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Overview over content

Editor's preface

This issue of MarIus comprises two theses from those submitted by our LLM students in 2017, by Steven Hardy and Ellinor Borén. The theses were selected due to their academic qualities and practical relevance. We congratulate the authors with their successful work and wish our readers joyful reading.

Oslo, March 2018

Trond Solvang

Navigating Through Corruption:

An Analysis of Anti-Corruption Criminal Laws in the Port Setting and the BIMCO Anti-Corruption Clause for Charter Parties

Steven K. Hardy

Contents

1 Introduction

"Remember that time is money."[1] There may be no industry where this quote is more applicable than international shipping. Any delay in an ocean-going ship can result in tremendous financial loss to its owner, the charterer, and all others involved. Accordingly, such parties make substantial efforts to minimize delay at every port of call. Although some delays are completely unavoidable, others are purely artificial. One such example, which is the focus of this paper, occurs when a corrupt port official demands a small "facilitation payment" in order to routinely process an incoming ship or cargo. Failure to make such payment can result in substantial delay. On the other hand, making the payment might violate the criminal laws of one or more States. In order to address these issues, The Baltic and International Maritime Council promulgated and approved the *BIMCO Anti-Corruption Clause for Charter Parties* (the "BIMCO Clause" or "Clause") in 2015.[2]

The BIMCO Clause will serve as a basis for this paper's discussion of the issue of port bribery and facilitation payments. This paper will first briefly examine the problem and effects of corruption in today's global economy, both generally and in the context of shipping/ports. It will then discuss public efforts to fight corruption by addressing important anti-corruption conventions and legislation with global impact. In particular, differentiating facilitation payments from conventional bribes will be a major topic. The paper will next detail which States may have jurisdiction to enforce their applicable anti-corruption criminal laws in any given situation. Finally, should a ship be demanded to make an illegal payment, the BIMCO Clause contains procedures that the parties will

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1 Benjamin Franklin, *Advice to a Young Tradesman, [21 July 1748]*, 3 The Papers of Benjamin Franklin, 304-308 (Leonard W. Labare ed., Yale Univ. Press 1961).

2 BIMCO, BIMCO Anti-Corruption Clause for Charter Parties, BIMCO Special Circular No. 7, 7 Dec. 2015, *available at* https://www.bimco.org/contracts-and-clauses/bimco-clauses/anti_corruption_clause (emphasis added) (attached hereto as Appendix A) [hereinafter BIMCO Clause].

be contractually bound to follow. These provisions will be discussed and compared with alternatives contained in private charter party clauses.

2 Situation / Context / Problem

2.1 Corruption and Bribery (Defined)

"Corruption" can be defined as "the abuse of power for private gain" and can involve officials from the lowest-level civil servants to those at the highest levels of government.[3] Corruption includes acts such as bribery, embezzlement, trading in influence, and abuse of functions.[4] Most relevant to the focus of this paper is *bribery*. Many legal and technical definitions of "bribery" are found in anti-corruption conventions, legislation, and contracts throughout the world, several of which will be discussed in this paper. For general purposes, however, "bribery" can be defined as "the offering, promising, giving, accepting or soliciting as an inducement for an action which is illegal, unethical or a breach of trust."[5]

2.2 Scope of Corruption and Bribery

The United National General Assembly has found that corruption is "a *transnational* phenomenon that affects *all* societies and economies".[6] The Organisation for Economic Co-operation and Development (OECD) has likewise described the problem as "a widespread phenomenon in

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3 Transparency International, What is Corruption?, http://www.transparency.org/what-is-corruption (last visited 17 Aug. 2017).

4 *See* United Nations Convention Against Corruption, G.A. Res. 58/4, Annex, arts. 15-19 (31 Oct. 2003), *available at* https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [hereinafter U.N. Convention].

5 Transparency International, Anti-Corruption Glossary: Bribery, http://www.transparency.org/glossary/term/bribery (last visited 17 Aug. 2017).

6 U.N. Convention, *supra* note 4, Preamble (emphasis added).

international business transactions, including trade and investment".[7] Transparency International annually scores, based on expert opinion, the perceived level of public corruption in States worldwide from zero (highly corrupt) to 100 (very clean).[8] In 2016, 176 States were evaluated, with the highest score being 90 and the lowest being ten.[9] Globally, the average score was 45 (for all States) and 54 (for G20 States). Only 31 percent of all States and 42 percent of G20 States scored 50 or better.[10] It is widely accepted that States perceived to have the highest levels of corruption are generally the ones least economically developed and the most politically unstable.[11] For example, the average score in the 2016 Index for States categorized as "least developed"[12] was 28.8.[13] Only three scored above the global average while only one scored 50 or higher.[14] Although there is a correlation between poverty and perceived corruption, some commentators admit that "concrete links" are difficult to demonstrate.[15]

As to the scope and extent of *bribery* in particular, the OECD published its Foreign Bribery Report in 2014 which analyzed 427 reported

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7 Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, OECD, Negotiating Conference, 6 (21 Nov. 1997), *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD Convention].

8 Transparency International, *Corruption Perceptions Index 2016* 3, *available at* http://files.transparency.org/ content/download/2089/13368/file/2016_CPIReport_EN.pdf.

9 *Id*. at 7.

10 *Id*.

11 Robert Bailes, *Facilitation Payments: culturally acceptable or unacceptably corrupt?*, 15:3 Bus. Ethics: A Eur. Rev. 293, 294 (July 2006); Grant Follett, *Facilitation Payments: Facilitating poverty?*, 40 Alternative L.J. 123, 123 (2015).

12 Forty-seven States are considered "least developed countries". United Nations Committee for Development Policy, Development Policy and Analysis Division, Department of Economic and Social Affairs, *List of Least Developed Counties (as of June 2017)*, *available at* https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf.

13 Two States considered "least developed countries" as of 5 Dec. 2017 were not scored in the 2016 Index: Kiribati and Tuvalu. *See Corruption Perceptions Index 2016*, *supra* note 8.

14 Bhutan scored a 65. *Id* at 4.

15 Follett, *supra* note 11 at 123.

and enforced cases of illegal bribery occurring between 1999 and 2013.[16] Over 60 percent of the cases involved bribes made by large organizations of 250 or more employees while only 4% were from small or medium enterprises.[17] Agents, including local agents, were used in 41 percent of cases.[18] Unlike the Transparency International Perceived Corruption Index results, nearly half of the reported bribes were made to officials in States with high to very-high levels of human development.[19]

2.3 Corruption in Shipping Industry

Shipping has been described as being "exposed to more levels of corruption than any other industry"[20] and as one of the most "high risk" industries to be affected by anti-corruption legislation.[21] Of the 427 cases analyzed in the 2014 OECD report, fifteen percent involved the "transportation and storage" sector.[22] Furthermore, customs officials accepted eleven percent of all reported bribes – the second highest of all categories of officials – and maritime officials accepted two percent of all

16 OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* 8 (OECD Publishing) (2014), *available at* http://dx.doi.org/10.1787/9789264226616-en.

17 *Id*. at 21. It seems plausible that bribes involving larger enterprises are more likely to be publicly reported and enforced (and therefore included in the report) than those involving smaller enterprises.

18 *Id*. at 29.

19 *Id*. at 8, 29. It seems plausible that cases of bribery discovered in States with high human development and low poverty may be more likely to publicly report and enforce the offense than those States with less human development and higher poverty.

20 Sam Chambers, *TRACE: 'Shipping exposed to more corruption than any other industry'*, Splash24/7, 21 Apr. 2015, http://splash247.com/trace-shipping-exposed-to-more-corruption-than-any-other-industry.

21 Philip Rose & Emma Humphries, *Shipping and Corrupt Practice: Intertanko Presentation* 8, Norton Rose, 14 June 2011, https://www.intercargo.org/pdf_public/norton%20rose%20bribery%20act%20presentation%20june%2014.pdf.

22 *OECD Foreign Bribery Report*, *supra* note 16 at 21-22. "Transportation and storage" is tied with "construction" and only exceeded by "extractive" (nineteen percent of cases). *Id*.

bribes.[23] As to purposes of bribes connected to shipping, the report shows that twelve percent of all reported bribes were for customs clearance and six percent for licenses or authorizations.[24] A study focusing on two ports in Africa found that bribes were made to customs officials, stevedores, scanner agents, port police/security agents, documentation clerks, and shipping planners.[25]

Generally, the more corrupt ports are found in States with higher levels of poverty.[26] Notably, Nigerian customs has been described as the "most corrupt agency in the world."[27] There is significant opportunity for corruption due to somewhere between 79 and 100 signatures being required to clear any single shipment.[28] In the ports of Durban, South Africa and Maputo, Mozambique, a study found the respective probabilities of making a bribe to be 36 percent and 53 percent.[29] Likewise, there is significant corruption in several States in Latin America.[30] Within Europe, Odessa, Ukraine is known to be corrupt, and instances of corruption have been detected in the ports of Genoa and Barcelona.[31]

There appear to be a few reasons why corruption is noticeable in the shipping industry. First and foremost is geography and the fact that

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23 *Id*. at 23-24. Twenty-four categories were considered with State-owned or controlled enterprises dominating at 27 percent. *Id*.

24 *Id*. at 32.

25 Sandra Sequeira & Simeon Djankov, *On the Waterfront* (Dec. 2008), *available at* https://www.cgdev.org/doc/events/2.10.09/Sequeira_Corruption.pdf.

26 Follett, *supra* note 11 at 123.

27 Ships & Ports, *Nigeria Customs most corrupt agency in the world*, 19 Sept. 2016, http://shipsandports.com.ng/nigeria-customs-most-corrupt-agency-in-the-world-nagaff.

28 Turloch Mooney, JOC.com, *Nigeria ramps up anti-corruption efforts*, 28 June 2016, http://www.joc.com/regulation-policy/import-and-export-regulations/international-importexport-regulations/nigeria-ramps-port-anti-corruption-efforts_20160628.html.

29 Sequeira & Djankob, *supra* note 25 at 3.

30 *See generally* Control Risks, *Corruption in Latin American Ports*, *available at* https://www.controlrisks.com/~/media/Public%20Site/Files/Reports/Corruptioninlatinamericanports.pdf (last visited 17 Aug. 2017).

31 Control Risks, *Corruption in European Ports*, *available at* https://www.controlrisks.com/~/media/Public%20Site/Files/Reports/Corruption%20in%20European%20Ports.pdf, (last visited 17 Aug. 2017).

shipping is a global business.[32] As a result, any single shipment may involve several jurisdictions and stakeholders, thereby increasing the opportunity for commission of corrupt acts.[33] Second, a level of corruption and bribery is a social norm in some parts of the world with significant economic consequences to those who do not acquiesce.[34] Finally, it has been noted that the shipping industry does not have a "mature anticorruption culture."[35] Anti-corruption policies and tools, such as the BIMCO Clause, are relatively new efforts to combat the problem.

2.4 Forms of Corruption in Shipping

Corruption in the shipping industry can take many forms at all stages of commercial activity. Some examples of corrupt acts not to be discussed in detail in this paper are far removed from interaction with port officials. These include illegally purchasing letters of credit, making illicit payments to marine surveyors, and procuring contracts through bribery.[36] Acts more-closely linked to port operations include tariff evasion/under invoicing and making illegal payments in connection with smuggling or for the overlooking of irregularities or procedural requirements.[37]

2.5 Facilitation Payments (Defined)

The focus of this paper is on "facilitation payments". Facilitation payments are known by many names: "petty corruption"; "coffee money"; "grease payments"; "speed money"; and "oiling the wheels".[38] A facilitation

[32] Rohit Mahajan et al., Deloitte, *Fighting corruption in the Maritime Industry* 4 (July 2015), *available at* https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-fighting-corruption-in-maritime-industry-noexp.pdf; Chambers, *supra* note 20.

[33] Mahajan et al., *supra* note 32 at 4.

[34] Ole Anderson, *Maersk Line: Shipping hit hard by widespread corruption*, Shipping-Watch, 9 May 2012, http://shippingwatch.com/articles/article4644243.ece.

[35] Chambers, *supra* note 20.

[36] Mahajan et al., *supra* note 32 at 5-6.

[37] *Id*.

[38] Follett, *supra* note 11 at 123.

payment can be distinguished from a conventional bribe due to two important qualities: (i) the payment is small; and (ii) in exchange for the payment, the payer receives nothing more than he is otherwise already entitled to under the law.[39]

2.6 Facilitation Payments in Shipping Industry (Context and Scope)

In the port and shipping context, facilitation payments often consist of cash or in-kind "gifts", such as cigarettes or alcohol, and are made to port and customs officials in order for them to process a ship and cargo in the normal course of business and in accordance with local laws and regulations.[40] In certain ports, local officials often explicitly demand facilitation payments or may otherwise expect them. For example, Intertanko, an association of independent tankers, reported that facilitation payments were requested eleven percent of the time during port-state control.[41]

Should a ship refuse to meet a demand or otherwise fail to make payment, there could be significant consequences.[42] These may include delays, costs, and fines.[43] It is even possible that the crew will be threatened.[44] A typical result of a ship being unfairly targeted is delay of entry into port.[45] One well-known example is from 2009 in a Ukrainian Black Sea port where a tanker that refused to make a USD 600-facilitation payment was fined USD 12.000 for "failing" a ballast water test even

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39 *Id.*

40 Kevin Cooper et al., INCE & Co, *The Bribery Act and the shipping industry: complying with a zero tolerance approach to facilitation payments in an imperfect world*, 21 May 2012, http://www.incelaw.com/fr/knowledge-bank/the-bribery-act-and-the-shipping-industry-complying-with-a-zero-tolerance-approach-to-facilitation-payments-in-an-imperfect-world.

41 *Corruption in European Ports*, *supra* note 31.

42 Anderson, *supra* note 34.

43 Gard, *Compliance with anti-corruption legislation*, 30 Aug. 2016, http://www.gard.no/web/updates/content/21761310/compliance-with-anti-corruption-legislation-.

44 Mahajan et al., *supra* note 32 at 6.

45 Gard, *supra* note 43.

though the ship was in compliance. Due to the economic costs of leaving port to exchange ballast water, the ship paid the fine.[46]

2.7 Local Port Agents

When making a port call, it is standard practice for a ship owner to contract with a local agent to organize, oversee, and coordinate all aspects of the call,[47] most notably inward and outward clearance of the ship, cargo operations, and husbandry.[48] These include arranging for berthing, tugs, stevedores, etc.[49] In total, there are over 130 separate operations the local agent may need to handle.[50] The port agent is expected to have strong relationships and contacts with local officials and service providers as well as expertise in local laws, rules, regulations, and procedures.[51] In summary, "the agent is the conduit for all information exchanged between the vessel and the shore."[52]

In ports where making facilitation payments (or bribes) are standard practice, a ship owner's local agent is naturally the one to arrange and carry out the payment. Often the owner or charterer will never explicitly instruct the agent to make payment and may not otherwise be aware of any details of the transaction. Furthermore, the local agent may not even itemize the expense on the owner's invoice but instead incorporate the cost into his commission. If the agent's invoice is higher than it should otherwise be, a prudent ship owner may be able to determine if the agent has made one or more facilitation payments on his behalf.

