasons of efficiency justified a

joint hearing.[15] On this basis it was concluded that there was jurisdiction for both claims in the Dutch court.

3.2 Comments on Dutch law

With regard to jurisdiction for the claim against the parent company, it was the clear starting point of the court that there was jurisdiction under art. 2(1) in the (former) Brussels I regime.

However, to some extent the court was forced to address the merits of the case and the likelihood of the success of the claim against the parent company even though this had not been brought up by the parent company itself in an attempt to avoid jurisdiction for the claim in the Netherlands and although jurisdiction for the claim against the parent company was not disputed. The reason for this is that there was only jurisdiction for the claim against the subsidiary if it was considered efficient to bring this claim together with the claim against the parent company and the court found that it could not be considered efficient to allow for the subsidiary's claim if it was obvious that the claim against the parent company would fail. In this way, a trying of the merits of the case was brought into the case "through the back door". It is not clear whether the court found that the claim against the parent company could also be dismissed if it was obvious that it would fail. Thus, the court used the formulation "cannot be allowed", which could refer to either dismissal or rejection. Regardless of this, it is worth noticing that the court did not go deeply into the question of whether it was likely that

[15] The court added that the same result would arise according to the Brussels Regulation regime, ie. art 6(1) Brussels I Regulation (now art 8(1) EC Regulation no. 1215/202), according to which the relevant criteria is whether: "The claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments". More specifically, it is relevant whether there is the same situation of facts and law and that the suit against the parent company is not an attempt to circumvent the jurisdictional rules. The court added that: "The above does not change because the legal bases of the claims against SPDC and RDS differ, or at least do not coincide altogether". It also added that it was not unforeseeable for SPDC that they might get sued.

the claimant would succeed with the claim against the parent company (the merits of this claim).

4 The UK experience

4.1 The Vedanta case – 2016 EWHC 975 (TCC) (May 2016)

The case concerned 188 Zambian citizens suing for environmental damage caused to the river forming the basis of their livelihoods. The damage was allegedly caused by the activities of a copper mine owned by the company Konkola Copper Mines Plc (KCM), incorporated in Zambia, and a subsidiary company to the parent company, Vedanta Resources Plc (Vedanta), domiciled in the UK.

With regard to the claim against the parent company, the court started out by referring to art 4(1) of the Brussels I Regulation and stated that none of the exceptions in the Regulation applied to the case. The court then moved on to consider three arguments put forward by Vedanta in support of the view that the court did not have jurisdiction, and for that reason should either issue a declaration[16] to this effect or else stay[17] the proceedings.

Firstly[18], it was argued that the case against Vedante should be stayed on forum non conveniens grounds. However, the judge saw no reason why the Owusu decision should not be applied and rejected staying/dismissing the case on this basis.

Secondly[19], Vedanta argued that bringing a claim against it was in fact abuse of EU law in the sense that the claim against Vedanta was allegedly only used as a "hook" to enable a claim against KCM before the English

16 Para 4.
17 Para 4.
18 Para 64
19 Para 73 ff

court. This argument was also rejected by the court which, by referring inter alia to the Chandler case, found that "on the face of the pleading" there was a "real issue" between the parties and, consequently, it could not be said that the sole purpose of the claim against Vedanta was to act as a hook for a claim against KCM.

Thirdly[20], Vedanta argued that the case should be stayed/dismissed on "case management" grounds, since according to Vedanta, the claim against it was not viable and that if there was no claim against KCM it would be safe to conclude that there would never be a trial of the claim against Vedanta. Although the court found that it did retain its case management options even after Owusu, it found that there was no basis for staying the procedure on the basis of case management needs.

Consequently, the judge concluded that there was no basis for staying/dismissing the case against Vedanta.

With regard to the claim against the subsidiary (KCM), the court started out by stating that the relevant rules were to be found in the UK national set of rules "Practice Direction 6B", the relevant part of which provides:

> 3.1 The Claimant may serve a claim form out of the jurisdiction with the permission of the court under 6.36 where –
>
> (3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and-
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary and proper party to that claim".

The rule is usually referred to as the "necessary and proper party" gateway. It reflects the "hook" line of thought touched upon above, in the sense

[20] Para 83 ff

that in order for the claim against the subsidiary to have a basis it is a necessary precondition to show that there is a real issue between the claimant and the parent company. In other words, just as in the Dutch case, in order to establish jurisdiction for the claim against the subsidiary, it is necessary for the court to go into the merits of the case against the parent company.

In order to come to a conclusion with regard to the question whether there is a "real issue" between the parent company and the claimant, the court – here – quite thoroughly analysed relevant case law, consisting in particular of the Chandler decision and related cases. On this basis, it reached the conclusion that there was a real issue between the parties[21]. The court also found that it was reasonable for the court to try the issue (finding it difficult to define the content of this criterion)[22]. Finally, the court reached the conclusion that the subsidiary was a necessary and proper party to the claim against Vedanta, finding that Vedanta and KCM were "broadly equivalent defendants".[23]

On this basis, the court found that there was also jurisdiction for the claim against KCM. It is interesting to note, that with regard to the question of jurisdiction for the claim against the parent company, it was sufficient for the court to note that "on the face of it" there was a real issue between the parties and for that reason there was no basis for assuming abuse of EU law, whereas with regard to the question of jurisdiction for the claim against the subsidiary, the court went much deeper into the question of whether there was a real issue between the parties.

Entirely parallel questions were raised in the Shell (Nigeria) case, dealt with below. However here, the court reached a different result.

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21 Para 126

22 Para 135 ff

23 Para 146. The court also made reference to two tests that have been applied in previous case law: 1) "Supposing both parties had been within the jurisdiction would they have been proper parties to the action?" (para 138) and 2) "..a serious issue involving (the foreign defendant) which is connected to the matters in dispute in the proceedings, and it is desirable to add (the foreign defendant) so that the court can resolve that issue" (para 139).

4.2 The Shell (Nigeria) Case: 2017 EWHC 89 (TCC) (January 2017)

The case concerned a group action, brought by His Royal Highness Emere Godwin Bebe Okpabi, representing 40.000 individuals, all Nigerian citizens, who were claiming damages for environmental damage that had resulted from oil spills from pipe lines and infrastructure in and around Bille Kingdom in Nigeria. The claims were brought against both the parent company (RDS) based in the UK and the subsidiary (SPDC) based in Nigeria and the case concerned the question of whether there was jurisdiction for these claims in the UK court.

With regard to the claim against the parent company (Royal Dutch Shell, RDS), the court acknowledged that prima facie there was jurisdiction on the basis of art 4 (1) in the Brussels Regulation and also acknowledged, by reference to the case Owusu v. Jackson (2005) QB 801, that the claim could not be dismissed on the basis of forum non conveniens. However, the court found that athe requirements in the UK national set of rules "Practice Direction 6B" referred to above must also be fulfilled.