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46 *Corruption in European Ports*, *supra* note 31.

47 FONASBA, *The Role, Responsibilities and Obligations of the Ship Agent in the International Transport Chain* 6, *available at* https://www.fonasba.com/wp-content/uploads/2012/10/Role-of-Agent-Final1.pdf.

48 FONASBA-BIMCO, Agency Appointment Agreement, cl. 3 (2017), *available at* https://www.bimco.org/-/media/bimco/contracts-and-clauses/contracts/sample-copies/sample-copy-agency-appointment-agreement.ashx.

49 FONASBA, *supra* note 47 at 7.

50 *Id*. at 9.

51 *Id*. at 9.

52 *Id*. at 6.

2.8 Comparison of Conventional Bribes and Facilitation Payments

Many argue that facilitation payments do not actually constitute corruption[53] and distinguish them from "real bribes".[54] For example, in 2001, BP P.L.C. (or an affiliate) ("BP") and Unilever N.V. (or an affiliate) both admitted before a committee of the U.K. House of Commons that, at the time, they had practices of making facilitation payments but also stated that they would "never offer, solicit or accept a bribe in any form."[55] A common argument in support of such a position consists of two related parts. First is the idea that facilitation payments are simply "expressions of local customs, traditions, and societal norms."[56] For example, practices of gift giving among business partners exist in States including China, Japan, and Russia.[57] The second part of the argument is that, as a practical matter, such local customs and norms must be adhered to in order for international businesses to operate. [58] It is further argued that if one international business refuses to conform to a local custom of making facilitation payments, then there are others that will fill the void and agree to comply.[59]

The drafters of the BIMCO Clause clearly appreciated that facilitation payments differ from other forms of bribery and therefore must be addressed in charter parties very carefully and precisely. As to conventional bribery, the explanatory notes state that "[t]he shipping industry fully supports international efforts to eradicate bribery and corruption. Bribery, such as a payment to obtain a contract or other commercial advantage,

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53 Follett, *supra* note 11 at 123.

54 Bailes, *supra* note 11 at 295.

55 Follett, *supra* note 11 at 123; Bailes, *supra* note 11 at 295.

56 Bailes, *supra* note 11 at 295.

57 *Id*. at 296.

58 *Id*. at 295-97. When BP announced a plan to publish all facilitation payments made in Angola, the national oil company sent a letter warning of the consequences. *Id*. at 296.

59 *Id*. at 296.

must never be condoned."[60] As to situations involving demands for facilitation payments, the explanatory notes recognize they are "more difficult".[61] Although the drafters of the BIMCO Clause did not, as a matter of policy, explicitly condemn facilitation payments like they did for conventional bribes, they didn't condone them either. Instead, without expressing such an opinion, the remaining background explanatory notes suggest that they promulgated the BIMCO Clause as a result of the practical realities of a trend towards the criminalization of facilitation payments, a changing corporate culture towards transparency, and the resulting dilemma that a ship owner may be faced with in the event of a demand for an illegal facilitation payment.[62]

2.9 Extortion

Closely related to bribery is extortion. With bribery, both the payer and receiver act culpably in that each receives an unjustified benefit. With extortion, however, the receiver demands payment, often under an explicit or implicit threat to provide substandard treatment to the other party or to put him in a worse state than he currently is in.[63] An example could be a corrupt port official demanding a small payment from a ship entering port under the threat of failing port-state control. In such a situation, the payer can be thought of as a victim who is forced to pay for something that he is otherwise entitled to without payment.[64] Whether succumbing to the demand and making payment constitutes illegal bribery will discussed below.

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60 BIMCO, Explanatory Notes, BIMCO Special Circular No. 7, 7 Dec. 2015, *available at* https://www.bimco.org/contracts-and-clauses/bimco-clauses/anti_corruption_clause [hereinafter BIMCO Notes].

61 *Id*.

62 *See id*.

63 *See generally* James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA.L.REV. 1695, 1698–1700 (1993).

64 *See generally id*.

2.10 Effects of Corruption

2.10.1 Corruption Generally

In recent years and decades, international bodies and States have, on numerous occasions, individually and collectively condemned corruption and pointed to its negative economic, governance, and cultural effects. For example, the U.N. General Assembly has stated that corruption "undermin[es] the institutions and values of justice and jeopardize[es] sustainable development and the rule of law."[65] The effects of corruption are realized by States in which corruption occurs, the citizens of those States, and multinational businesses conducting or desiring to conduct business therein.[66] A non-exhaustive list of recognized negative effects include "reduction in growth rates, insufficient capital formation, capital diverted towards private profit rather than social good, reduced foreign investment, less efficient public spending structure . . ., reduced tax revenues, loss of economic rationality in public decisions and ineffectiveness of international aid programmes".[67] As to the effect on businesses, bribes can result in shortsighted business strategies and the realistic possibility of additional future bribes.[68]

2.10.2 Facilitation Payments

At least one commentator has argued that the *effects* of facilitation payments can be distinguished from conventional bribery in three aspects. The first argument is based on the assumption that uncertainty is a major deterrent of foreign investment. Unlike conventional bribes that cannot be accurately predicted, facilitation payments are small, predictable, and can be incorporated into a business model even if they add up to fiscally significant amounts over time. Second, facilitation payments, by definition, do not result in unfair advantages but only give payers what

65 U.N. Convention, *supra* note 2, Preamble; OECD Convention, *supra* note 7, Preamble.
66 Bailes, *supra* note 11 at 294.
67 *Id*. at 294.
68 *Id*. (emphasis added).

they are already entitled to. Therefore, unlike with conventional bribes, there is no economic-distorting misallocation of resources resulting from decisions based on bribes instead of market conditions and worthiness of competing firms. Finally, unlike with conventional bribes, facilitation payments serve as a mechanism that may actually allow for foreign investment and economic activity that would otherwise be prevented due to corruption.[69]

The counter argument is that facilitation payments are often *de minimis* to firms paying them, especially large multinational ones. At the same time, however, they are of financial significance to lower-level public officials in developing States. In other words, facilitation payments provide a financial incentive to public servants to accommodate those willing to make payment, which is often to the detriment of those unwilling or unable to pay.[70]

2.10.3 Shipping Industry

When analyzing the effects of corruption in international shipping, unique aspects of the industry must be taken into account. This is especially true in regards to facilitation payments. For example, while international businesses may, at some level, "compete" with individual citizens for the limited time and resources of public officials, this is less likely to be the case with ports. Most port and customs officials have very specialized roles, including port-state control/safety inspections, cargo inspections, and customs clearance. These are not services that average citizens or local businesses often directly rely on. Any negative effects on the local population would likely be less pronounced and more indirect.

An empirical study of over 1,300 shipments in two competing ports in Africa, Durban and Maputo, provides enlightening results as to effects of bribery specific to shipping.[71] Overall, bribes increased total shipping costs for a standard container by fourteen percent while increasing compensa-

69 Follett, *supra* note 11 at 124-25.

70 *Id*. at 125-26.

71 Sequeira & Djankob, *supra* note 25.

tion of port officials by up to 600 percent.[72] Additionally, the study noted three primary effects: diversion; congestion; and reduced port revenues. First and foremost, in response to known (or relatively higher) corruption, ships will tend to divert to less-corrupt ports.[73] Likewise, shippers will take "longer" land routes to those less corrupt ports even in light of higher land transportation costs.[74] The second effect, congestion, is a direct consequence of diversion. As firms divert from the most corrupt ports, the alternate ports become more congested, resulting in an imbalance.[75] Finally, the study concludes that port corruption and bribery result in diminished revenues to ports.[76] Based on the average tariff rate, the study showed a five-percentage point reduction in revenue due to corruption.[77] In conclusion, "bribe payments at ports are not just a transfer of surplus between a private agent and a bureaucrat. Instead, bribes distort firms' shipping choices, generate deadweight loss in the economy, and reduce tariff revenue for the government."[78]

3 Anti-Corruption Initiatives

3.1 Foreign Corrupt Practices Act (United States)

The first major legislative and public effort to combat foreign corruption was in 1977 when the United States Congress adopted the Foreign Corrupt Practices Act ("FCPA").[79] This was in response to investigations

72 *Id*. at 1.

73 *Id*. at 4, 29-30.

74 *Id*. at 4.

75 *Id*. at 30-31.

76 *Id*. at 4, 31.

77 *Id*.

78 *Id. at* 31.

79 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977), as amended; 15 U.S.C. §§ 78dd-1 to 78ff, *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf.

demonstrating that hundreds of U.S. companies had been paying millions of dollars to overseas officials to secure new business.[80] The operative anti-bribery sections of the FCPA read as follows:

> "It shall be unlawful for [any person subject to the FCPA] . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an *offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value* to . . . any *foreign official* . . . in order to assist such [person] in *obtaining or retaining business* for or with, or directing business to, any person . . . ."[81]

As emphasized, the three primary elements are: (i) a payment (or offer, promise, or authorization); (ii) to a foreign official; and (iii) for unfair business purposes. Each will be examined in turn. The statutory exception for facilitation payments will then be addressed.

3.1.1 Payment

An act violating the FCPA must involve a payment. In addition to the actual making of a payment, the FCPA also encompasses the offer, promise, or authorization of a payment.[82] The broad language of the statute allows for many forms of payment, with cash being the most obvious and prominent.[83] Other examples may include sports cars, fur coats, country club memberships, and extravagant travel and entertainment.[84] Smaller gifts, especially a pattern of them, can also be illegal. It is important to emphasize, however, that the size of the gift is not decisive.

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80 U.S. Dept. of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 3, 14 Nov. 2012, *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [hereinafter FCPA Guide].

81 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (emphasis added).

82 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a); *See generally* FCPA Guide, *supra* note 80 at 14-16.

83 FCPA Guide, *supra* note 80 at 15.

84 *Id*. at 15-16.

Instead, the critical issue is whether, through the gift, there is intent to influence a foreign official. With that policy in mind, small gifts generally do not violate the FCPA when made for the limited purpose of gratitude. Such examples may include reasonable meals or taxicab fares as they are unlikely to influence a public official.[85] In other words, gifts are not prohibited, but bribes disguised as gifts are.[86]

3.1.2 Foreign Official or Other Qualifying Person

In order to violate the FCPA, the payment must be made to a "foreign official" (or other similar person).[87] "Foreign official" has been defined broadly in the statute to include, among others, the lowest-level civil servants, the highest-ranking public officials, and employees of State-owned enterprises.[88] In the context of port corruption, public port employees and customs officers would certainly qualify.

3.1.3 Unfair Business Purposes

In order to constitute an illegal bribe under the FCPA, the payment must be made "to assist . . . in *obtaining or retaining business* for or with, or directing business to, any person."[89] This is known as the "business purpose test". The clearest example that meets this requirement is a payment in order to obtain or retain a government contract. Other unfair advantages include favorable tax treatment, exceptions to otherwise required licenses, and prevention of competitors from the market.[90] In the port context, a payment to admit a ship or cargo that would otherwise not be allowed would qualify as an unfair business purpose. As an example, Panalpina

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85 *Id*.

86 *Id*. at 16.

87 The FCPA does not prohibit payments to foreign *governments*, as opposed to foreign *officials*. FCPA Guide, *supra* note 80 at 20.

88 *See* 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A); FCPA Guide, *supra* note 80 at 20.

89 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (emphasis added).

90 FCPA Guide, *supra* note 80 at 12-13.

World Transport (Holding) Ltd., a Swiss freight forwarding and logistics firm, along with related parties, admitted in 2010 to having paid over USD 27 million, in violation of the FCPA, to officials in several States in order to circumvent import rules and regulations.[91]

3.1.4 Exception for Facilitation Payments

Facilitation payments are specifically addressed in the FCPA as follows:

> "[The prohibition against making a payment] shall not apply[92] to any *facilitating or expediting payment* to a foreign official, . . . the purpose of which is *to expedite or to secure the performance* of a *routine governmental action* by a foreign official . . . ."[93]

The scope of the exception for facilitation payments is narrow and only covers payment for acts that are both *routine* and *non-discretionary*.[94] Examples include payments for processing visas or business licenses, providing police services, processing/forwarding mail, supplying public utilities, and scheduling inspections.[95] As most "routine government action" is conducted by lower-level government officials, eligible facilitation payments will generally be made to such persons.[96] Sizes of qualifying facilitation payments tend to be low as large payments tend to suggest improper influence.[97]

Port and customs officials generally have nondiscretionary duties to process an incoming ship and its cargo. This may include port-state

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91 U.S. v. Panalpina World Transport (Holding) Ltd., Crim. No. 4:10-cr-00769 (S.D. Tex., 4 Nov. 2010); SEC v. Panalpina, Inc., Civ. No. 4:10-cv-4334 (S.D. Tex., 4 Nov. 2010).

92 Facilitation payments are excepted from the scope of the general rule as opposed to being an affirmative defense. FCPA Guide *supra* note 80 at 111 n. 159.

93 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). The original language regarding facilitation payments was replaced with this language in 1998. Pub. L. No. 105-366, 112 Stat. 3302 (1998).

94 FCPA Guide, *supra* note 80 at 25.

95 *Id*. at 111 n. 162; U.S. v. Kay, 359 F.3d 738, 750-51 (5th Cir. 2004).

96 Kay, 359 F.3d at 750-51.

97 H.R. Rep. No. 95-640, at 8.

control for the ship and completion of necessary inspections and paperwork for cargo. In the narrow case of a ship owner or charterer making a small payment to an official, whether in the form of cash or cigarettes/alcohol, for the sole purpose of ensuring that the official carries out his required duty and processes the ship and/or cargo according to local law, such payment should fall into the facilitation payment exception. In the case, however, that a payment is made to ensure that the ship or cargo is granted entry when it otherwise should not be admitted under law, such payment would not be protected by the exception.

3.2 The OECD Convention

The next major effort to combat public corruption and bribery was the 1997 Convention on Combatting Bribery of Public Officials in International Business Transactions (the "OECD Convention").[98] The OECD Convention, largely influenced by and modeled after the FCPA, only targets *active* bribery. In other words, this convention targets those making bribes to public officials and does not address public officials accepting bribes.[99]

3.2.1 Article 1, Paragraph 1 – Anti-Bribery Provision

Article 1, Paragraph 1, the operative anti-bribery provision, reads as follows:[100]

> "Each [State] shall take such measures as may be necessary to establish that it is a *criminal offence* under its law for any person intentionally to *offer, promise or give* any *undue pecuniary or other advantage*, whether directly or through intermediaries, to a *foreign*

98 OECD Convention, *supra* note 7 at 6-13.

99 OECD, *Commentaries on the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions* ¶ 1 (21 Nov. 1997), *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD Commentaries].

100 The provision only provides a standard of what should be transcribed in national legislation and does not mandate specific details. ¶ 4.