The court found that: "Neither the terms of the Recast Regulation, nor the case of Owsusu v. Jackson removes that as a step to be considered…"[24]. In other words, although there was prima facie jurisdiction for the claim against RDS based on the Brussels I Regulation, the case against RDS could still be dismissed if the court found that there was no "real issue" between the parties. Accordingly, the court examined the extent to which it must be assumed that the plaintiffs would be able to succeed with a claim against RDS. The examination of the substantive law issues in this regard is detailed and goes in depth. The court reached the conclusion that the claims against RDS would fail[25]. In other words, there was no "real issue" between the parties. For that reason, the claims against RDS would not proceed before the English court.

With regard to the claim against the subsidiary (SPDC), this matter became straightforward for the court. Since the "anchor claim" against

[24] Para 69

[25] Para 122

RDS had been dismissed, the claim against SPDC was also dismissed. Thus, the court did not need to address the issue of whether SPDS was a "necessary and proper party" to the claim. The court simply stated: " Absent the existence of proceedings on foot in England against RDS, there is simply no connection whatsoever between this jurisdiction and the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty and /or in common law for acts and omissions in Nigeria, by a Nigeria Company".[26]

4.3 Comments on UK law

It is not easy to get a clear picture of English law on these issues, based on these two cases. The facts are very similar. Nevertheless, the approaches taken in the two cases are different. In the first case, the judge was satisfied that the claim against the parent company could not be dismissed as abuse of EU law since "on the face of it" there was a real issue between the parties, whereas in the second case the judge found that the criteria found in English law with regard to jurisdiction for the claim against the subsidiary were also relevant with regard to the decision as to whether there was jurisdiction for the claim against the parent company under article 4(1) of the Brussels I Regime. This approach differs not only from the approach taken in the first English case but also from the approach taken in the Dutch case. Thus, in the second English case the likelihood of the success of the claim against the parent company became determinant for the formal question whether there was jurisdiction for the claim at all, and considering the level of detail the decision on the formal issue in reality came close to a decision with regard to the substance of the case.

[26] The judge stresses however, that he finds that this case can be distinguished from the Vedanta case, since in Zambia there is no access to justice. However, the theme of "access to justice" does not seem to form part of the premises for the decision, cp. The case Connelly v. RTZ Corp. (1998)1 A.C. 854 (HL).

5 Conclusion

Special national rules potentially granting jurisdiction to sue a subsidiary in the same court as the parent company may indirectly have an impact on the interpretation of the Brussels I Regulation art 4(1), with regard to the jurisdiction for the claim against the parent company. In recent practice from the UK there are signs that in essence, the likelihood of the success of the claim against the parent company may, in this way, become a criterion for deciding whether there is jurisdiction under art 4(1) of the Brussels I Regulation. This contrasts with the wording of the article, according to which the only relevant criterion is whether the company is registered in the country in which it is sued. It also contrasts with the purpose of the article which, according to the preamble, is to provide predictability, since turning the formal issue into a substantive issue makes it less clear whether there is jurisdiction for a claim or not. The more correct application of article 4(1) in this type of case seems to be exemplified by the Dutch decision in the Shell Nigeria case and by the UK decision in Vedanta case. In contrast, if the reasoning in the UK Shell Nigeria case is followed, a national provision that on the face of it may seem beneficial to would potential plaintiffs in the developing world, may in reality prove to be a disadvantage.

Private classification societies acting on behalf of the regulatory authorities within the shipping industry

By Kristina Maria Siig,
Associate Professor,
University of Southern Denmark

Contents

1 Introduction – a few general comments[1]

1.1 Using the private sector to ensure the maintenance of standards of Danish shipping

The 'freedom of the seas' concept could, in a regulatory context, be considered a fallacy. Shipping is nationally, and not least internationally, densely regulated in order to ensure the safety of life at sea and the protection of the environment. It has long been a goal for the Danish authorities that the Danish flag State should be considered as a leader in 'quality shipping', and thus setting benchmarks for health, safety and protecting the environment at sea.[2] Denmark is widely considered to have achieved this goal, but this has required intensive regulation and policing to ensure compliance with the rules.[3] The Danish Maritime Authority (hereafter the DMA) is generally the relevant administrative authority in this area, but many of the tasks of the DMA are carried out by companies/entities within the private sector. This contribution will discuss the most central of these, namely the classification societies, and their exercise of administrative duties and authority on behalf of the DMA.

The fact that certain areas of public management are delegated to private enterprises is not, as such, peculiar to the shipping industry. It is common in other legal areas to see private entities, by delegation from an administrative authority, undertaking registration, certification, control and possibly even issuing injunctions or, if necessary, prohibitions.

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1 This article is a revision and translation of the article "Private klassifikationsselskaber som udøvere af forvaltningsmyndighed i shippingindustrien", in Clausen et al (eds.), Festskrift til Hans Viggo Godsk Pedersen, DJØF; Copenhagen 2017. It has been presented here in the English language in order to make it available for a larger audience.

2 See e.g. the Danish Maritime Authority: Sikkerhed, sundhed og miljø i fremtidens kvalitetsskibsfart, Søfartsstyrelsen 2010, http://www.soefartsstyrelsen.dk/SikkerhedTilSoes/Skibssikkerhed/Arbejdsmiljoe/VejledningerArbejdsmiljoe/Documents/Sikkerhed,%20sundhed%20og%20milj%C3%B8%20i%20fremtidens%20kvalitetsskibsfart.pdf.

3 See e.g. International Chamber of Shipping: Shipping industry flag state performance table 2015/2016 http://www.ics-shipping.org/docs/flag-state-performance-table.

Examples in an everyday context would include an authorised garage inspecting if a car is roadworthy or local municipalities employing private chimney sweeps to reduce the risk of chimney fires from occurring.[4]

What is more unusual, however, is that private entities within the shipping industry will have not only a (possibly controlling) influence on how the legal framework of the shipping industry is enforced, but may also have (controlling) influence on the actual content of these rules. In this respect classification societies have essentially two roles:

1) They will supply the regulations, current industry standards and best practices with which ship owners are expected to comply in order to achieve an appropriate level of classification within that particular society, with the ship owner potentially being subject to civil law consequences in case of non-compliance.

2) In addition, and possibly more importantly, these same private companies are largely authorised to issue administrative rules on behalf of Denmark as a flag State.