> *public official*, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, *in order to obtain or retain business or other improper advantage* in the conduct of international business."[101]

The criminal act must first involve an "offer, promise or gi[ft of] any undue pecuniary or other advantage". Likewise, such offer, promise, or gift must be made to a "foreign public official" or third-party intermediary. "Foreign public official" is broadly defined in Article 1, Paragraph 4 to include a vast array of officials and persons performing public functions as well as quasi-government officials of State-owned enterprises.[102] Finally, the purpose of the offer, promise or gift must be "to obtain or retain business or other improper advantage".[103] The content of this language clearly includes government contracts but also encompasses much more. The official commentary states that "'[o]ther improper advantage' refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the legal requirements."[104]

3.2.2 Facilitation Payments

The OECD Convention language indirectly addresses facilitation payments while the commentary directly addresses them. First, the actual language of Article 1, Paragraph 1 provides that the offer, promise, or gift must be made "in order to obtain or retain business or other *improper* advantage".[105] As discussed above, "improper" means something to which the person "was not clearly entitled".[106] In the case of a true facilitation payment, this requirement will not be met as the payer will receive nothing more than he was already entitled to under the law. Although

101 OECD Convention, *supra* note 7, art. 1(1) (emphasis added).
102 *Id*. art. 1(4).
103 *Id*. art. 1(1).
104 OECD Commentaries, *supra* note 99, ¶ 5.
105 OECD Convention, *supra* note 7, art. 1(1) (emphasis added).
106 OECD Commentaries, *supra* note 99, ¶ 5.

some argue that this clause by itself is sufficient to conclude that the OECD Convention does not require the criminalization of facilitation payments,[107] the official commentary affirmatively provides for this:

> "Small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 and, accordingly, are also not an offence. . . . Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalization by other countries does not seem a practical or effective complementary action."[108]

The commentary is quite explicit that that member States are not bound to criminalize foreign facilitation payments.[109] Accordingly, the payment of a small sum of money or gift to a port or customs official to ensure a ship and cargo are processed in accordance with local law, is not an act that the OECD Convention requires to be criminalized.

3.3 The U.N. Convention

Approximately 25 years after the FCPA and six years after the OECD Convention, the United Nations General Assembly adopted the United Nations Convention against Corruption (the "U.N. Convention"). While the OECD Convention primarily covers bribery of foreign public officials,

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107 *See generally* Follett, *supra* note 11 at 123-24.

108 OECD Commentaries, *supra* note 99, ¶ 9.

109 In 2009, the OECD's Council for Further Combating Bribery of Public Officials in International Business Transactions *recommended* that the member States regularly review their internal policies regarding foreign facilitation payments and "prohibit or discourage" their use. It further *urged* all States to ensure that their public officials are aware of all local anti-bribery laws with the goal of "stopping the solicitation and acceptance of small facilitation payments." While significant, this clearly falls short of an agreement among OECD States to *prohibit* facilitation payments. OECD, *Recommendations of the Council for Further Combatting Bribery of Foreign Public Officials in International Business Transactions* 20, 22 (26 Nov. 2009), *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

the U.N. Convention is much more comprehensive and, in addition, addresses a host of other forms of corruption including public sector hiring, public procurement management, private sector bribery, embezzlement, money laundering, and obstruction of justice.[110]

3.3.1 Foreign Bribery

Most relevant to the topic of this paper is Article 16 which addresses bribery of foreign public officials.[111] The controlling language reads as follows:

> "Each State Party *shall adopt* such legislative and other measures as may be necessary to establish as a *criminal offence*, when committed intentionally, the *promise, offering or giving* to a *foreign public official* . . ., directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, *in order to obtain or retain business or other undue advantage* in relation to the conduct of international business."[112]

Article 16 largely contains the same elements as those found in the OECD Convention and the FCPA in regards to the payment, to whom the payment is made, and the purpose of the payment. Specifically, there must be a "promise, offer or gif[t]", to a "foreign public official", "in order to obtain or retain business or other undue influence."[113] Furthermore, the term "foreign public official" is defined similarly to its counterpart in the OECD Convention and includes all types of public officials and those executing public functions."[114]

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110 U.N. Convention, *supra* note 4, arts. 7, 9, 21, 22, 23, 25.

111 The language of Article 15 requiring the criminalization of domestic bribery largely mirrors that of Article 16 for foreign bribery. Art. 15.

112 Art. 16(1) (emphasis added). In addition to *requiring* that members States implement laws criminalizing the making of a bribe to a public official, it also *recommends* that member States consider implementing acts which would make it a criminal offense for a foreign public official to receive such a bribe. Art. 16(1).

113 Art. 16(2).

114 Art. 2(b).

3.3.2 Facilitation Payments

Facilitation payments are not specifically addressed in the U.N. Convention. It is, however, critical to note that Article 16 requires that an otherwise improper promise, offering or gift be made "in order to obtain or retain business or other *undue* advantage."[115] This language is nearly identical to that found in the OECD Convention, with "undue" having been substituted for "improper". Furthermore, although "other undue advantage" is not defined in the U.N. Convention, it should arguably be interpreted in the same way as "other improper advantage" in the OECD Convention.[116]

Unlike with the OECD Convention, there is no official commentary to the U.N. Convention explicitly addressing facilitation payments. The *travaux préaratoires* suggest, however, that most State delegations to the U.N. Convention wanted to exclude the phrase, "in order to obtain or retain business or other undue advantage", while other delegations insisted that such qualification be included.[117] Notwithstanding the fact that there is not an affirmative allowance for facilitation payments, the inclusion of the term "undue" results in an absence of a prohibition.[118] Had this term been excluded, the Convention would demand that member States adopt criminal legislation prohibiting foreign facilitation payments. Instead, like the OECD Convention, the member States are free to decide this issue for themselves.

3.4 Bribery Act 2010 (United Kingdom)

In 2011, the Bribery Act 2010 ("UKBA") became effective in the United Kingdom and has been labeled as "the most draconian anti-corruption legislation in the world".[119] The UKBA is comprehensive and contains

115 Art. 16(2).
116 Follett, *supra* note 11 at 124.
117 *Id*.
118 *Id*.
119 Cooper et al., *supra* note 40.

several (and potentially overlapping) criminal bribery offenses. It covers active and passive bribery, both domestic and abroad.[120]

3.4.1 Bribery of Foreign Public Officials

The first offense to be discussed is that specifically relating to foreign public officials. The operative language is found in Section 6 and reads as follows:

> "(1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.
>
> (2) P must also intend to obtain or retain—
> (a) business, or
> (b) an advantage in the conduct of business.
>
> (3) P bribes F if, and only if—
> (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
> (i) to F, or
> (ii) to another person at F's request or with F's assent or acquiescence, and
> (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift."[121]

Although structured in a slightly different way, Section 6 contains the same basic elements as those in the FCPA, the OECD Convention, and the U.N. Convention: (i) an offer, promise, or gift; (ii) to a foreign public official; and (iii) to obtain to retain business or an advantage. Similarly,

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120 Ministry of Justice, *Guidance about procedures* ¶ 10, Mar. 2011, available at https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf [hereinafter UKBA Guidance]; *E.g.* Bribery Act 2010, 2010 c., 23, §§ 1, 2, 6, (Eng.), *available at* http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

121 Bribery Act 2010, *supra* note 120 § 6(1)-(3).

"foreign public official" is broadly defined in the Act to include all persons holding public positions or fulfilling public functions.[122]

3.4.2 Facilitation Payments

A critical departure from the policies of the FCPA, OECD Convention, and U.N. Convention is found in Section 6(2)(b). This sub-section provides that simply "an *advantage* in the conduct of business"[123] must be intended to be obtained or retained. The word "advantage" is not qualified by a term such as "improper" or "undue". Accordingly, the scope of the UKBA is much broader and includes all situations where payment is made to a foreign official in exchange for any advantage. Most importantly, the language is broad enough to encompass facilitation payments. Specifically, a payment to a public official to fulfill a duty that the payer is entitled to under law, such as an inspection of cargo for purposes of customs clearance, would be considered an "advantage". The official Guidance publication to the UKBA expressly states that there is no exception for facilitation payments.[124]

3.4.3 General Bribery

In addition to the specific offence of *foreign* bribery in Section 6, the UKBA also contains a general prohibition of active bribery, not limited to foreign public officials, in Section 1.[125] The two cases are as follow:

> "(1) A person ("P") is guilty of an offence if either of the following cases applies.

[122] § 6(5).

[123] § 6(2)(b).

[124] UKBA Guidance, *supra* note 120 ¶ 45.

[125] Bribery Act 2010, *supra* note 120, § 1. Article 2 contains the general passive bribery offense. § 2.

(2) Case 1 is where—
(a) P offers, promises or gives a financial or other advantage to another person, and
(b) P intends the advantage—
(i) to induce a person to perform improperly a relevant function or activity, or
(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—
(a) P offers, promises or gives a financial or other advantage to another person, and
(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity."[126]

In each case, there must be an offer, promise, or gift of a financial advantage to another person. Case 1 covers the situation where the payer intends the advantage to induce the other person to improperly perform a "relevant function or activity" or reward the person for improper influence.[127] In the alternative, Case 2 applies when the payer knows or believes that mere acceptance of such an advantage by the payee would result in improper performance.

Depending on the facts concerning a bribe or facilitation payment made to a foreign public official, such an act could violate both UKBA Sections 1 and 6.[128] The primary difference is that Section 1 requires that the payment be accompanied with improper performance or the intent to induce it. The official Guidance to the UKBA notes that, in the context of foreign public officials, it is often difficult to delineate the precise functions of the foreign public official. This could make proving

126 §§ 1(1)-(3).

127 UKBA Guidance, *supra* note 120, ¶ 17. Improper influence occurs when the payee does not fulfill the expectation that he will act in good faith, impartially, or in accordance with his position of trust. ¶ 18. This is based on the reasonable expectations of a person in the United Kingdom. Bribery Act 2010, *supra* note 120, § 5(1); UKBA Guidance, *supra* note 120, ¶ 19.

128 UKBA Guidance, *supra* note 120, ¶ 44.

actual improper performance or intent to induce it very difficult for the prosecution. Accordingly, such a requirement is absent from Section 6.[129]

3.4.4 Extortion

A facilitation payment affirmatively initiated by a payer is illegal under the UKBA. Likewise, capitulating to a demand for a facilitation payment under threat from a foreign public official also appears to violate the act.[130] The official Guidance provides as follows: "It is recognized that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defense of duress is very likely to be available in such situations."[131] In the port context, however, the vast majority of threats have consequences that are merely economic (e.g., perishing cargo) and do not strictly affect "life, limb or liberty". The policy set forth in the official Guidance suggests that making a payment to avoid such threats of economic hardship, however major, would violate the UKBA.[132]

4 BIMCO Clause – Introduction

On 24 November 2015, BIMCO announced the approval and launch of the BIMCO Clause. The drafting of the Clause was a joint effort by a team of lawyers and practitioners from across the world. The result was a "clearly-worded" clause that is purely voluntary but also applicable in any jurisdiction worldwide. Inherent in the drafting of the Clause was

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129 ¶ 23.

130 This situation is not as relevant under the FCPA as there is an exception for a facilitation payment whether or not it is in response to a demand.

131 UKBA Guidance, *supra* note 120, ¶ 48.

132 William J. Boddy, Lexology, *Payment made under duress: bribery or extortion?*, 13 June 2011, http://www.lexology.com/library/detail.aspx?g=5da424b3-1183-4320-be82-2eb-f7087cf01.

the goal of a "workable alternative" to already-existing anti-corruption clauses found in private charter parties. In particular, the Clause requires compliance with anti-corruption laws and calls for a procedure in which the owner and charterer shall resist a demand for an illegal bribe or facilitation payment. It then provides the contractual procedure and consequences if the effort to resist should fail.[133] The result under the BIMCO Clause is much different than under alternative clauses, especially the "zero tolerance"[134] clauses largely drafted and utilized by petroleum charterers.

The ensuing sections of this paper will review and analyze the substantive terms of the BIMCO Clause. This will include presenting the results under both the Clause's plain language and in the context of relevant public anti-corruption laws as well as general maritime and contract law. Finally, the terms of the Clause will be compared with alternative private clauses that are or have been promoted by BHP Billiton Ltd. ("BHP"),[135] BP,[136] Cargill, Inc. ("Cargill"),[137] The Maritime Anti-Corruption Network ("MACN"),[138] Morgan Stanley,[139] RWE AG ("RWE"),[140] and Royal Dutch Shell plc ("Shell").[141]

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133 Press Release, BIMCO, 24 Nov. 2015, https://www.bimco.org/news/press-releases/20151124_press_release_anti-corruption_clause.

134 Grant Hunter, TheBalticBriefing.com, *Corruption and charter party consideration*, 23 July 2015, http://thebalticbriefing.com/2015/07/23/corruption-and-charter-party-considerations.

135 BHP anti-corruption clause (attached hereto as Appendix B) [hereinafter BHP].

136 BPTime Time Charterparty, Additional Clauses 24-25 (Feb. 2001), *available at* https://www.sec.gov/Archives/edgar/data/1483934/000119312510060061/dex103.htm (attached hereto as Appendix C) [hereinafter BP].

137 Cargill anti-corruption clause (attached hereto as Appendix D) [hereinafter Cargill].

138 Anti-corruption Clauses for Charter Parties, Maritime Anti-corruption Network (Jan. 2014) (attached hereto as Appendix E) [hereinafter MACN].

139 Anti-Corruption Representation, Morgan Stanley (June 2010) (attached hereto as Appendix F) [hereinafter MS].

140 Compliance, Anti-Corruption and Sanctions clause, RWE (attached hereto as Appendix G) [hereinafter RWE].

141 Bribery Clause, Shell (attached hereto as Appendix H) [hereinafter Shell].

5 Sub-Clause (a)(i) – Applicable Anti-Corruption Legislation

BIMCO sub-Clause (a)(i) provides that each party shall "comply at all times with *all applicable anti-corruption legislation*."[142] The official commentary notes that the Clause is "designed for worldwide trading[,] is not linked to any specific legal system, [and] aims to encompass any laws or regulations to which the parties are subject under their own national legislation or legislation in the country or jurisdiction where they are operating."[143] Accordingly, with any given charter party that incorporates the Clause, it is critical to identify all anti-corruption legislation that applies to either or both parties, including national criminal legislation.[144] Before identifying specific legislation of interest, however, it is important to first understand the various bases of jurisdiction under which States may impose their anti-corruption laws in the port context.

5.1 Bases for Jurisdiction

In the international law context, the term "jurisdiction" means the "power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court."[145] Alternatively, the term "describes the power of a State under international law to exercise its authority over persons and property by use of municipal law."[146] Such laws can certainly include prohibitions on committing crimes such as bribery. In the context of international shipping, multiple States may be able to assert jurisdiction of their laws. Particularly relevant are (i)

142 BIMCO Clause, *supra* note 2, § (a)(i) (emphasis added).

143 BIMCO Notes, *supra* note 60, Commentary Sub-clause (a).

144 *Id*.

145 Bevan Marten, Port State Jurisdiction and the Regulation of International Merchant Shipping § 2.1 (Springer International Publishing Switzerland 2014).

146 Z. Oya Özçayir, Port State Control § 3.1 (Informa Professional 2004) (2001). The five bases for jurisdiction are the territorial, nationality, protective, passive personality, and universality principles. § 3.2.

port-state jurisdiction, (ii) flag-state jurisdiction, and (iii) extraterritorial jurisdiction.[147] Each will be addressed in turn.