1.2 About classification societies

Classification societies are independent private companies, whose main task is to inspect ships on behalf of the ship owner, since the ship owner's hull and machinery insurers may require a form of quality assurance when determining if the insurance can be signed off. The classification society may also be requested to assess any damage under the policy should an accident occur and to oversee the quality of repairs.[5] This role has been held by the companies since the mid 18th century, a role strengthened perhaps in the late 19th century following Samuel Plimsoll's political efforts to combat the unacceptable loss of life at sea in so called 'coffin ships'; vessels that were poorly maintained frequently overloaded and often heavily insured.

[4] See in general on the topic, Bønsing, Lovbestemt delegation af forvaltningsmyndighed til private, Juristen nr. 6, 2013, page 263 ff.

[5] Falkanger, Bull, Overby; Søret, 4th. ed., Copenhagen 2013, p. 81 ff with further references.

In addition, classification societies approve vessels according to their own rules, which in shipping terminology means awarding a vessel its 'class'. The societies' rules primarily contain specific technical parameters concerning, for example, the vessel's navigational equipment, the thickness of the hull, the machinery or the life-saving equipment onboard, but the rules may also cover security procedures or other less objectively identifiable conditions. The societies' rules are at least as stringent and detailed as most flag States rules, although they may differ on several points.

The classification societies rely mainly on their good name and reputation. How accurate and updated are their rules? Do they employ suitably skilled and qualified surveyors? Do those surveyors have a reputation for being principled and incorruptible etc.?[6]

It is not generally a requirement of the flag States that a ship has class, as long as it complies with the flag State's own requirements. However, the industry itself attaches a particular importance to class, just as a relevant ISO certification may be considered commercially necessary in other industries. Thus, if a vessel loses its class status due to poor maintenance, this would as a starting point be considered as valid grounds for an immediate termination of a charter party agreement,[7] but in addition the ship's insurance policies may no longer be valid.[8] When considering that most coastal States will insist that a ship within its territorial waters be suitably insured, a ship's trading area is therefore wholly conditional upon the ship's insurance certificates and policies being valid.[9] Consequently, in

[6] Unfortunately, this latter criterion carries some weight. See e.g. the Swedish RO agreement clause 3.5, Code of conduct: »When performing its duties on behalf of the STA, the RO is to take into account every person's equality before the law and is also to act in an objective and impartial manner. When performing duties in accordance with this agreement, *RO employees may not give or receive gifts, rewards or other benefits*«. (My emphasis).

[7] See e.g. BPTIME 3, clause 9(2) or NYPE 2015, clause 6(a).

[8] See e.g. Gard Rules, rule 8(1) »Unless otherwise agreed in writing between the Member and the Association it shall be a condition of the insurance of the Ship that: a) the Ship shall be and remain throughout the period of entry classed by a classification society approved by the Association…«. See further regarding the Hull and Machinery Insurance Nordisk Sjøforsikringsplan, §§ 3-22, 3-23 and 3-27.

[9] See e.g. the Danish Maritime Code (DMC) section 153, 154 and 197.

real terms, the loss of certification means that the ship can effectively no longer trade. In addition, some of the certificates issued by the classification societies on behalf of the DMA are a necessary requirement without which the ship is not even allowed to leave port. Finally, in exceptional cases, the loss of certain certificates may result in the shipping company being denied its entitlement to operate vessels at all.[10]

1.3 About the contribution

This contribution, as the headline indicates, will discuss the role of classification societies as executives of public authority. First,, in part 2, the overall legal framework is presented for the classification societies' exercise of competence on behalf of the Danish Maritime Authority. The international, regional and national rules will be discussed and the legal basis for the delegation of competence will be presented. In part 3, the focus rests instead on the statutory status and obligations of the classification societies. In part 4, the contribution will then briefly compare the Danish regulation with corresponding regulations in Norway and Sweden, before part 5 contains some general conclusions and some judicial policy considerations regarding statutory self-regulation.

2 Overview of the regulations

2.1 In general

The rules for regulation, certification and control of the shipping industry can be found at international, regional and national level. What is somewhat unusual in comparison with other industries is, however, that the shipping industry is primarily regulated through international

[10] See judgment of the Eastern Court of Appeal of 18 March 2009, which upheld the finding of the DMA and the Danish Shipping Tribunal that the Skibsmæglerfirmaet H. Folmer & Co. I/S should be stripped of its "document of compliance", meaning that the company would not be allowed to continue its ship management activities.

conventions. The high degree of international regulation is due to an understanding by both flag and coastal States that safety at sea cannot be effectively ensured by national regulations alone. If you want to gain a level of control over sub-standard shipping and thereby improve safety and reduce the environmental impact of shipping, internationally uniform legislation with relatively high minimum standards is necessary.[11] This has led to a high degree of international administrative co-operation, including co-operation on regulatory issues at the UN level.[12]

At a regional level probably the most important are the rules on port state control[13] and environmental regulations, such as e.g. the EU rules on marine pollution or the EU rules on the use of classification societies etc.[14] These rules are complementary to the international conventions and the national Danish rules are largely regarded as an implementation of the finely tuned treaties. However, the international conventions and resolutions issued on this basis of this do not comprehensively cover all relevant regulations, so there is room for special rules to be applied by each individual flag State. It is partly within these special flag State rules, and with regard to the flag State's administration of the international rules, that the differences between flag States manifest themselves.

2.2 International rules

As mentioned in Article 94 (1) of the Convention on the Law of the Sea, (hereafter named UNCLOS): "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[15] Continuing from the same article, paragraph 2(a): "In particular, every State shall maintain a register of ships" and shall further, according to paragraph 2(b), "assume jurisdiction under

[11] Falkanger, Bull, Overby; ibid., p. 22.

[12] See below regarding the SOLAS-, MARPOL-, CLC- and Fund Convention.

[13] See particularly regarding the European area, Paris Memorandum of Understanding on Port State Control, https://www.parismou.org/system/files/Paris%20MoU%2C%20including%2039th%20amendment%20_rev%20final_.pdf.

[14] See below, section 2.3.

[15] The United Nations Convention on the Law of the Sea of 10 December 1982.

its internal law over each ship flying its flag...” In addition, for the sake of maritime safety, the flag State is generally required to comply with Article 94 (3) to (5), that they “shall take such measures necessary to ensure safety at sea, with regard *inter alia* to: the construction, equipment and seaworthiness of ships…” and to ensure that “each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships...”. It is the responsibility of the contracting States to take international legal unification of law into account when implementing relevant measures. Particularly, it follows directly from Article 94 (5) that “each State is required to conform to generally accepted international regulations, procedures and practices and take any steps which may be necessary to secure their observance”. In addition, the UNCLOS Article 192 provides that “States have the obligation to protect and preserve the marine environment.” The provision is not only a general clause, but is followed by Article 194 (1), providing an obligation for the States, either individually or in co-operation, to take “all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source...”. On that topic, the UNCLOS Article 194 paragraph 3(b) specifically states that the States shall lay down rules to reduce pollution from vessels, including in particular “measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges and regulating the design, construction, equipment, operation and manning of vessels”.