5.2 Port-State Jurisdiction (Explained)

In the context of port corruption, the State in which the port is located and in which the corrupt act occurs may always assert jurisdiction. One of the five internationally-accepted bases for jurisdiction, including criminal jurisdiction, is the "territorial principle". Simply put, this principle provides that a State has the powers to adopt and enforce laws necessary to properly govern within its borders.[148] In the context of criminal law, it provides that a State has jurisdiction to prescribe criminal acts and adjudicate offenses committed in its own territory.[149] Therefore, when entering a State's territory, a foreign national becomes subject to and submits himself to that State's laws and jurisdiction.[150]

Port-state jurisdiction is the assertion of jurisdiction on ships visiting ports within its territory[151] and is simply a special case and extension of territorial jurisdiction.[152] Ports and harbors have long been recognized as being under the territorial jurisdiction of the States in which they are located.[153] Furthermore, due to significant economic and commercial

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147 The governing law of the charter party is distinct from "applicable anti-corruption legislation". BIMCO Notes, *supra* note 60, Commentary, Sub-clause (a).

148 Marten, *supra* note 145, §§ 2.1.1., 2.3.2.

149 *See* Özçayir, *supra* note 146, § 3.2(i). It is well accepted that criminal jurisdiction is inherently territorial. Peter D. Clark, *Criminal Jurisdiction Over Merchant Vessels Engaged in International Trade*, 11:2 J. Mar. L. & Com. 219, 221 (1980).

150 Marten, *supra* note 145, § 2.1.1.

151 G.P. Pamborides, International Shipping Law § 3.1 (Ant. N. Sakkoulas Publishers 1999).

152 Marten, *supra* note 145, §§ 2.1.1, 2.3.2; Ademuni-Odeke, *An Examination of the Basis for Criminal Jurisdiction over Pirates Under International Law*, 22 Tul. J. Int't & Comp. L. 305, 311 (2014).

153 Marten, *supra* note 145, § 2.3.2. UNCLOS specifically provides that the sovereignty of a State "extends beyond its land territory and internal waters [and includes its] territorial sea[s]. United Nations Convention on the Law of the Sea, art. 2(1), 10 Dec. 1982, 1833 U.N.T.S. 3, *available at* http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter UNCLOS].

interests, global logistics, the transfer of goods and persons, and other effects on port communities, States have taken a special interest in asserting its port-state jurisdiction.[154]

There was a period when the question remained unanswered as to whether a foreign-flagged ship and onboard foreign nationals entering a port State were fully subject to the port State's territorial jurisdiction. Specifically at issue was whether port States maintained jurisdiction over certain "internal affairs" or the "internal economy" of a foreign-flagged ship, including criminal acts of foreign nationals on board, when in the port State.[155] Largely decided in the context of violent criminal acts among foreign national crew members, two lines of thought emerged – the Anglo-American view and the French/European view.[156] Adopted by both the United Kingdom[157] and the United States[158], the Anglo-American view provides that a port State has absolute jurisdiction over foreign vessels in port and those on board.[159] The competing French/European view provides that a port State has jurisdiction over the internal affairs of a ship only when the event touches or disturbs the interests of the port State.[160] Although the Anglo-American approach may be more widely accepted today,[161] it has been pointed out that the differences between the two views are minimal in that those States adopting the Anglo-American view often voluntarily refrain from exercising its jurisdiction in most internal matters whereas those States adopting the French/European view tend to more broadly categorize events as "port disturbances".[162]

In the context of port bribery and facilitation payments, a ship owner or charterer who, while in port, makes payment to a local official in violation of the laws of that port State, is subject to criminal sanctions

154 Marten, *supra* note 145, §§ 2.1.1, 2.3.3.

155 Marten, *supra* note 145, § 2.4.

156 Clark, *supra* note 149 at 230-34.

157 Regina v. Cunningham, (1859) Bell Cr. Cas 72 (Eng.).

158 Wildenhus' Case (Mali v. Keeper of Common Jail), 120 U.S. 1 (1887).

159 Clark, *supra* note 149 at 231-33.

160 *Id*. at 233.

161 Pamborides, *supra* note 151, § 3.2.

162 Marten, *supra* note 145, § 2.4.4.3.

under that State's jurisdiction. If the act occurs on land or on the dock, the port State clearly has jurisdiction. If, however, the act occurs on the ship (e.g., after a public officials boards the ship), the port State should likewise have the same authority and jurisdiction whether adhering to the Anglo-American view or the French/European view since an illegal payment to a port official would arguably affect the immediate operation of the port.

5.3 Port-State Jurisdiction (Examples)

In light of the foregoing, it is critical that both ship owners and charterers be aware of applicable anti-corruption laws in the port States in which calls will be made. As conventional bribery is nearly universally prohibited at the domestic level,[163] the more interesting issue is the legality of facilitation payments. Additionally, local extortion laws and defenses should be examined as a facilitation payment made response to an illegal demand and corresponding threat may be legal.[164] While it is not practical or useful for this paper to exhaustively detail all laws around the world, Nigeria and China serve as useful examples. Nigeria is an example of a State with a high level of corruption.[165] China, on the other hand, is an example of a State with several of the world's busiest ports and tremendous volumes of activity.[166]

5.3.1 Nigeria

Nigeria, like most States, long ago banned bribery of its public officials. A 1998 analysis of Nigeria's laws concluded, however, that although fa-

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163 Philip M. Nichols, *Are Facilitating Payments Legal?*, 54:1 Va. J. of Int'l L. 127, 135 (2013).

164 *Id*. at 136; Lindgren, *supra* note 63 at 1698.

165 Ships & Ports, *supra* note 27; *Corruption Perceptions Index 2016*, *supra* note 8 at 5, 10.

166 World Shipping Council, Top 50 World Container Ports, http://www.worldshipping.org/about-the-industry/global-trade/top-50-world-container-ports (last visited 17 Aug. 2017). Seven of the top ten and thirteen of the top thirty busiest container ports are in China. *See id*.

cilitation payments could seemingly have violated both the then-existing Criminal Code and the Code of Conduct for Public Officers, a series of exceptions as well as court precedence suggested that facilitation payments were actually legal.[167] Subsequent to this analysis, however, a new civilian government, constitution, and anti-corruption laws have replaced those existing under the former order.[168] In particular, the Corrupt Practices and Other Related Offenses Act now provides as follows:

> "Any person who offers to any public officer . . . an inducement or reward for- . . .
>
> (b) Performing or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of any official; or . . .
>
> ([d]) showing or forbearing to show any favour or disfavor in his capacity as such officer.
>
> shall . . . be guilty of an offence . . . ."[169]

Based on the language of subsections (b) and (d), it appears that facilitation payments to local Nigerian officials are criminal. In furtherance of this policy, Section 60 specifically prohibits the admission of any evidence demonstrating that any such payment or gratification is customary.[170] Finally, there is no clear defense in regards to a payment being made to meet an extortionary demand. While practical enforcement of this law may not exist, this does not change the fact that facilitation payments are nevertheless criminal.[171] Accordingly, should this law be violated in connection with a charter party containing the BIMCO Clause, the

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167 Nichols, *supra* note 163 at 135.

168 *Id*. at 137.

169 Corrupt Practices and Other Related Offenses Act 2000, § 18, 2000 Act No. 5 (Nig.), *available at* http://icpc.gov.ng/wp-content/uploads/downloads/2012/09/CORRUPT-PRACTICES-ACT-2010.pdf.

170 § 60.

171 Nichols, *supra* note 163 at 137.

Clause would be triggered even in the absence of a realistic possibility of local enforcement.

5.3.2 China

Bribery is illegal under Chinese law. The law, however, does not allow for an act to be prosecuted absent other conditions being met. In particular, the aggregate payments to a single government official must equal at least RMB 10.000. Notwithstanding the foregoing, any such act(s) can be prosecuted if payments are made to more than three officials, cause significant damage to the Chinese State, or are made to the Communist Party. Accordingly, it is very difficult to determine whether any single facilitation payment is legal.[172]

5.4 Flag-State Jurisdiction (Explained)

Ocean-going ships sail worldwide and on the high seas where no State has sovereignty.[173] As "[t]he absence of any authority over ships sailing the high seas would lead to chaos[,]"[174] a system has developed where all ships must fly the flag of one State and be subject to the laws and jurisdiction of that State.[175] Enforcement of anti-corruption laws is not usually what comes to mind in this context. Typically, one of the more-prevalent roles of the flag State is "flag-state control".[176] The jurisdiction of the flag State, however, is much broader than technical and operational matters. The United Nations Convention on the Law of the Sea provides that the flag State has "jurisdiction under its internal law over each ship flying its flag and its *master, officers and crew* in respect of administrative, technical and

172 *Id*. at 137-39.

173 UNCLOS, *supra* note 153, art. 89.

174 John N.K. Mansell, Flag State Responsibility § 1.2 (Springer 2009).

175 UNCLOS *supra* note 153, art. 92(1); Mansell, *supra* note 174, § 1.2.

176 Mansell, *supra* note 174, § 1.4; *E.g.* UNCLOS, *supra* note 153, arts. 94, 217(4).

social matters concerning the ship."[177] More generally, it is well accepted that the flag State has jurisdiction over persons on board.[178]

The jurisdiction of the flag State over a ship *sailing on the high seas* is exclusive.[179] For purposes of payments to port and customs officials, however, this is not particularly relevant as payments are not made or arranged under such conditions.[180] When a ship is in port, however, there is concurrent jurisdiction between the port State and the flag State.[181] In other words, although the port State gains jurisdiction when a ship enters port, the flag State's jurisdiction over the ship and its crew/passengers continues uninterrupted. Accordingly, the flag state has jurisdiction to enforce its criminal laws, including anti-corruption legislation, while the ship is in a foreign port,

Notwithstanding the foregoing, some flag States choose to not always extend the full reach of their flag-state jurisdiction over crimes committed on board ships. It is therefore necessary to determine this for each flag State on a case-by-case basis.[182] For example, the extent of criminal jurisdiction of the United States is statutory[183] but has been specifically extended to include crimes on board its ships.[184] Likewise, since 1867, crimes committed aboard British ships have been subject to U.K. law.[185]

In the case of a payment made to a port official, determining whether the laws of the flag State are "applicable", within the meaning of the BIMCO Clause, will likely be a consequence of where and how the payment is made. There are at least three possibilities: (i) the official

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177 UNCLOS, *supra* note 153, art. 94(2)(b) (emphasis added).

178 Jörn-Ahrend Witt, Obligation and Control of Flag States 15-17 (Lit Verlag 2007).

179 UNCLOS, *supra* note 153, art. 87; *See generally* Witt, *supra* note 178 at 4-11.

180 It is conceivably possible for a payment to be arranged, whether by radio or otherwise, in violation of the laws of the flag State while the ship is on the high seas and therefore give rise to flag-state jurisdiction over the offense. This, however, is not likely how such arrangements are made and will not be further discussed.

181 *See* Witt, *supra* note 178 at pp. 10, 15-17; Clark, *supra* note 149 at 222.

182 *See generally* Clark, *supra* note 149 at 225-27.

183 U.S. v. Hudson, 11 U.S. (7 Cranch) 32 (1812); Witt, *supra* note 178 at 226-27.

184 18 U.S.C. § 7(1).

185 Witt, *supra* note 178 at 226.

boards the ship to complete the transaction with the ship's agent; (ii) the ship's agent disembarks the ship to complete the transaction with the port official on shore; or (iii) a local shipping agent completes the transaction with the port official on shore.[186] Flag-state jurisdiction only extends to acts committed on board a ship.[187] Therefore, the flag State would have jurisdiction over scenario (i) but not over (ii) or (iii).[188] In situation (i), the flag State can have jurisdiction even if it has implemented a general practice to defer to the port State.[189] For example, the policies of the United States and the United Kingdom are to assert jurisdiction over such crimes only after the port State has declined jurisdiction.[190] Under Swedish law, there must be specific government approval prior to prosecution.[191]

Pursuant to the language of the BIMCO Clause, it is insignificant whether any anti-corruption legislation will not be enforced, for example due to a decision by a flag State to defer prosecution of an illegal payment to the port State. Instead, it is only important that the anti-corruption legislation be "applicable".[192] As discussed above, so long as the flag State has, though its own laws, (i) extended its jurisdiction to criminal acts committed on board its flagged vessels and (ii) made such payment illegal, then the laws of the flag State should be considered "applicable" for purposes of the BIMCO Clause.

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186 Facilitation payments are commonly made by contracted local shipping agents on behalf of the principal and with the costs imputed back to the principal. Sequeira & Djankob, *supra* note 25 at 9.

187 *See* UNCLOS, *supra* note 153, art. 27; Witt, *supra* note 178 at 15-17.

188 As previously discussed, scenarios (ii) and (iii) would certainly over be within the scope of port State's territorial jurisdiction and, as will be discussed, could also be within the scope of other States' extraterritorial jurisdiction. For example, Sweden asserts extraterritorial jurisdiction over all acts committed by an officer or crew member of a Swedish-flagged ship in connection with official duties. SPC, *infra* note 263, § 2:3(1).

189 *See generally* Clark, *supra* note 149 at 230-34. It is accepted that a flag State consciously deciding to not exercise its authority is within the bounds of its sovereignty. Mansell, *supra* note 174, § 1.2.

190 Clark, *supra* note 149 at 230-34. U.S. v. Flores, 289 U.S. 137 (1933); U.S. v. Rogers, 150 U.S. 264 (1893); U.S. v. Reagan, 453 F. 2d 165 (6th Cir. 1971), cert. den., 406 U.S. 946.

191 SPC, *infra* note 263, § 2:5, second paragraph.

192 BIMCO Clause, *supra* note 2, § (a)(i).

5.5 Flag-State Jurisdiction (Examples)

In light of the foregoing, it is critical that ship owners and charterers alike be aware of applicable anti-corruption legislation of the flag State of the ship being chartered. While it is not practical or useful for this paper to exhaustively detail the laws of all flag states around the world, focusing on the largest ones would be beneficial. In 2015, the top ten ship registries (by number of vessels and deadweight tonnage) were Panama, Liberia, Marshall Islands, Hong Kong, Singapore, Malta, Bahamas, Greece, China, and Cyprus.[193] With regard to the OECD Convention, Greece is the only of the foregoing that is a signatory.[194] As to the U.N. Convention, on the other hand, all except Hong Kong have ratified or acceded to it.[195] Accordingly, those who own or charter ships flagged in such States should carefully monitor specific details of implementation. With Panama, for example, "there is a perception that [it] should more effectively implement the convention[]."[196]

5.5.1 The Marshall Islands

The Republic of the Marshall Islands has fully criminalized bribery of foreign officials. The operative language reads as follows:

> "A person . . . is guilty of bribery . . . if the person, whether in the Marshall Islands or elsewhere, directly or indirectly promises, confers or agrees to confer a benefit upon a foreign public official or an official of an international organization as an inducement to, or reward for, or on account of:

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193 Lloyd's List, Flag State 2015: Top 10 Ship Registers, https://www.lloydslist.com/ll/static/classified/article506818.ece/binary/Flag-worldfleet-final2.pdf (last visited 17 Aug. 2017).