These two main obligations: the general obligation towards maritime safety and the obligation to protect the marine environment, have been created by the conclusion of comprehensive international agreements. These regulations are of a very technical nature, including in particular the SOLAS[16] and MARPOL[17] conventions. The conventions are concluded under the auspices of the United Nations maritime organisation, known as the International Maritime Organisation (IMO), which encompasses both maritime safety and marine pollution. It is directly assumed in

[16] International Convention for the Safety of Life at Sea (SOLAS), 1974.

[17] International Convention for the Prevention of Pollution from Ships (MARPOL), 1973.

the convention system that the classification societies' regulations are decisive on how ships are to be constructed; see for example, the SOLAS Convention Annex 1, Chapter II-1 (1), Rule 3-1:

> **Structural, mechanical and electrical requirements for ships**
> In addition to the requirements contained elsewhere in the present regulations, ships shall be designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a classification society which is recognised by the Administration in accordance with the provisions of regulation XI-1/1, or with applicable national standards of the Administration which provide an equivalent level of safety.

It should be noted that the provision considers the classification society's rules as the primary rules and that the provision states that each flag State, if it wishes to regulate independently, must regulate at a level that corresponds to at least the level of safety provided by the classification societies' rules. In addition, it follows directly from the SOLAS convention that the relevant public authority may delegate the surveying of ships to certain "recognised organisations"; see the SOLAS Convention Annex 1, Chapter 1B, Rule 6:

> The inspection and survey of ships, in so far as regards the enforcement of the provisions of the present regulations and the granting of exemptions therefrom, shall be carried out by officers of the Administration. The Administration may, however, entrust the inspections and surveys either to surveyors nominated for the purpose or to organisations recognised by it.

However, the flag State is required to fully guarantee the accuracy and effectiveness of the inspection and that the flag State takes the necessary

steps to ensure that this obligation is respected. In other words, the flag State asserts and controls the quality of the recognised organisation's work.

In order to ensure that recognised organisations implement the international requirements set out in the SOLAS and MARPOL system to a sufficient degree, as well as ensuring that national States fulfill their obligations regarding the recognition, authorisation and control of classification societies, the IMO Maritime Safety Committee adopted guidelines for the flag State's allocation of authorisations to inspect on behalf of the flag State[18] as well as the so-called RO Code,[19] which contains certain minimum standards to be met by both recognised organisations and flag States.

2.3 Regional rules

European regional rules for co-operation in the field of environmental protection and safety at sea are found first and foremost in the co-operation on Port State Control. This is regulated in the so-called Paris Memorandum of Understanding,[20] which ensures co-operation between the member States regarding the inspection of ships that call at ports within the network. These inspections are carried out by the relevant States themselves, and not by classification societies, but the issue of Port State Control is relevant to this discussion, in that a large part of this control consists in ensuring that the ship's certificates, which will normally be issued by the classification societies, are adequate and up-to-date.

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[18] Guidelines for the authorisation of organisations acting on behalf of the Administration, Res. A.739(18) (as revised in Res. MSC 208(81)), and Specifications on the survey and certification functions of recognised organisations acting on behalf of the Administration, Res. A.789(19).

[19] Code for Recognised Organisations, Resolution MSC.349 (92) of 21 June 2013.

[20] See for further information https://www.parismou.org. The Paris MOU encompasses European ports as well as Canadian ports. We find similar regional agreements on port state control and cooperation in the Caribbean, (http://www.caribbeanmou.org), the Indian Ocean (http://www.iomou.org), the Persian Gulf, (http://www.riyadhmou.org) and the Asiatic part of the Pacific (http://www.tokyo-mou.org).

In addition to this, there are a number of relevant regulations at EU level. These regulations should be seen in the context of the EU Maritime Transport Strategy 2018.[21] For the purposes of this discussion, it is particularly relevant to look at Directive 2009/15/EC (RO Directive) and Regulation (EC) No 391/2009 (RO Regulation), which were updated by implementing Directive 2014/111/EU. The purpose of the regulation is to quality assure classification societies, as well as to pre-approve a certain number of companies that may work on behalf of the EU maritime authorities.[22] It is not the case that member States *must* delegate their competence to classification societies, but if they choose to do so, they must use one or more of the EU-approved companies. Member States may also choose to limit the number of classification societies to reflect the needs of each Member State.[23] The EU rules have either been published directly or incorporated into Danish law in the classification society decree.[24]

2.4 National rules

2.4.1 The overall structure of the regulation

The overall regulation in the SOLAS and MARPOL conventions has been incorporated[25] into Danish law through the Maritime Safety Act[26] and the Marine Environment Act,[27] whereas the more technical regulations of the conventions are incorporated at the regulation level through the so-called 'Notices from the Danish Maritime Authority'. The two main laws thus interact, with the Maritime Safety Act regulating the ship's construction and safety levels on board in general, specifically including

21 See http://ec.europa.eu/transport/themes/strategies/2018_maritime_transport_strategy_en.htm.

22 Preamble, Directive 2009/15 / EC, para. 8ff.

23 Preamble, Directive 2009/15 / EC, para. 13.

24 Regulation No. 1294 of 24/11/2015, on the recognition and authorisation of organisations which carry out inspection and surveys of vessels.

25 Falkanger, Bull, Overby; ibid., p. 78 f.

26 Law No. 72 of 17/01/2014 on Safety at Sea.

27 Law No. 1616 of 10/12/2015 on Protection of the Marine Environment.

the requirement that the ship must be built, equipped and operated so that "human life at sea is secured to the largest extent" and that "utmost consideration must be given to protection against pollution", see § 2(1). The Marine Environment Act, on the other hand, regulates whether, or to what extent, potentially harmful substances can be discharged from the Danish territorial waters and adjacent areas. Generally speaking, the rule is that no discharge may take place in Danish territorial waters, see §§ 9-21.

Both the Danish Maritime Safety Act and the Marine Environment Act, with their associated regulations, apply to Danish registered vessels. In addition, they may also apply to varying degrees, *inter alia* to foreign registered vessels sailing within Danish territorial waters, within the Danish economic zone and the Danish continental shelf area. The administrative competence under the Maritime Safety Act does not, as one would expect, rest with the Danish Minister of Transport, but with the Minister for Business and Growth, cf. the Maritime Safety Act § 17(1), whereas the Act is administered in practice by the Danish Maritime Authority, under the Maritime Safety Act § 17(2). The Minister may, in accordance with § section 17 (5), delegate competence to the Danish Maritime Authority, as has in fact been the case. The Marine Environment Act is administered primarily by the Ministry of Nature, Environment and Food, whereas the physical performance of surveillance and pollution control lies with the Ministry of Defence, see the Marine Environment Act § 34.