194 *See* OECD, Ratification Status as of May 2017, http://www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited 17 Aug. 2017).

195 UNODC, Signature and Ratification Status, https://www.unodc.org/unodc/en/corruption/ratification-status.html (last visited 17 Aug. 2017).

196 U.S. Dept. of State, *Panama 2017 Investment Climate Statements Report*, 29 June 2016, *available* at https://www.state.gov/e/eb/rls/othr/ics/2017/wha/270086.htm.

a) Obtaining or retaining business or other undue benefit in international business;
b) Taking action or refraining from acting in a manner that breaches an official duty[.]"[197]

The elements and structure of the foregoing offense are similar to and those of the OECD Convention and the U.N. Convention. In particular, it is important to note that the benefit to be obtained in exchange for the payment must be "undue". Consistent with the interpretation of the two conventions, this qualification supports the conclusion that foreign facilitation payments do not violate the laws of the Marshall Islands. Finally, it is critical to note that the Marshall Islands has chosen to fully utilize flag-state criminal jurisdiction by making the foregoing bribery law applicable and enforceable if the offense "occurs on any vessel belonging in whole or in part to the Republic or any citizen thereof, or any corporation created by or under the laws of the Republic, when such vessel is within the admiralty and maritime jurisdiction of the Republic."[198]

5.6 Extraterritorial Jurisdiction (Explained)

Extraterritorial jurisdiction is simply a State's exercise of jurisdiction outside of its territorial limits.[199] When prescribing and enforcing extraterritorial laws, States must rely on at least one of the following principles: nationality, protective, passive personal, and universality.[200] Each will be addressed.

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197 31 MIRC Ch. 1 § 240.1(3) (Marsh. Is.), *available at* http://rmiparliament.org/cms/images/LEGISLATION/PRINCIPAL/2011/2011-0059/CriminalCode2011_1.pdf. A similar offense against bribery of Marshall Islands officials also exists. § 240.1(2).

198 § 1.03(1)(h).

199 Kate Lewins, *Jurisdiction over prosecution of criminal acts on cruise ships* 3, 18 Jan. 2013, *available at* http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/crimes%20at%20sea/subs/sub001.pdf.

200 Marten, *supra* note 145, §§ 2.1.2, 2.1.3.

5.6.1 Nationality Principle

The *nationality principle* allows States to prosecute the acts of its nationals, whether committed inside or outside its geographic limits, based solely based on nationality.[201] In other words, the State's law "follows" its nationals.[202] Although every State has such powers to prescribe its laws to nationals outside of its territory, not every State has chosen to do so.[203]

In the context of port bribery and facilitation payments, "applicable anti-corruption legislation", within the meaning of the BIMCO Clause, could include anti-corruption legislation under the laws of the State of the nationality of the master, crew, or other person making such bribe or payment. Accordingly, it is critical to determine whether the laws of the State of the payer's nationality make such an act illegal when committed outside of the State's territorial limits. If such laws are applicable abroad, then the BIMCO Clause would be triggered.

5.6.2 Protective, Passive Personal, and Universality Principles

The *protective principle* provides jurisdiction to a State over acts or offenses that are committed outside of its territory when they have negative effect on the "security, integrity[,] vital economic interests",[204] or the "political independence" of the State.[205] The key component is that such offense must actually be against the State itself and not merely against one or more of its nationals.[206] Historical examples are crimes involving immigration, currency, and mail fraud.[207] The *passive personal principle* gives extraterritorial jurisdiction to a State based on the nationality of the

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201 § 2.1.2; Özçayır, *supra* note 146, § 3.2(ii).

202 Marten, *supra* note 145, § 2.1.2.

203 Clark, *supra* note 149 at 220. For example, both the American and British courts have found that they have such power, but that their criminal laws are, by default, territorial unless specifically made applicable internationally. *Id*.

204 Özçayir, *supra* note 146, § 3.2(iii).

205 Clark, *supra* note 149 at 221-22.

206 Marten, *supra* note 145, § 2.1.3.

207 Clark, *supra* note 149 at 221-22.

victim,[208] thereby allowing the State to punish foreign nationals for acts that took place outside of its geographic boundaries.[209] The *universality principle* has a very narrow scope and grants jurisdiction to any State to prosecute crimes that are universally condemned, such as piracy.[210]

5.7 Extraterritorial Jurisdiction (Examples)

In light of the foregoing, ship owners and charterers should be aware of potentially-applicable anti-corruption laws with extraterritorial effect, especially the most far-reaching ones. While it is not practical or useful for this paper to exhaustively detail such laws around the world, of most prominence are the FCPA and UKBA. The extraterritorial anti-bribery laws of three Scandinavian States will also be discussed.

5.7.1 United States (Foreign Corrupt Practices Act)

The FCPA, as previously discussed, targets bribery of public officials outside the United States and contains a narrowly-tailored exception for qualifying facilitation payments. The primary anti-bribery provisions consist of three parallel statutes, each applicable to a specific set of persons: (i) issuers (and their officers, directors, etc.) of securities registered under U.S. securities laws;[211] (ii) "domestic concerns", including U.S. nationals and business entities formed under the laws of the U.S. or a state in the U.S. (and their officers, directors, etc.);[212] and (iii) other foreign nationals while in the territory of the U.S.[213] Accordingly, with both territorial and extraterritorial effect, the FCPA utilizes and is based on several principles of jurisdiction.

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208 Özçayir, *supra* note 146, § 3.2(iv). This is distinguished from the protective principle in that a national of the State, rather than the State as a political entity, is the victim of the extraterritorial act.

209 Clark, *supra* note 149 at 221.

210 Marten, *supra* note 145, § 2.1.3.

211 15 U.S.C. § 78dd-1.

212 § 78dd-2.

213 § 78dd-3.

5.7.2 United Kingdom (Bribery Act 2010)

5.7.2.1 Territorial or "Close Connection" Requirement

The UKBA provides for extensive jurisdiction, with application inside and outside of the United Kingdom. For both general bribery (Section 1) and bribery of foreign public officials (Section 6), the UKBA has jurisdiction over all acts committed inside the United Kingdom as well those committed outside of the territorial limits by person[s] with a "close connection with the United Kingdom".[214] Those with a "close connection" generally include U.K. nationals and legal entities existing under U.K. law.[215]

5.7.2.2 Commercial Organizations

The UKBA also provides for additional and broader extraterritorial jurisdiction over "commercial organisations". Applying only to legal entities (i.e., not natural persons), Section 7(1) provides that a commercial organization will be guilty of an offense if a person associated with the organization commits bribery on behalf of and for the benefit of the organization.[216] Unlike the offenses in Sections 1 and 6, however, jurisdiction is not limited to only those committed within the territory and those with a "close connection" to the U.K. Instead, any legal entity formed under the laws of the U.K. or conducting any business therein is subject to UKBA enforcement regardless of whether the payment took place inside or outside the territorial limits.[217]

Section 7(2) provides the organization (but the underlying person who commits the act) an affirmative defense if it had "adequate procedures" in place to prevent bribery.[218] The Ministry of Justice has issued an official publication containing guidance as to what "sufficient procedures" include.[219] Generally, the following six items are necessary: (i) that the procedures be proportionate to the bribery risks the commercial

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214 Bribery Act 2010, *supra* note 120, § 12(1)-(3); UKBA Guidance, *supra* note 120, ¶ 15.

215 Bribery Act 2010, *supra* note 120, § 12(4).

216 § 7(1). Section 7 makes reference to the elements of bribery in Sections 1 and 6. § 7(3)(a).

217 § 7(3)(b); UKBA Guidance, *supra* note 120, ¶ 16.

218 Bribery Act 2010, *supra* note 120, § 7(1).

219 § 9(1); UKBA Guidance, *supra* note 120.

organization faces; (ii) that top-level management be committed to an anti-bribery policy and culture; (iii) that the organization periodically assesses its bribery risks; (iv) that the organization acts diligently when selecting those who will act on its behalf; (v) that the anti-bribery policies be properly communicated throughout the organization and that personnel be trained; and (vi) and that the policies be regularly monitored and reviewed.[220] Rather than abruptly stopping facilitation payments, it appears the goal of this office is to phase them out and for businesses to begin taking proactive steps towards this goal.[221] At least one expert believes only businesses with an endemic of making facilitation payments will be prosecuted anytime in the near future.[222]

5.7.2.3 Applicability

The parties to a charter party containing the BIMCO Clause should be intimately aware of the terms of the UKBA if any person has a close connection to or either party carries on any business in the United Kingdom. In every case, any payment, including a facilitation payment, will violate the act. Although the U.K. authorities may choose not to prosecute the offense, this is of no legal significance for purposes of triggering the BIMCO Clause.

5.7.3 Scandinavia

The Scandinavian States have, in accordance with their obligations as members of the OECD Convention and the U.N. Convention, largely implemented conforming anti-corruption criminal legislation with extraterritorial effect. Not generally having as far-reaching connections to international firms as the larger economies of the United States and the United Kingdom, their legislation is therefore not as widely applicable as the previously-discussed FCPA and UKBA. In the shipping industry,

220 UKBA Guidance, *supra* note 120 at 20-31.

221 Cooper et al., *supra* note 40.

222 Mark Sands, Operationalriskandregulation.com, *Facilitation payment charges unlikely under Bribery Act*, 22 Dec. 2010, http://www.risk.net/risk-management/operational-risk/1933202/bribery-act-unlikely-see-firms-pursued-facilitation.

however, the Scandinavian States are traditional seafaring nations with significant ship-owning interests. Accordingly, in the context of the BIMCO Clause, this legislation is extremely relevant should a ship owner or charterer have a connection to any of them. The ensuing analysis will focus on Norway, Denmark, and Sweden as they are the Scandinavian States with the most shipping activity.

5.7.3.1 Norway

Norway's primary anti-bribery legislation is found in The General Civil Penal Code, Section 276a.[223] It reads as follows:

> "Any person who . . .
>
> b) *gives or offers* any person an *improper advantage* in *connection* with a position, officer or assignment shall be liable to a penalty for corruption.
>
> Position, office or assignment in the first paragraph also mean a position, office or assignment in a *foreign country*."[224]

5.7.3.1.1 Elements

The elements of Section 276a cover active bribery and are largely in line with the requirements of the OECD Convention and the U.N. Convention.[225] The first element is that the payer must either "give" or "offer". The preparatory works clarify that "promise" was intentionally excluded as the Ministry of Justice determined that "promise" would have no independent significance from "offer".[226] It is likewise the official position

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[223] Prior to joining the OECD Convention, Norway's anti-bribery legislation was limited to GCPC § 128. To comply with the convention, the existing language was amended to explicitly apply to foreign officials. In 2003, § 276a was adopted while § 128 was amended so as to be limited to threatening (vs. bribing) public officials. Act No. 79 of 4 July 2003 (Nor.); OECD, *Norway: Phase 2 Report* ¶ 1 (2004), *available at* https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/31568595.pdf.

[224] The General Civil Penal Code, Act of 22 May 1902 No. 10, as amended, § 276a, first and second paragraphs (Nor.), *available at* http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf (emphasis added) [hereinafter NGCPC].

[225] Related sections include Section 276b regarding "gross corruption" and Section 276c regarding "trading in influence".

[226] *Norway: Phase 2 Report*, *supra* note 223, ¶ 83.

that a payer agreeing to a solicitation from an official would constitute an "offer".[227] Next, the gift or offer must be an "improper advantage". Although not explicit in the plain language, the Norwegian authorities have taken the position that an "improper advantage" can be pecuniary or non-pecuniary;[228] the preparatory works address in detail what makes an advantage "improper".[229] The gift or offer must be "in connection with a position, officer or assignment". The term "position, officer or assignment" is broader than "public official" and results in the inclusion of private officials.[230] Paragraph 2 explicitly provides application to foreign officials.[231] Finally, the critical link between the gift or offer and an act or omission of the official is made by requiring that the gift or offer be made "in connection with" the duties of the official.[232]

5.7.3.1.2 Facilitation Payments

In respect to the legality of facilitation payments, whether made to officials in Norway or abroad, it is the position of the Norwegian government that they are barred as any ordinary bribe.[233] Specifically, facilitation payments are considered "improper" within the meaning of Section 276a.[234] This was confirmed by the Ministry of Foreign Affairs in its 2007 brochure, *Say No to Corruption – It Pays*, stating that "all forms of corruption are prohibited by Norwegian law" and that "[f]acilitation payments, i.e. payments for services to which one is already entitled without paying extra, are also a form of corruption."[235] Notwithstanding the foregoing, it is important

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227 ¶ 83.

228 ¶ 85. It also can be something with no independent value such as an honor. *Id*.

229 ¶ 86.

230 ¶ 88.

231 NGCPC, *supra* note 224, § 276a, second paragraph.

232 *Norway: Phase 2 Report*, *supra* note 223, ¶ 93.

233 ¶ 86.

234 Some authorities have indicated that certain payments may not be punishable or should not be punished. OECD, *Norway: Phase 3 Report* ¶ 33, note 31 (2011), *available at* https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Norwayphase3reportEN.pdf.

235 Norwegian Ministry of Foreign Affairs, *Say No to Corruption – It Pays!* 7 (2008), *available at* http://www.regjeringen.no/en/dep/ud/dok/veiledninger/2008/neitilkorrupsjon.

to note that this was only a position of the then-current government and that any developments in case law should be tracked.[236] Notwithstanding the foregoing, the preparatory works provide an example that if a person was forced to make an otherwise illegal payment for the purpose of having his passport returned or to being allowed to exit the country, then such payment should not be punishable. Accordingly, under Norwegian law, there may be some instances where facilitation payments are legal, especially in response to extortionary demands.[237]

5.7.3.1.3 Jurisdiction

The criminal jurisdiction of the General Civil Penal Code is broad and utilizes many principles of jurisdiction.[238] Norway has jurisdiction over all criminal acts, including bribery under Section 276a, within its national borders,[239] on Norwegian-flagged ships on the high seas,[240] and by all crew and passengers on Norwegian-flagged ships regardless of the ship's location.[241] As to Norwegian crimes committed abroad by Norwegian nationals or persons domiciled in Norway, Norway has chosen to exercise jurisdiction only over certain enumerated offenses, one of which is Section 276a.[242] Likewise, with respect to crimes committed abroad by non-Norwegians, Section 276a is explicitly listed as a crime Norway will have jurisdiction to enforce.[243]

5.7.3.2 Denmark

Denmark's anti-bribery prohibition is found in Section 122 of the Criminal Code and reads as follows:

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html?id=49938; *Norway: Phase 3 Report*, *supra* note 234, ¶ 32.

236 *Norway: Phase 2 Report*, *supra* note 223, ¶ 87.

237 *See* Simonsen Vogt Wiig, New BIMCO anti-corruption clause, 25 Jan. 2016, http://svw.no/aktuelt/aktuelt/2016/januar/new-bimco-anti-corruption-clause/.

238 *Norway: Phase 2 Report*, *supra* note 223, ¶ 140.