Since the technical rules on pollution prevention under the MARPOL Convention are not incorporated into Danish law under the auspices of the Ministry of Nature, Environment and Food, but by regulations issued by the Danish Maritime Authority (hereafter the DMA), the remainder of this article will focus on the Maritime Safety Act and the Danish Maritime Authority's competence thereunder.

2.4.2 The issuance of rules and regulations

The Danish Maritime Authority has the competence to draft rules and regulations in virtually all areas relevant to shipping, including general

rules on construction, operation, navigation, security, anti-terrorism, working conditions, anti-collision rules, navigation systems etc., in accordance with the Maritime Safety Act, see §§ 3-6. As indicated above, the DMA's main task is not to specifically lay down Danish rules in this area, but to ensure that the international and regional regulations are at all times implemented and adhered to. Thus, it is assumed in the Maritime Safety Act § 17(6) that a large part of the DMA's issuance of rules and regulations involves "incorporating international conventions within the scope of Danish law" and that these can be maintained in their original English language.

The provision continues:
"The Minister may furthermore decide that ships shall comply with regulations laid down by recognised classification societies, etc."

In this way, roughly speaking, it is statutorily accepted that the DMA may incorporate privately defined safety standards and regulations, issued by private actors – in this context being recognised classification societies – into legislation.

A classification society's rules are often included in the regulations issued by the DMA, as a supplement or an addition to the national technical regulations and to some extent, as a supplement to regulations of procedures etc.[28] Take, for example, the 'Notices from the Danish Maritime Authority E: Technical Regulations for the construction of and equipment on Fishing Vessels'.

Regulation No. 1459 of 14/12/2010, Rule 1a: *Use of recognised organisations (classification societies)* (1)

"In cases where the Administration has not established national standards for an area in this framework, new fishing vessels shall be designed, constructed and maintained in accordance with the rules of *a recognised organisation* with regard to hull design, structural strength, materials, anchors, anchor chains, windlasses, towing hooks, machinery plants, boilers, and all other technical installations or electrical installations". [My emphasis]

[28] Falkanger, Bull, Overby; ibid., p. 84 f.

In addition, the classification societies' rules are quite often used instead of national regulation, so that no national regulation is issued at all. An example of this can be found in the technical regulations for towing/anchor handling winches and towing hooks, Regulation No. 10128, of 13/09/2006, § 7(2):

"Towing winches, anchor handling (tugger) winches and towing hooks must be provided with a certificate stating that these are *designed, installed and tested in accordance with the rules of a classification society*". [My emphasis]

In this way, a full overview of the technical and safety standards that Danish ships must fulfill can only be achieved by combining the Danish Maritime Authority's rules with those of the relevant classification society.

2.4.3 Enforcement

Unfortunately, issuing rules is not enough to achieve high quality shipping. Some form of control to ensure the compliance with the rules is necessary for those rules to thus be effective. In shipping, this occurs through a system based on certification and control. It follows from the nature of the Convention on the Law of the Sea Article 94, "Duties of the flag State", paragraph 4(a), that controlling the compliance of the rules should not only be done during the ship's construction, but should be carried out continuously for as long as the ship is in operation, and that this should be done by "qualified surveyors".

For this purpose, the DMA's employees are entitled to board and inspect any ship that is covered by the Danish Maritime Safety Act without a court order, see Maritime Safety Act §19 (1). However, aside from the inspection(s) carried out during the initial registration of the vessel into the Danish flag or during Port State Control, it is rare that the DMA itself carries out these periodic surveys. The competence for this, as can be seen in the Maritime Safety Act § 22, is instead delegated to the authorised classification societies.

> **Classification societies, etc.**
> § 22. The Minister of Business and Growth may, on specified terms, authorise classification societies, other companies or individuals, on behalf of the Danish Maritime Authority, to carry out surveys of ships, including carrying out calculations, surveys and measurements of ships, as well as issuing certificates.

The rather absolute terminology used in the wording indicates that, although theoretically it is not a legal requirement that the ship has class, it is clearly implied that it should have. It also follows directly from the Maritime Safety Act § 22 (5), that the DMA is not obliged to carry out surveys or make approvals that fall within the scope of the relevant classification society's authorisation. In this way, if a ship is classed by a recognised classification society, it will, as a starting point, be the surveyors and inspectors of that classification society who carry out inspections and certification, and *not* the DMA. As an example, all surveys, certification and formalities in connection with registering a vessel under the Danish flag are delegated to the classification societies, except for the final inspection before officially awarding a Danish Certificate of Nationality and Trading Permit, which is always carried out by the DMA's own technical inspectors. In principle, therefore, it will be the ship's own classification society which carries out the bulk of the tasks on behalf of the DMA, with the DMA effectively ratifying such work during the final inspection, see Annex to the RO Agreement, clause 1.2.[29]

The recognised classification societies can be found in an updated list on the Danish Maritime Authority's website,[30] and include the American Bureau of Shipping, Bureau Veritas, Class NK, DNV GL, Lloyd's Register, the Polish Register of Shipping, RINA, the Korean Register and the China Classification Society.

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[29] The national Danish Recognised Organisation Agreement with its subsequent annex, see http://www.soefartsstyrelsen.dk/SynRegistrering/Syn/Klassifikationsselskaber/Documents/DanishROAgReement2015.pdf.

[30] http://www.dma.dk/SynRegistrering/Flagskifte/LastskibOver500/Sider/default.aspx.

2.5 Further details regarding the authority to delegate the Danish Maritime Authority's competence to private organisations

As previously stated, the authorised classification societies often issue (or refuse to issue) certificates and licences on behalf of the DMA, based on the classification society's own set of rules. These private rules are not subject to any form of prior official control and may be amended by the classification society in accordance with the company's own procedures and articles of association.

The classification societies do not just perform the technical surveys, they also decide whether the regulated requirements have been met, so that certification can take place. Consequently, one could argue that there is a decisive delegation of authority on behalf of the Danish Maritime Authority with regards to the issuance of rules, their enforcement their and subsequent certification. It is assumed in literature[31] and ombudsman practice that such an external delegation of authority requires a "clear and explicit legal basis", see for example, the FOU 2005-99,[32] FOU 2008-20, and FOU 2015-40. Since the authorisation is provided in both the international and regional rules, and that it is stated directly in the national rules under the Maritime Safety Act §§ 17(6) and 22 that such a delegation to an external party may take place, this requirement has been met. However, the question is whether classification societies exercising competence on behalf of the Danish Maritime Authority are subject to the general rules of administrative law. This is not stated in the delegation provisions, so the answer to this must therefore be found elsewhere. This will be the focus for discussion and analysis immediately below, in section 3.

[31] Se fx Andersen, Forvaltningsret, 4th ed., Thomson 2000, p. 37f; Andersen, Socialforvaltningsret, 2nd ed., Nyt Nordisk Forlag 2006, p. 130f; Revsbech et al., Forvaltningsret – sagsbehandling, 7th ed., DJØF 2014, p. 67.

[32] FOU: Report of the Ombudsman.

3 The status of classification societies under administrative law

3.1 The classification societies' position within the management structure in general

3.1.1 Legal basis

In Denmark, the competence delegated to the classification societies is described more specifically in the so-called "Class Agreement" or "RO Agreement" (Danish Recognised Organisation Agreement with its subsequent annex).[33] The agreement is concluded by reference to the RO Directive[34] and the RO Regulation,[35] as mentioned above under section 2.3.[36] In addition, the agreement itself indicates that it complies with the IMO's RO Code,[37] so that not only EU regulation, but also the RO Code, should be used, in case of any doubt, to create a frame of reference for interpretation.

3.1.2 The competence of the classification society

According to clause 4 of the RO Agreement, certified classification societies are, in principle, authorised to issue all statutory certificates for use on Danish flagged ships. The Danish Maritime Authority may at any time decide to issue a given certificate itself, see section 11 of the RO Agreement, but certificates issued by the authorised classification society are deemed to have been issued by the Danish Maritime Authority. See in particular, clause 4(6) of the RO Agreement, which states: "*statutory services rendered and statutory certificates issued by ROs in accordance*

33 http://www.soefartsstyrelsen.dk/SynRegistrering/Syn/Klassifikationsselskaber/Documents/DanishROAgReement2015.pdf.

34 Directive 2009/15/EC.

35 Regulation EC No. 391/2009.

36 See the RO Agreement's preface.

37 RO Agreement, clause 1.3.

with this agreement shall be accepted as services rendered by or certificates issued by the DMA provided that the RO maintains compliance with the provisions of the agreement". In return, the classification society, according to clause 5(3) of the RO Agreement, enjoys the same legal status regarding its liability etc., as the Danish Maritime Authority would have had, had it performed the task itself.

The competence of the classification society is more extensively regulated in clause 15 of the RO Agreement and in the Annex to the RO Agreement, clause 1.[38] The classification society is entitled to (and indeed must) require ship owners to carry out any change or repair required in order to comply with a given regulation. In addition, the classification society can suspend or revoke any certificate which it has issued.[39] In view of the above mentioned legal effects of revocation or refusal of certificates, this competence is so far-reaching that its exercise will directly affect the ability to operate the ship (or the shipping company as a whole).[40]

Clause 12(1) of the RO Agreement specifies the rules that the classification society must follow when operating, in a hierarchical order. The provision gives Danish legislation and Danish administrative acts, issued by the Danish Maritime Authority, precedence over EU legal sources. If under consultation these sources do not produce results, IMO regulations must be applied, and finally, and as a last resort, existing industry standards.

> It falls outside the scope of this article to discuss in detail how this hierarchy harmonises with the principle of the primacy of EU law. However, when considering that both Danish law and European Union law in this area consists of implementing rules required to be implemented by IMO regulations, contradictions are likely to be a rare occurrence. I would therefore restrict myself to pointing out, that the RO agreement seems to indicate an unusual version of the normal hierarchy of rules.

[38] See in particular the Annex to the RO Agreement clauses 1.11 and 1.12.

[39] See the Annex to the RO Agreement clause 1.13. Revocation of the vessel's ISM Certificate may however only be done by the DMA.

[40] See above point 1.2.

If the above rules do not provide answers to a specific question, the classification society must provide the DMA with a proposal as to how the problem should be solved. The DMA ultimately decides whether it will follow the proposal, but even the possibility of proposing solutions in itself provides for a certain quasi-legislative effect.[41]

3.1.3 Complaints, administrative recourse and control

The DMA, as the delegating entity, has a general authority to instruct the recognised classification society in relation to its duties under the RO Agreement, see the RO Agreement clause 4.4. According to clause 14 of the RO Agreement, complaints by the subject of the classification (the "RO client"), which in most cases would be the shipping company, shall be handed over to the Danish Maritime Authority for its final administrative decision. In this way, the Danish Maritime Authority is the appeals body for decisions made by the private entity to which the competence is delegated. Further explanation is provided by the Maritime Safety Act § 21(1), which states that the decisions of the Danish Maritime Authority regarding statutory certificates may be brought before the Board of Appeals for Maritime Affairs, see § 7(2) of Regulation No. 744 of 24/06/2013 concerning the assignment of certain powers to the Danish Maritime Authority and on appeal, etc.

Clause 14 of the RO Agreement, which specifies the Danish Maritime Authority as the highest administrative authority, and the Maritime Safety Act § 21, which on the contrary indicates that the Board of Appeals for Maritime Affairs is the highest administrative entity, seem to cover some of the same situations and may therefore be seen as contradictory. It may be assumed, however, that a complaint about e.g. the non-issuance of certificates must be made to the Danish Maritime Authority first, with the possibility of further appeal to the Board of Appeals for Maritime Affairs thereafter. See also the Eastern Court of Appeal's judgment of 18 March 2009, in the Folmer case,[42] where this approach was followed.

41 RO Agreement, clause 12.3.

42 Ruling of the Eastern Court of Appeal of 18 March 2009 in the case of The Board of Appeal for Maritime Affairs and the Danish Maritime Authority v. the Shipbroking

In addition to being a complaint body, the Danish Maritime Authority, as the flag State representative, is obliged to continuously review the authorised classification societies, see clause 19 of the RO Agreement. If the DMA discovers that the classification society does not meet the requirements of the RO Agreement and the further requirements which Denmark as a flag State may reasonably impose, the DMA may suspend the classification society and ultimately withdraw its authorisation in accordance with Clause 7 of the RO Agreement.[43]

3.2 Obligations of classification societies under general administrative law

3.2.1 Obligations under general administrative law

In view of the extensive competence of classification societies under the Maritime Safety Act and the RO Agreement, it is natural to ask whether the companies should respect general public governance principles, including (the principles of) the Public Administration Act. According to § 1(1) of the Public Administration Act, the act is intended to apply to "public administration", so the areas of activity are thus defined at an institutional level. *Bønsig* concluded, with regards to the possible obligation of private parties under the same legislation that:

> "... it must be considered a *very firm point of departure*, that private entities are not bound by the rules of administration, be it written terms or implied. This point of departure is most clear within the scopes of application of the Public Administration Act and the Publicity Act. It is clearly defined that these laws are as a starting point limited to administrative authorities in formal terms and

Firm H. Folmer & Co., following the administrative ruling of the Board of Appeal for Maritime Affairs of 8 May 2007 in case No. 200614317.