239 NGCPC, *supra* note 224, § 12(1).

240 § 12(1)(d).

241 § 12(2).

242 § 12(3)(a). All crimes contained within Chapter 26 (fraud, breach of trust, and corruption) are also included. § 12(3)(a).

243 § 12(4)(a).

> "Any person who *unlawfully*[244] *grants, promises or offers* some other person exercising a Danish, *foreign* or international *public office or function* a *gift or other privilege* in order *to induce him* to do or fail to do anything in relation to his official duties shall be liable . . . ."[245]

5.7.3.2.1 Elements

The first element is that the payer must "grant", "promise", or "offer". The Danish authorities have confirmed that the term "grant" covers the same actions as the term used in the OECD Convention, "give".[246] Next, the law requires that there be a "gift or other privilege". Although the Danish term "fordel" may be better translated as "advantage" than "gift", the *travaux préparatoires* confirm that such gain does not have to be strictly financial.[247] Although the language of Section 122 does not explicitly cover offenses committed through intermediaries, the law on complicity set forth in Section 23 provides for such result.[248] As to the next element, Section 122 specifically includes "foreign" and "international" public officials in addition to Danish ones.[249] Finally, the grant, promise, or offer must "induce" the public official to affirmatively make or omit from making an action in connection with his official duties.[250] Importantly, Danish authorities have taken the position that it is immaterial whether the action or omission breaches any duty of the official.[251]

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244 Also translated as "unduly".

245 Danish Criminal Code, Act No. 126 of 15 Apr. 1930, as amended, § 122 (Den.), *available at* https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/37472519.pdf (emphasis added) [hereinafter DCC]. Section 122 was amended by Act No. 228 of 4 Apr. 2000 to comply with requirements of the OECD Convention.

246 OECD, *Denmark: Review of Implementation* 2 (2000), *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2018413.pdf.

247 *Id*.

248 *Id*. at 4.

249 *Id*. at 5.

250 *Id*. at 6.

251 *Id*. at 5.

Id. at 6.

5.7.3.2.2 Facilitation Payments

The legality of facilitation payments is not fully resolved in that Section 122 provides that the payer must act "unlawfully". The Authorities have stated that the better translation of the Danish term "uberettiget" may be "unduly" or "unjustifiably".[252] Nevertheless, the *travaux préparatoires* provide that "it cannot be precluded that in some countries such very special conditions may prevail that certain token gratuities will fall outside the criminal scope in the circumstances although they would be criminal bribes if they had been given in Denmark."[253] In response to concerns that this exception may apply even in situations where the foreign public official breaches his duties, Denmark's Ministry of Justice issued a publication entitled, "How to Avoid Corruption", which contains the following statement: "Paying sums of money in connection with international business relationships for the purpose of making public employees *breach* their duties will always be undue and thus constitute a criminal offense."[254] With ongoing concerns as to the scope of the exception found in the *travaux préparatoires*, Danish officials have stated that the exception will be narrowly interpreted.[255] At this time, however, there is no case law to support such a position.[256] Developments should be monitored.

5.7.3.2.3 Jurisdiction

Denmark exercises criminal jurisdiction, including violations of Section 122, in its territory[257] and over its nationals.[258] As to jurisdiction over acts of Danish nationals committed abroad, jurisdiction is more limited than that of other States. Specifically, the act must also be criminal in the State

252 *Id*. at 25.

253 *Id*. at 3.

254 Danish Ministry of Justice, *How to Avoid Corruption* 6 (2008), *available at* http://jm.schultzboghandel.dk/upload/microsites/jm/ebooks/andre_publ/corruption.pdf.

255 OECD, *Denmark: Phase 3 Report* ¶¶ 37-38 (2013), *available at* https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Norwayphase3reportEN.pdf.

256 ¶ 38.

257 DCC, *supra* note 245, § 6; OECD, *Denmark: Phase 2 Report* ¶ 188 (2006), *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/36994434.pdf.

258 DCC, *supra* note 245, § 7(1); *Denmark: Phase 2 Report*, *supra* note 257, ¶ 189.

where it is committed (i.e., dual criminality requirement).[259] Consistent with the protective and passive personal principles, Denmark has jurisdiction over certain extraterritorial acts by foreign nationals that affect Denmark.[260] This jurisdiction, however, is also limited in that foreign bribery is not one of the enumerated crimes subject to this jurisdiction.[261] In conclusion, the reach of Section 122 is not as broad as the anti-bribery laws of other States. Nevertheless, those who are Danish nationals or are utilizing Danish-flagged ships should be keenly aware of the law.

5.7.3.3 Sweden

Sweden's anti-bribery prohibition is found is found in Chapter 17, Section 7 of the Swedish Penal Code and reads as follows:

> "A person who gives, promises or offers a bribe or other improper reward, whether to an employee or other [defined public official], for that person or anyone else, for the exercise of official duties, shall be sentenced for bribery . . . ."[262]

5.7.3.3.1 Elements

The elements for bribery contained in Chapter 17, Section 7 are consistent with the general structure of the OECD Convention and the U.N. Convention. A "person" is limited to mean a natural person and not to mean a legal person such as a business entity.[263] The next element requires a gift, promise or offer of a "bribe or other improper reward". A "reward" is simply any benefit, whether tangible or intangible.[264] Next,

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259 DCC, *supra* note 245, § 7(1); *Denmark: Phase 2 Report*, *supra* note 257, ¶ 189.

260 DCC, *supra* note 245, § 9; *Denmark: Phase 2 Report*, *supra* note 257, ¶ 188.

261 *Denmark: Phase 2 Report*, *supra* note 257, ¶ 192.

262 Swedish Penal Code, § 17:7 (Swe.), *available at* http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf [hereinafter SPC]; OECD, *Sweden: Phase 2 Report*, Annex 2 (2005), *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/35394676.pdf.

263 OECD, *Sweden: Review of Implementation* 3 (1999), *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2389830.pdf. Although only legal entities cannot commit crimes under Swedish law, certain fines may be assessed under SPC § 36:7. *Id*. at 7-8.

264 *Id*. at 3-4.

the person to whom the bribe must be made can be any person falling into an enumerated list, which includes most, but not all, categories of foreign officials.[265] Finally, the bribe must be "for the exercise of official duties". Swedish authorities have advised this includes both affirmative acts and omissions.[266]

5.7.3.3.2 Facilitation Payments

In regards to facilitation payments, the term "reward" is qualified by "improper", similar to the language found in the OECD Convention and the U.N. Convention. This suggests that some facilitation payments may be legal. Furthermore, Swedish authorities have advised that the commentary to the OECD Convention, including Comment 9 specifically excluding facilitation payments as bribery, can be used to interpret the language of the Swedish offense.[267] On the other hand, the authorities have also advised that facilitation payments are indeed criminalized and would be enforced on a case-by-case basis.[268] Accordingly, case law and other developments should be closely monitored.

5.7.3.3.3 Jurisdiction

Sweden exercises criminal jurisdiction pursuant to the Swedish Penal Code, Chapter 2. This includes jurisdiction over criminal acts within the Swedish territory,[269] on Swedish vessels or by officers or crew thereof in connection with their duties,[270] and over Swedish nationals as well as certain foreign nationals outside of Sweden.[271] As to its extraterritoriality jurisdiction based on the nationality principle, there are two additional requirements: (i) that the act also be criminal in the State where it was committed (i.e., dual criminality requirement); and (ii) that the act in

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265 The categories are found in SPC § 20:2. Sweden*: Phase 2 Report*, *supra* note 263, Annex 2.

266 *Sweden: Review of Implementation*, *supra* note 264 at 5.

267 *Id*. at 3-4.

268 *Id*. at 44.

269 SPC, *supra* note 263, § 2:1.

270 § 2:3(1).

271 § 2:2(1). *E.g.* § 2:5(5).

the foreign State be punishable by more than a fine.[272] Finally, of great significance is the fact that Sweden does not have criminal jurisdiction over legal entities, whether organized in Sweden or elsewhere, so long as the act was committed abroad.[273] Accordingly, Sweden may not be able to enforce such laws against Swedish legal entities who act though non-Swedish nationals outside of Sweden.

5.8 Applicable Anti-Corruption Laws Limited to "legislation".

It is worth briefly noting that the BIMCO Clause provides that the parties shall "comply at all times with all applicable anti-corruption *legislation*."[274] The selection of the term "legislation" could be limiting. "Legislation" can be defined as "[t]he law so enacted" or "[t]he whole body of enacted laws."[275] The term "enacted" clearly distinguishes "legislation" from judicially-created law, such as the common law. "It has been said to be 'merely misleading' to speak of *judicial legislation* . . . . There is no equivalent to the authoritative text of a statute . . . ."[276] Therefore, a breach of judicially-created law, including common law, would likely not trigger the BIMCO Clause. For example, although recently repealed by the UKBA,[277] common law bribery in the United Kingdom would be such a case."[278] An example of more-encompassing language is found in the Shell clause: "Owners and charters . . . shall (a) comply with the applicable laws, rules, regulations, decrees, and/or official government orders . . . ."[279]

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272 § 2; *Sweden: Review of Implementation*, *supra* note 264 at 13-14.

273 OECD, *Sweden: Phase 3 Report* ¶¶ 79-82 (2013), *available at* http://www.oecd.org/daf/anti-bribery/Swedenphase3reportEN.pdf.

274 BIMCO Clause, *supra* note 2, § (a)(i) (emphasis added).

275 Black's Law Dictionary 982 (9th ed. 2009).

276 *Id*.

277 Bribery Act 2010, *supra* note 120, § 17(1)(a).

278 *See generally* Omar Qureshi & Joe Smith, CMS Cameron McKenna LLP, *A guide to existing bribery and corruption offenses in England and Wales* 3, (Apr. 2010), *available at* https://www.scribd.com/document/282736722/A-Guide-to-Existing-Bribery-and-Corruption-Offenses.

279 Shell, *supra* note 141, § (a).

5.9 Comparison with Private Charter Party Clauses

The use of the term "applicable legislation" in BIMCO sub-Clause (a)(i) makes reference to and results in the applicability of the legislation of all States with valid jurisdiction. The contractual requirements are therefore no more or no less strict than those set by public law. None of the seven private clauses being analyzed take this pure approach. Instead, they fall into three distinct categories.

The Cargill and Morgan Stanley clauses are most similar to the BIMCO Clause in that each refers to "applicable anti-corruption laws" and contains related warranties and representations.[280] These two clauses, however, contain additional independent warranties and representations as to described acts comprising elements nearly identical to those found in public anti-bribery legislation.[281] This results in significant redundancy.

The second group of clauses, BHP, MACN, RWE, and Shell, also refer to "applicable laws" or "applicable anti-corruption laws" and contain corresponding representations and warranties to comply with them.[282] All four (except the RWE clause) contain redundant representations and warranties like those found in the Cargill and Morgan Stanley clauses.[283] The significant difference with this second group is that each clause explicitly addresses facilitation payments and contains special terms relating to them. Under the BHP and Shell clauses, the making of a facilitation payment is explicitly barred[284] whereas the MACN and RWE clauses grant certain rights to a ship owner in the event of a demand for a facilitation payment.[285]

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280 Cargill, *supra* note 137, §§ 64(a), (b)(i); MS, *supra* note 139, §§ 1, 2(A).

281 Cargill, *supra* note 137, § 64(b)(ii); MS, *supra* note 139, § 2(A).

282 BHP, *supra* note 135, §§ 27(A), (B)(I); MACN, *supra* note 138, § 1; Shell, *supra* note 141, § (a); RWE, *supra* note 140, § 1.3. Interestingly, the RWE Clause appears to contractually require the parties to comply with the FCPA, the UKBA, as well as certain European Union and United Nations law. RWE, *supra* note 140, § 1.3.

283 BHP, *supra* note 135, § 27(B)(II); MACN, *supra* note 138, § 2; Shell, *supra* note 141, § (b).

284 BHP, *supra* note 135, § 27(B)(III); Shell, *supra* note 141, § (a).

285 MACN, *supra* note 138, § 4; RWE, *supra* note 140, §§ 1.7-1.8.

The clause promoted by BP is the most unique. It is brief and contains two main parts. The first part is a reference to BP's Code of Conduct and requires the owner, as a third party, to "act consistently with and adhere to [the Code's] principles".[286] Notably, the referenced Code of Conduct requires compliance with anti-corruption laws and does not allow facilitation payments.[287] The second part of the BP clause specifically addresses facilitation payments and simply provides that neither party shall make them or require the other party to do so.[288]

6 Sub-Clause (a)(i) – Internal Anti-Corruption Procedures

BIMCO sub-Clause (a)(i) also provides that each party shall "have *procedures* in place that are, to the best of its knowledge and belief, designed to *prevent* the commission of any *offense* under such legislation by any member of its organization or by any person providing service for it or on its behalf[.]"[289] Focusing on employees and agents, the commentary provides that such procedures should include internal policies with high and strictly-enforced standards of conduct as well as due diligence and background checks when selecting new agents and contractors.[290] Similar requirements are contained in the MACN, Shell, and RWE clauses.[291]

286 BP, *supra* note 136, § 24.

287 BP, *BP: Code of Conduct* 4, http://www.bp.com/content/dam/bp/pdf/about-bp/code-of-conduct/bp-code-of-conduct-english.pdf (last visited 17 Aug. 2017).

288 BP, *supra* note 135, § 25.

289 BIMCO Clause, *supra* note 2, § (a)(ii) (emphasis added).

290 BIMCO Notes, *supra* note 60, Commentary Sub-clause (a); BIMCO Clause, *supra* note 2, § (a).

291 MACN, *supra* note 38, § 8; Shell, *supra* note 141, § (c); RWE, *supra* note 140, §§ 1.4-1.5.

6.1 Corruption Detection and Prevention Procedures

Outside sources can provide the needed guidance as to what substance and details should be included in a business's internal anti-corruption policy. OECD has published good-practice guidelines designed to *detect* and *prevent* bribery of foreign officials. It recommends that internal procedures include the following: (i) anti-bribery commitment at highest levels of management; (ii) clear corporate policies; (iii) expectation of compliance for all personnel; (iv) oversight and reporting procedures; (v) specific measures to address gifts, facilitation payments, etc.; (vi) policies for third-party contractors, distributors, etc.; (vii) financial and accounting procedures; (viii) personnel training; (ix) positive reinforcement for compliance; (x) discipline for violation; (xi) compliance guidance and confidential reporting; and (xii) periodic reviews and updates to policies.[292] Likewise, the guidelines discussed earlier in regards to "adequate procedures" under UKBA Section 7(2)[293] may provide guidance to meet the contractual requirements under BIMCO sub-Clause (a)(i). Form/model policies are also available with an example being the International Organization for Standardization (ISO) 37001 Anti-Bribery Management Systems Documentation.[294]

6.2 Example Bribery Policies of Major International Ship Owners and Charterers

International ship owners and charterers, like most major commercial organizations doing business worldwide, have adopted internal policies relating to corruption, bribery, and facilitation payments. Two of the largest ship owners, A.P. Moller–Maersk Group and CMA CGM S.A.,

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[292] OECD, *OECD Good Practice Guidance on Internal Control, Ethics, and Compliance* 30, 30-32, *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf. *See also* OECD, *OECD Guidelines for Multinational Enterprises* 39, 39-41, *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

[293] UKBA Guidance, *supra* note 120 at 20-31.