[43] According to the RO Directive (Directive 2009/15/EC) art. 8, the DMA must, in the event of withdrawal of the authorisation, immediately inform the Commission of the withdrawal and the reasons for it.

> thus do not cover private entities, even if they do perform administrative tasks." [My translation, Bønsig's own emphasis].[44]

Classification societies are clearly established on the basis of private law and thus cannot formally be considered part of the public administration. The question is, however, whether they are subject to the restrictions and obligations applicable to public entities for other reasons.

Looking firstly at the Public Administration Act, the Act provides in § 1(2)(2), that its scope of application also extends to "*self-governing institutions, associations, foundations, etc. established under private law, which engage in public activities of a more comprehensive nature and are subject to intensive public regulation, intensive public scrutiny and intensive public control .*" The classification societies are subject to official control under the RO agreement, so the wording itself could indicate that they are potentially covered by the Public Administration Act, *at least within the boundaries of the authorisation.* Nevertheless, it may be held with quite some certainty that this is not the case. The type of public control which, in literature and case law, is found to be relevant under the Public Administration Act, is, for example, public funding of activities, State audits, public appointment of leadership positions, public approval of statutes or accounts, as well as public guidelines for the general running of the entity.[45] The RO Agreement, and consequently the cooperation between the classification societies and the Danish Maritime Authority, do not meet any of these criteria. The basic principle that the Public Administration Act and the general administrative principles cannot apply to the activities of classification societies, must therefore be maintained. If the RO client appeals against the classification society's decision, then (clear) breaches of the principles of administrative

[44] Bønsig, Lovbestemt delegation af forvaltningsvirksomhed til private, Juristen no. 6, 2013, p. 263 ff., at p. 264, column 2. At this point, Bønsig is referring to the two acts in general, and not to the specific rule on application of the Publicity Act to non-public entities under the Publicity Act § 5. See further e.g. fx Fenger, Forvaltningsloven med kommentarer, DJØF 2013, s. 70.

[45] Fenger, Forvaltningsloven med kommentarer, DJØF 2013, p. 72.

law will of course be considered by the appeals authority, even though classification societies are not formally required to comply with these principles in the first place, so the classification societies do not exist totally outside the (indirect) scope of application of the principles of public governance. It does, however, give raise to legal concerns when a managing authority, such as the DMA, is able to delegate so much of its management under the Maritime Safety Act, without the private entity to which it delegates having to comply directly with the principles of administrative law. This is especially the case when one considers the extent to which the classification societies, in their role as recognised organisations, may affect the shipping company with their interventions. This will be discussed further below.

Turning to the Publicity Act, the act has a wider scope of application than the Public Administration Act, and provides in § 5(1) that it also *"applies to companies, institutions, privately owned companies, associations, etc. to the extent that they have been authorised by law to take decisions on behalf of the State, a region or a municipality"*. The provision is two fold. First of all, there must be the issuance of decisions, and not just the performance of tasks. Secondly, the decision must be issued on behalf of the State and not on behalf on the non-public entity itself. To the extent that the classification society makes decisions regarding the statutory certificates that are within the RO Agreement, both of these criteria have been met. Therefore, the refusal to issue a statutory certificate, or, for example, to instruct the ship owner to make a certain improvement or repair in order to maintain the certificate, clearly falls within the traditional understanding of the term 'decision-making authority', as certificates issued under the RO Agreement have been issued *on behalf of* the Danish Maritime Authority.[46] The classification society, in this respect, would therefore be clearly covered by the Publicity Act.[47]

[46] It is assumed that it is the normal definition of what is a "decision", which is relevant under the provision, see Ashan, Offentlighedsloven med kommentarer, DJØF 2014, p. 149f.

[47] Ashan, ibid., p. 151f; Fenger, ibid., p. 84.

Clause 8.1 (b) of the RO Agreement specifically mentions that the provisions regarding confidentiality in the Publicity Act apply to the activities of classification societies under the RO Agreement. One might consider whether, by specifically pointing out that the confidentiality provisions apply, it has been intended to indicate that the rest of the Publicity Act does not. This would in principle be possible, as § 5(2) of the Publicity Act opens the possibility for the administration to decide that the Publicity Act, despite §5(1), shall not apply to specific institutions, including private companies. In view of the essential considerations that § 5 intends to take, as stated by the Commission on Publicity in its report,[48] it may however be assumed that it will require very specific reasons as well as a precisely worded order by the Minister to exclude the application of the Publicity Act. An agreement between the relevant authority and the private entity authorised by that authority, that *a part* of the Publicity Act should apply, can hardly be considered sufficient. Indeed, in other situations where § 5(2) has been used, the deviation from the main rule has been achieved by the issuing of specific executive order, with the sole purpose of exempting a named private entity from the scope of the Publicity Act.[49]

In conclusion, therefore, it seems that classification societies, in their work for the Danish Maritime Authority, are covered by the majority of the Publicity Act,[50] but not by the Public Administration Act, and in addition, that the general principles of administrative law do not apply directly. The question is however, whether, and if so to what extent, the societies have assumed a contractual obligation to undertake a similar level of consideration of those rules and principles to that expected of a public authority. This will be investigated immediately below.

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48 Finding of the Commission on Publicity (Offentlighedskommissionens betænkning) No. 1510/2009, vol.1, chap. 9, clause 6.8.3.2. See in particular p. 301.

49 See regarding examples of such wordings, Ashan, ibid., p. 150.

50 According to the Publicity Act § 5(1), the starting point of the act is that it also applies to private parties, apart from §§ 11-12 and 15-17.

3.2.2 Contractual obligations to act in accordance with (certain) rules and principles of public administration

The RO Agreement contains certain provisions that impose specific obligations of administrative law on the recognised organisations. First, as mentioned in clause 8 of the RO Agreement, the authorised classification society is, in its work on behalf of the Danish Maritime Authority, subject to the obligations for the protection of private information and confidentiality arising from the Public Administration Act, the Publicity Act and the Personal Data Act. This is in accordance with the principles of the Penal Code § 152b regarding confidentiality for information obtained while carrying out public duties after public authorisation and, therefore, the obligation of confidentiality would already, according to the flag State principle, apply to some of the activities of the authorised classification societies. In addition, clause 4.7 of the RO Agreement stipulates that the classification society must seek to avoid situations where a conflict of interest may occur. Thus, the companies have a procedural obligation to ensure that situations where this type of misuse of their powers would be possible do not arise, which typically indicates that the classification society or the actual surveyor concerned, must not have an economic interest in the subject under certification or control. (It should be noted that as the classification society is paid by the RO client for its services, some level of financial interdependence is in theory always present. Therefore, the provision must be seen as directed at situations where the actual inspector has a more direct financial interest in the entity inspected than simply to get paid for his or her services.)