[294] International Organization for Standardization, Anti-bribery management systems ISO 37001:2016(en) § 1, *available at* https://www.iso.org/obp/ui/#!iso:std:65034:en.

serve as good examples. Maersk has a "zero tolerance" policy regarding bribes and is striving to reduce and eliminate facilitation payments.[295] In 2014, after significant effort and taking hard stances, Maersk achieved its goal of no facilitation payments along the Suez Canal.[296] CMA CGM likewise has a policy condemning bribes and has also implemented a separate "gifts policy" that must be strictly followed by all personnel before making or receiving any gift or benefit.[297] As to charterers, BP and Exxon Mobil Corporation ("Exxon") provide good examples. BP has a strict policy against making or accepting any bribes or facilitation payments.[298] It also has separate policies in place for due diligence and gifts/entertainment.[299] Exxon has implemented a comprehensive anti-corruption compliance program[300] and has specific policies regarding interaction with government officials, gifts/entertainment, and third-party agents/contractors.[301] As to facilitation payments, Exxon does not have a zero-tolerance policy but instead has adopted a general rule that the making of a facilitation payment will be considered only in rare circumstances and can be approved only by Exxon's internal legal department after a finding that "the payment would be legal under all applicable laws."[302] Exxon likewise has a policy against its third-party agents and contractors making facilitation payments while carrying out work for Exxon.[303]

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295 Tan Yi Hui, Maersk, When zero means zero, 9 Oct. 2014, *available at* http://www.maersk.com/en/the-maersk-group/about-us/publications/maersk-post/2014-4/when-zero-means-zero.

296 *Id*.

297 CMA CGM, *Code of Ethics* 15, https://www.cma-cgm.com/static/Communication/Attachments/CMA%20CGM%20-%20Code%20of%20ethics.pdf (last visited 17 Aug. 2017).

298 *BP: Code of Conduct*, *supra* note 288 at 20.

299 *Id*. at 16, 20.

300 ExxonMobil, *Exxon Mobil: Anti-Corruption Legal Compliance Guide* 12 (Rev. 2014), http://cdn.exxonmobil.com/~/media/global/files/other/2015/anti-corruption-legal-compliance-guide.pdf.

301 *Id*. at 4-13.

302 *Id*. at 11.

303 *Id*.

7 Sub-Clause (a)(ii) – Record Keeping

Sub-Clause (a)(ii), provides that each party shall "make and keep books, records, and accounts which in reasonable detail accurately and fairly reflect the transactions in connection with [the] Charter Party."[304] In particular, the commentary provides that all payments and gifts, along with the circumstances pertaining to them, should be properly recorded.[305] This is consistent with the accounting and reporting requirements of the OECD Convention,[306] good practice recommendation from OECD,[307] the FCPA,[308] and the internal policies of many international businesses.[309]

The seven private clauses being compared in this paper vary significantly in regards to record requirements. The RWE clause is the only one that, like the BIMCO Clause, simply requires that the parties maintain records.[310] The MACN and Shell clauses take this a step further by providing inspection and auditing rights to the other party.[311] The BHP clause is similar but only requires the *owner* to maintain records and only grants inspection rights to the *charterer*.[312] The issue is not addressed in the BP, Cargill, and Morgan Stanley clauses.

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304 BIMCO Clause, *supra* note 2, § (a)(ii).

305 BIMCO Notes, *supra* note 60, Commentary, Sub-clause (a). The actual language of the provision is not limited to corruption/bribery/facilitation context but applies to "the transactions in connection with [the] Charter Party." BIMCO Clause, *supra* note 2, § (a)(ii). Other provisions of a charter party or applicable background law may provide that records be required for other aspects. *E.g.* The Norwegian Maritime Code, Act of 24 June 1994 No. 39, as amended, § 133 (Nor.), *available at* http://folk.uio.no/erikro/WWW/NMC.pdf; Ship Safety and Security Act, Act of 16 Feb. 2007 No. 9, as amended, §§ 19(b), 20(c), 33(e), 37(c) (Nor.), *available at* https://www.sjofartsdir.no/contentassets/a7a1a5cc4998405286e99c6fbccc5c8a/ship-safety-and-security-act.pdf.

306 OECD Convention, *supra* note 7, art. 8(1).

307 *OECD Good Practice Guidance*, *supra* note 293, § A(7); *OECD Guidelines for Multinational Enterprises*, *supra* note 293, § VII(2).

308 15 U.S.C. §§ 78m(b)(2)(A). This applies to applicable issuers of securities. *Id*.

309 *E.g.*, *BP: Code of Conduct*, *supra* note 288 at 20; *Exxon Mobil: Anti-Corruption Legal Compliance Guide*, *supra* note 301 at 4, 5, 12.

310 RWE, *supra* note 140, § 1.6.3.

311 MACN, *supra* note 138, §§ 9-10; Shell, *supra* note 141, §§ (d)-(e).

312 BHP, *supra* note 135, § 27(D).

8 Sub-Clauses (b)-(c) – Demand, Resist, and Letter of Protest

The operative portions of the BIMCO Clause are found sub-Clauses (b) and (c) and are designed to apply in the situation when a foreign port official makes a demand for an illegal bribe or facilitation payment. Specifically, these sub-Clauses are triggered when (i) an official or other qualified person; (ii) makes a "demand"; (iii) to the owner or master of the ship; (iv) for "payment, goods, or other thing of value"; and (v) "it appears that meeting such Demand would breach any applicable legislation".[313] If the foregoing conditions are satisfied, then the master or owner must notify the charterer as soon as possible. More significantly, both the owner and the charter then become contractually bound to "cooperate to take *reasonable steps* to *resist* the Demand."[314] Such "reasonable steps" will vary based on the situation, location, and resources available and may include assistance from local agents, other port representatives, consulates, and commercial contacts.[315]

Should the parties' joint effort fail to result in the demand being withdrawn, then sub-Clause (c) allows the owner to issue a "letter of protest".[316] A letter of protest formally documents the owner's complaint and would typically be sent to local port interests unless the master or owner has reason not to (e.g., sending the letter may lead to additional problems).[317] Nevertheless, the BIMCO Clause requires that the letter be delivered to or copied to the charterer.[318] The Clause therefore recognizes that both the owner and the charterer have an interest in timely resolving the issue.[319]

313 BIMCO Clause, *supra* note 2, § (b).

314 *Id*. (emphasis added).

315 BIMCO Notes, *supra* note 60, Commentary, Sub-clause (b).

316 BIMCO Clause, *supra* note 2, § (c).

317 BIMCO Notes, *supra* note 60, Commentary, Sub-clause (c).

318 BIMCO Clause, *supra* note 2, § (c); BIMCO Notes, *supra* note 60, Commentary, Sub-clause (c).

319 BIMCO Notes, *supra* note 60, Commentary, Sub-clause (b).

The collaborative approach of the BIMCO Clause is unlike the procedures found in any of the seven private clauses being analyzed. Those clauses vary substantially in this regard. The BP clause simply requires the owner to notify the charterer if a facilitation payment is actually made.[320] The Shell clause requires notification to the other party upon receiving a request or demand from an official.[321] This notification, however, appears to be for the purpose of discussing legalities rather than resisting the demand and having it withdrawn. Neither the BP Clause nor the Shell clause gives the master or owner the right to issue a letter of protest. On the other hand, however, both the MACN and RWE clauses provide the master with the right to issue a letter of protest immediately upon receiving a demand without any obligation to first resolve or resist.[322] The MACN clause does not even require a "demand" from an official but allows the master to issue a letter of protest after a mere "request" for payment.[323] Accordingly, in this regard, the BIMCO Clause can be considered a balanced agreement where the contractual language provides a mechanism to resolve the dilemma instead of merely allocating risk.

9 Sub-Clause (c) – Effect of Letter of Protest

BIMCO sub-Clause (c), second sentence, provides the contractual consequences of an owner issuing a letter of protest. First, there will be a presumption that any time lost at the port is a result of resisting the demand. The loss is then allocated to the charterer by providing that the ship will remain on hire (for a time charter) or that the time lost will be allocated as laytime or demurrage, as applicable (for a voyage

320 BP, *supra* note 136, § 25(c).
321 Shell, *supra* note 141, § (d).
322 MACN, *supra* note 138, § 4; RWE, *supra* note 140, § 1.9.
323 RWE, *supra* note 140, § 1.9.

charter).[324] The reasoning behind this allocation is that ports of call are selected by the charterer whereas the owner merely follows the charterer's commercial instructions.[325]

Both the MACN clause and the RWE clause, the two private clauses that contain procedures for the issuance of letters of protest, largely provide for the same result as the BIMCO Clause.[326] The MACN clause further supports this policy by requiring the charterer to confirm that that its schedule will allow for delays for the master and crew to review and resist demands for bribes and facilitation payments.[327] The RWE clause provides some language to the charterer's benefit, specifically that the "[m]aster[] and/or crew must never issue Protests to circumvent legitimate claims of non-compliance in relation to the vessel and/or cargo operations."[328] Although not explicit in the BIMCO Clause, such a rule can be implied.

The BHP, BP, Cargill, Morgan Stanley, and Shell clauses do not provide for letters of protest and therefore also do not specifically allocate any resulting lost time. This is likewise true for charter parties that do not contain any anti-corruption clause. In such cases, the general clause(s) concerning suspension of hire or laytime/demurrage may need to be consulted. The result will often be the same as under BIMCO sub-Clause (c) in that such delay is unlikely to fit into one of the enumerated categories for suspension of hire or exception to laytime.[329]

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324 BIMCO Clause, *supra* note 2, § (c).

325 *See* BIMCO Notes, *supra* note 60, Commentary, Sub-clause (c).

326 MACN, *supra* note 138 §§ 5-7; RWE, *supra* note 140, §§ 1.10-1.11.

327 MACN, *supra* note 138, § 1.8.

328 RWE, *supra* note 140, § 4.

329 .*E.g.* BIMCO Uniform Time-Charter , cl. 11 (Rev. 2001), *available at* https://www.bimco.org/contracts-and-clauses/bimco-contracts/baltime-1939-as-revised-2001; BIMCO Uniform General Charter, cl. 6 (Rev. 1994), *available at* https://www.bimco.org/contracts-and-clauses/bimco-contracts/gencon-94.

10 Sub-Clause (e) – Termination

Another remedy provided for in the BIMCO Clause is termination.[330] Termination can only be exercised when the following conditions precedent are met: (i) the non-terminating party or member of its organization has breached applicable anti-corruption legislation; and (ii) such breach has caused the terminating party to also be in breach of applicable anti-corruption legislation (but not necessarily the same legislation).[331] The official commentary provides that the breach must have been committed by the party to the charter or a direct employee; a third-party agent or contactor, including a local agent, is not eligible.[332] The commentary also emphasizes that the exercise of the provision is fully optional but that termination must be selected with "undue delay" in order to prevent a party from using a prior breach to later cancel an inconvenient charter.[333]

BIMCO sub-Clause (e) was drafted as an alternative to the strict "zero tolerance" policies that had developed within the industry. For example, the Morgan Stanley clause provides the charterer with the right to immediately terminate the charter upon evidence of the owner breaching the clause.[334] Even harsher, the Shell clause provides that either party may terminate the charter not only if the other party has already breached the clause but also when a breach is imminent.[335] Likewise, the BHP clause gives the charterer the option to withhold further payments if it, in good faith, has reason to believe the owner has breached the clause.[336]

330 In the absence of BIMCO sub-Clause (e) or an alternative provision, the rights of the non-breaching party, if any, would be governed by the generally-applicable provisions of the charter party and/or by the applicable background governing laws.

331 BIMCO Clause, *supra* note 2, § (e).

332 BIMCO Notes, *supra* note 60, Commentary, Sub-clause (e). Notwithstanding this explanation, many public anti-bribery laws allow for criminal liability when a qualifying bribe or payment is made through an intermediary. Therefore, by virtue of public law, it appears the principal could therefore breach applicable anti-corruption legislation based on the actions of a third-party and thereby fulfill this requirement.

333 BIMCO Notes, *supra* note 60, Commentary, Sub-clause (e).

334 MS, *supra* note 139, § 3.

335 Shell, *supra* note 141, § (e).

336 BHP, *supra* note 135, § 27(E).

Less harsh are the MACN and RWE clauses that provide for a gap period between suspicion of breach and termination. Under the MACN clause, mere suspicion gives the party the right to audit the records of the other, but it cannot actually terminate until the audit concludes there was a breach.[337] The RWE clause, on the other hand, temporarily suspends the charter and grants the accused party with a seven-day period to provide "satisfactory explanation and documentation".[338]

11 Sub-Clauses (d) and (f) – Indemnification and Warranty

The BIMCO Clause contains an indemnification provision in sub-Clause (d), specifically providing that a party who violates applicable anti-corruption legislation will defend and indemnify the other party for any resulting liability or loss.[339] The official commentary provides that this provision will be of most use when termination is not available or was not utilized.[340] The RWE clause contains similar provisions,[341] whereas as the BHP clause provides for only one-way indemnification from the owner to the charterer.[342] It is important to remember that even if a charter party does not contain an indemnification clause specific to corruption, it may nevertheless contain an indemnification provision of general applicability.

Finally, sub-Clause (f) contains reciprocal warranties where each party certifies that it has not already breached any applicable anti-corruption legislation in connection with the charter. If it is later determined that

337 MACN, *supra* note 138, §§ 10-11.
338 RWE, *supra* note 140, § 1.12.
339 BIMCO Clause, *supra* note 2, § (d).
340 BIMCO Notes, *supra* note 60, Commentary, Sub-clause (d).
341 RWE, *supra* note 140, §§ 1.15, 1.17.
342 BHP, *supra* note 135, § 27(F).

this warranty was false, then the non-breaching party may terminate.[343] The commentary provides that this language was included in the Clause to ensure that the charter or a contract in connection with the charter was not fraudulently obtained.[344] Similar warranties exist in the BHP and Cargill clauses.[345] The warranties contained in the BP, MACN, Morgan Stanley, RWE, and Shell clauses, on the other hand, are strictly limited to future acts.[346]

12 Conclusion

Port corruption remains an obstacle for ship owners and charterers involved in international shipping. The past 40 years have brought strict criminal anti-corruption/anti-bribery laws with a more-recent trend towards the criminalization of facilitation payments. Accordingly, interested parties should be aware of and understand all applicable public laws governing bribery and facilitation payments. These include laws of port States, laws of flag States, and certain laws with extraterritorial applicability. While conventional bribery is universally illegal, the making of a facilitation payment will very likely violate the laws of at least one State with jurisdiction. Additionally, should the parties utilize the BIMCO Clause, any such violation may also result in private/contractual consequences. Likewise, the BIMCO Clause lays out a procedure for responding to a demand for an illegal payment and requires the parties to take reasonable steps to resist it. Should the effort fail, the Clause then allocates the financial loss of a resulting delay to the charterer. Overall, the BIMCO Clause largely addresses all aspects of the underlying problem, is applicable worldwide, and provides a reasonable outcome. It is critical

343 BIMCO Clause, *supra* note 2, § (f).

344 BIMCO Notes, *supra* note 60, Commentary, Sub-clause (f).

345 BHP, *supra* note 135, § 27(B)(II); Cargill, *supra* note 137, § (b)(ii);

346 *E.g.*, BP, *supra* note 136, § 25(a); MACN, *supra* note 138, § 2; MS, *supra* note 139, §§ 1-2; RWE, *supra* note 140, § 1.6.1; Shell, *supra* note 141, §§ (a)-(b).

that ship owners and charterers be familiar with this area of changing law whether or not they choose to utilize the BIMCO Clause.