Apart from these two specific obligations, namely respecting confidentiality and the obligation to avoid any conflict of interest situations from occurring, the RO Agreement does not contain any specific governance rules or guiding principles regarding the classification societies. However, as mentioned earlier, the content of the RO Agreement must be read in conjuntion with the IMO RO Code and the classification society must also comply with principles contained therein. In this context, the RO code generally outlines that a recognised organisation must

exhibit independence,[51] impartiality,[52] integrity[53] and transparency[54] in its work. Translated into the context of Danish administrative law, it can be assumed that the obligation to act as an independent party applies and that misuse of power must not occur. In this way, some of the most basic general principles of administrative law apply to the authorised classification societies on a contractual basis.

It has already been established above that the majority of the Publicity Act applies within the scope of authorisation to a private actor, but even if it did not, the private actor would to some extent be expected to follow the principles of transparency expected of a public entity under the requirements of the RO Code.

It must therefore be concluded that the classification society must, at a minimum, comply with certain basic administrative rules. It is an interesting to note, however, that these apply on a contractual basis regarding the delegation of authority, and are not based directly on a public law background.

4 A brief comparative angle

As probably already indicated, the author finds that from the point of view of legality, it would be appropriate if the RO agreement indicated that the recognised organisations were covered by the Public Administration Act, to the extent that they can make decisions against the citizen, in this case the RO client. However, it could be asked if this would provide for insurmountable administrative obstacles and, therefore, that the handling of procedural guarantees would have to be referred to a potential complaints or appeals procedure. If this were the case, one would expect that other flag States would have chosen not to impose full obligations on

[51] RO Code clause 2.3.
[52] RO Code clause 2.4.
[53] RO Code clause 2.5.
[54] RO Code clause 2.8.

classification societies under the part of their regulation that corresponds to the Public Administration Act. To compare, contrast and perhaps even promote further discussion, a quick glance at how the Norwegian and The Swedish Maritime Authorities have chosen to tackle this situation will therefore be provided below.

The Norwegian class agreement (the "Class Agreement")[55] is concluded between the Maritime Directorate and the classification societies DNV-GL, the American Bureau of Shipping, Bureau Veritas, Class NK, Lloyd's Register and RINA. The Norwegian authorities have thus chosen not to grant licences to all the companies approved by the EU and EFTA. The classification societies can generally perform the same tasks on behalf of the coastal State, as is the case under the Danish Ro Agreement. Contrary to the Danish RO agreement however, it is stated directly in clause 6.3 of Class Agreement that the Norwegian Public Administration Act applies when the classification society carries out work on behalf of the Norwegian Maritime Directorate. Their appeals body is formally the Ministry of Trade and Industry, but the Norwegian Maritime Directorate may choose to agree fully with the complainant, in which case they would not send the case to the ministry.

The Swedish authorities have also chosen to limit the number of recognised organisations, as is permitted in the EU and EFTA, and have, with the exception of Class NK, authorised the same classification societies as is the case in Norway. The Swedish rules do not indicate that the principles of public administrative law apply, but set out specific principles of administrative law that classification societies must follow when carrying out tasks on behalf of the Department of Transport.[56] The rules specifically concern the principle of equality, the obligation to be objective and impartial, see clause 3.5, 1st indent of the agreement, and a general duty of care to maintain confidentiality, cf. clause 7.5 of the agreement. In addition, clause 3.5, 2nd and 3rd indents of the agreement

[55] See https://www.sjofartsdir.no/en/vessels/inspection/approved-classification-societies/klasseavtalen.

[56] See https://www.transportstyrelsen.se/en/shipping/Vessels/Survey-and-inspection/Recognised-Organisations/Swedish-RO-Agreement/.

stipulate that the classification society's employees must not have a conflict of interest and may not receive gifts. However, it is important to note that according to Swedish law, recognised classification societies only have the power to make decisions that fully endorse the applicant, see clause 3.6, 1st indent of the agreement. As soon as it becomes clear that the applicant's full certification will be denied or suspended by the classification society, the case will be transferred to the Department of Transport for further action. Decisions made by the classification societies on behalf of the Swedish authorities will thus never have the same potential for major impact as those made by classifications societies on behalf of Denmark as a flag state. As mentioned earlier, under Danish rules the classification society can effectively deny a Danish ship the right to sail and even initiate full or partial sanctions on the shipping company's operation of other ships within their fleet. The Swedish approach that the activities of the authorised classification societies are not covered by the general rules of administrative law therefore does not pose the same potential problems as the Danish approach, since the classification societies acting on behalf of the Swedish flag State do not hold all the decision-making power.

When comparing Danish regulation with its Norwegian and Swedish counterparts, one can quickly note that the Danish regulation is the most far-reaching. Firstly, the Danish Maritime Authority has chosen to authorise all classification societies permitted by the EU rules (which consequently means that the Danish Maritime Authority is required to supervise more companies than the Norwegian and Swedish authorities); secondly, the competence that the Danish Maritime Authority has allocated to the classification societies goes to the limit of what may be delegated at all; and finally, the administrative principles and procedural rules to be adhered to by the classification societies are limited. The author therefore proposes that during any forthcoming renegotiation of the RO Agreement and/or revision of the Maritime Safety Act, that the Norwegian and Swedish rules should be used as a source of inspiration and that it be clearly stated which parts of the administrative regulation should apply to the classification societies' activities. Particular consideration should be given to whether (at least parts of) the Administration Act should

apply when a recognised organisation, acting on behalf of Denmark as a flag State, takes potentially restrictive decisions against the citizen.

5 Some final reflections on statutory self-regulation

The current use of, and co-operation with, the recognised organisations in ensuring safety and the environment at sea, enables maritime managing authorities to offer global levels of service that otherwise would not be resource realistic. Accordingly, the authorisation of classification societies must be accepted as a pragmatic necessity, at least for those States that have a sizeable merchant fleet.

The system stands and falls by the confidence that one can realistically have in the classification companies' procedures and integrity. For example, if it appears that a classification society is either corrupt or performing poorly, the system loses not only its legitimacy – the system collapses altogether, as has unfortunately been seen in the performance rates of some flag States. The extensive transfer of the Danish Maritime Authority's competence to classification societies therefore requires a relevant, regular and thorough system in place to control the classification societies, as also pre-supposed in the EU and national rules, and a pressure on Denmark as a flag State to perform to *at minimum* classification society standards. One should never ignore the age-old question, 'quis custodiet ipsos custodes?'.

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07 Media