APPENDIX A – BIMCO Clause

(a) The parties agree that in connection with the performance of this Charter Party they shall each:

(i) comply at all times with all applicable anti-corruption legislation and have procedures in place that are, to the best of its knowledge and belief, designed to prevent the commission of any offence under such legislation by any member of its organisation or by any person providing services for it or on its behalf; and

(ii) make and keep books, records, and accounts which in reasonable detail accurately and fairly reflect the transactions in connection with this Charter Party.

(b) If a demand for payment, goods or any other thing of value ("Demand") is made to the Master or the Owners by any official, any contractor or sub-contractor engaged by or acting on behalf of Owners or Charterers or any other person not employed by Owners or Charterers and it appears that meeting such Demand would breach any applicable anti-corruption legislation, then the Master or the Owners shall notify the Charterers as soon as practicable and the parties shall cooperate in taking reasonable steps to resist the Demand.

(c) If, despite taking reasonable steps, the Demand is not withdrawn, the Master or the Owners may issue a letter of protest, addressed or copied to the Charterers. If the Master or the Owners issue such a letter, then, in the absence of clear evidence to the contrary, it shall be deemed that any delay to the Vessel is the result of resisting the Demand and (as applicable):

(i) the Vessel shall remain on hire; or

(ii) any time lost as a result thereof shall count as laytime or (if the Vessel is already on demurrage) as time on demurrage.

(d) If either party fails to comply with any applicable anti-corruption legislation it shall defend and indemnify the other party against any fine, penalty, liability, loss or damage and for any related costs (including, without limitation, court costs and legal fees) arising from such breach.

(e) Without prejudice to any of its other rights under this Charter Party, either party may terminate this Charter Party without incurring any liability to the other party if

(i) at any time the other party or any member of its organisation has committed a breach of any applicable anticorruption legislation in connection with this Charter Party; and

(ii) such breach causes the non-breaching party to be in breach of any applicable anti-corruption legislation.

Any such right to terminate must be exercised without undue delay.

(f) Each party represents and warrants that in connection with the negotiation of this Charter Party neither it nor any member of its organisation has committed any breach of applicable anti-corruption legislation. Breach of this Sub-clause (f) shall entitle the other party to terminate the Charter Party without incurring any liability to the other.

APPENDIX B – BHP Clause

27. Anti-Corruption

(A) Anti-corruption laws include those that are implemented in accordance with the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the UN Convention Against Corruption and other international conventions, and include, when applicable, the United States Foreign Corrupt Practices Act, the UK Bribery Act 2010 and/or the laws of the countries with jurisdiction over the vessels, ports and/or owners (collectively the "Applicable Anti-Corruption Laws"). Applicable Anti-Corruption laws prohibit the authorisation, offering, or giving of anything of value, directly or indirectly, to a government official to influence official action or to anyone in the private sector to induce a violation of the duty of loyalty that the person owes to his or her employer. Violations of Applicable Anti-Corruption Laws may lead to criminal proceedings, monetary and other penalties and imprisonment.

(B) The Owner represents, warrants and covenants that, in connection with this Contract, neither the Owner nor any of its shareholders, members, directors, contractors, subcontractors

(I) will take, or omit to take, any action that would be in breach or violation of applicable anti-corruption laws;

(II) has authorized, offered, promised or given or will authorize, offer, promise or give anything of value to:

– any "government official" (meaning any person employed by or acting on behalf of a government, government-controlled entity or public international organization, any political party, party official or candidate; any individual who holds or performs the duties of an appointment, office or

position created by custom or convention; or any person who holds him/herself out to be the authorized intermediary of a government official) in order to influence official action;

– any other person while knowing or having reason to know that all or any portion of the money or thing of value will be offered, promised or given to a government official in order to influence official action; or

– any person (whether or not a government official) to influence that person to act in breach of a duty of good faith, impartiality or trust ("acting improperly"), to reward the person fact acting improperly, or where the recipient would be acting improperly by receiving the thing of value;

(III) will offer, give or authorize any "facilitation payment" to a government official ("facilitation payment" meaning small payments or gifts or anything else of value to a government official to expedite or secure the performance of a route government action that is ordinarily and commonly performed. Examples include payments to expedite customs inspections, berthing, the issuing of legitimate visas, licenses or permits, and to connect telephones or other utility services); or

(IV) will receive or agree to accept any payment, gift or other advantage which violates Applicable Anti-Corruption Laws.

(C) If there is any doubt whatsoever as to whether an action, offer, promise or payment is permitted under Applicable Anti-Corruption Laws or this Contract, Owner agrees to consult Charterer prior to taking any such action. Without prejudice to any other part of this Contract, no payment made in breach of this clause may be claimed from the other party.

(D) The Owner will keep and maintain accurate and reasonably detailed books and financial records in connection with its performance under, and all payments made and received in connection with, this Contract. The Charterer and its authorized representatives will have the right to

unrestricted access to all necessary books and records of the Owner or any other information in relation to this Contract in order to test compliance with Applicable Anti-Corruption Laws and the representations, warranties and covenants herein. The Owner will provide any information and assistance reasonably required by the Charterer in connection with such an audit.

(E) Without prejudice to remedies referred to elsewhere in the Contract or any rights or remedies available at law or in equity, if the Charterer in good faith has reason to believe that a breach of any of the representations, warranties, or covenants relating to compliance with Applicable Anti-Corruption occurred or is imminent, the Charterer, notwithstanding any other clause of this Contract, may withhold further payments under this Contract until such time as it has received confirmation to its satisfaction that no breach has occurred or is likely to occur. The Charterer has the right to take whatever action it deems appropriate to avoid a violation of Applicable Anti-Corruption Laws, including by requiring such additional representations, warranties, undertakings and other provisions as it believes necessary and the Owner agrees that this Contract will be so amended to include such additional provisions.

(F) The Owner shall defend and indemnify the Charterer against any fine, penalty, liability, loss or damages and for any related costs (including, without limitation, court costs and legal fees) arising directly or indirectly out of the owner's failure to comply with any Applicable Anti-Corruption Laws, or arising out of the owner's causing the Charterer to be in violation of any Applicable Anti-Corruption Law.

(G) The Owner shall notify the Charterer immediately on becoming aware of any violation by it or its associates of Applicable Anti-Corruption Laws in connection with this Contract. The Owner will promptly take all such steps as may be necessary and/or requested by the Charterer to ensure minimum adverse effect on the Charterer's reputation in the event of a violation.

APPENDIX C – BP Clause

24. BP Ethical Policy Clause

Owners warrant that they, the Managers, Master and crew of the Vessel are aware of Charterers' ethics and business policies, as set out in the BP Code of Conduct, entitled "Our commitment to integrity" (a copy of which is available on www.bp.com), and their application to third party contractors. Owners undertake to ensure that in the performance of their obligations under this Charter, they, the Managers, Master and crew shall at all times act consistently with and adhere to the principles in the BP Code of Conduct.

25. BP Facilitation Payments Clause

(a) The parties hereby agree that in the course of performing their respective obligations hereunder, they shall not make, nor shall they require the other party to make, any facilitation payment.

(b) For the purposes of this clause, a Facilitation Payment means a payment, gift or gratuity, whether in cash or in kind, to any governmental or quasi-governmental officer or other official in any country for the purpose of procuring the provision of any service or level of service which such officer or official is required to provide in the normal course of their employment or duty without such Facilitation Payment being made.

(c) Any such Facilitation Payment, or other departure from the requirements of this Clause, necessarily made to permit efficient or continued trading of the Vessel shall be reported to Charterers in a mutually agreed format.

APPENDIX D – Cargill Clause

Clause 64 – ANTI-CORRUPTION CLAUSE

(a) Anti-corruption laws include those that are implemented in accordance with the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the UN Convention Against Corruption and other international conventions, and include, the United States Foreign Corrupt Practices Act, the UK Bribery Act 2010 and/or other national the laws relating to bribery and corruption (collectively, the "Anti-Corruption Laws"). Anti-Corruption Laws prohibit the authorisation, offering, or giving of anything of value, directly or indirectly, to a government official to influence official action or to anyone in the private sector to induce a violation of the duty that the person owes to his or her employer. Violations of Applicable Anti- Corruption Laws may lead to criminal proceedings, monetary and other penalties and imprisonment.

(b) The parties represent, warrant and covenant that, in connection with this Contract, neither party nor any of its shareholders, members, directors, officers, employees, masters, crew members, agents, representatives, contractors, subcontractors or affiliates ("Associates"):

(i) will take, or omit to take, any action that would be in breach or violation of applicable Anti- Corruption Laws;

(ii) has authorised, offered, promised or given or will authorise, offer, promise or give anything of value to:

(A) any "Government Official" (meaning any person employed by or acting on behalf of a government, government-controlled entity or public international organisation; any political party, party official or candidate; any individual who holds or performs the duties of an appointment,

office or position created by custom or convention; or any person who holds him/herself out to be the authorised intermediary of a Government Official), in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

(B) any other person while knowing or having reason to know that all or any portion of the money or thing of value will be offered, promised or given to a Government Official in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

APPENDIX E – MACN Clause

1. Parties will comply with applicable anti-corruption laws, such as those implemented in accordance with the OECD Anti-bribery Convention, UN Convention Against Corruption and other international anti-corruption conventions.

2. Parties agree that in connection with this charterparty, they will not, and will use best endeavors to ensure that their Associated Persons will not, acting intentionally, promise, offer, give or authorise the giving of, any Improper Payment. An Improper Payment is defined to be an undue advantage to (1) a Government Official, directly or indirectly, for the Official himself or herself or another person or entity, in order that the Official act or refrain from acting in the exercise of his or her official duties in order to obtain or retain business or other undue advantage in relation to the conduct of international business or (2) any other person (whether or not a Government Official) to influence or reward that person for breaching a duty of good faith, impartiality or trust.

3. Parties shall use best endeavors to ensure that Associated Persons undertaking tasks in relation to the charterparty (including disbursements and agency, handling of vessels and cargoes, containers and equipment, harbor authorities, pilots, stevedores, tugboats, surveys, suppliers) abide by applicable anti-corruption laws and by the anti-corruption provisions in this charterparty, including by informing such Associated Persons of their obligations pursuant to applicable anti-corruption laws.

4. If the Master and/or crew are requested to make an Improper Payment or make a Facilitation Payment the Master shall have the right to issue a Protest consisting of, at a minimum, a written notification (email or otherwise) of the known facts. Any Protest issued shall immediately be provided to Owners and Charterers, and shippers or receivers as the circumstances warrant. Masters and/or crew must never issue Protests

to circumvent legitimate claims of non-compliance in relation to the vessel and/or cargo operations.

5. It is understood that the refusal to give an Improper Payment or Facilitation Payment may result in false or irrelevant allegations against Owners, Master, crew and/or the vessel and ultimately a delay to the vessel and/or to cargo operations. If the Master issues a Protest in accordance with Paragraph 4, absent clear evidence to the contrary, it shall be deemed that any delay is the result of the refusal to give an Improper Payment or Facilitation Payment.

6. Voyage charters: All time lost due to either Party refusing to make an Improper Payment or Facilitation Payment shall count as laytime or time on demurrage, unless laytime or demurrage has already been excluded for another reason not connected to the refusal to make an Improper Payment or Facilitation Payment.

7. Time charters: Delay as a result of a refusal by or on behalf of the vessel to make an Improper Payment or Facilitation Payment shall not count as time lost for the purpose of any off-hire provision, unless the vessel is already off-hire for another reason not connected to the refusal to make an Improper Payment or Facilitation Payment.

8. Parties agree to have a policy on Facilitation Payments and will use best endeavors to ensure that neither they nor their Associated Persons will promise, offer, give or authorise any Facilitation Payment.

9. Parties will keep and maintain accurate and reasonably detailed books and financial records in connection with their performance, and all payments made or received, under this charterparty.

10. In the event that any Party reasonably believes that a counterparty has breached the anti-corruption provisions in this charterparty, the suspecting Party shall have the right to audit the other Party and the other

Party agrees to cooperate. This audit right shall be limited to payments and transactions in connection with this charterparty.

11. If it is established that a breach of these provisions has occurred, the non-breaching Party may, following written notice to the breaching Party, terminate the charterparty (A) with immediate effect; or (B) once the laden voyage has been completed and cargo discharged if at the time of notification of breach, the laden voyage has not been completed.

12. If there is a conflict between the anti-corruption clauses and any other clause of this charterparty, the anti-corruption provisions shall prevail.

Definitions

Facilitation Payment means a payment or gift or anything else of any value to a Government Official to expedite or secure the performance of a routine government service or action that is ordinarily and commonly performed and that the party is entitled to. Examples include, but are not limited to, payments to expedite or facilitate customs clearance or other inspections, berthing, or the issuance of legitimate visas, licenses or permits. Facilitation payments do not include payments made as a result of a threat to the health or safety of an individual(s).

Government Official or Official means any person working for or on behalf of a government, including in or for a legislative, administrative or judicial office or agency or a government-controlled enterprise; any person exercising a public function, including for a public agency or public enterprise; and any employee or agent of a public international organisation.

Associated Person means employee, manager, agent, sub-agent, representative and/or contractor.

APPENDIX F – Morgan Stanley Clause

1. Owners and Charterers each agree that in connection with the negotiation and performance of this Charter, they and each of their respective offices, directors, employees and any agents acting on their behalf shall comply with all applicable anti-corruption laws in accordance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as implemented in relevant national legislation including the United States Foreign Corrupt Practices Act (FCPA).

2. Owners and Charterers each represent and warrant that they and each of their respective officers, directors, employees and agents acting on their behalf shall note, directly or indirectly:

A. Improperly offer, pay, promise to pay, or authorize a payment of or giving of other things of value to any government official or to any other person while knowing that all or some portion of the money or value will be offered, given or promised to a government official to influence official action, to obtain or retain business or otherwise to secure any improper advantage; or

B. engage in other acts or transactions, in each case if this would be in violation of or inconsistent with any applicable anti-corruption laws.

3. Charterers may terminate this Charter forthwith upon written notice to the Owner(s) at any time there is evidence of the owner is[] in breach of any of the above representations, warranties or undertakings. Owners ensure people who carry out services for them abide by the principles set forth here except [certain] agents that . . . are decided by Charterers.

APPENDIX G – RWE Clause

1. Compliance, Anti-Corruption and Sanctions clause

1.1 Notwithstanding anything to the contrary stated or implied in this Charter Party, it is a condition of this Charter Party that Owners and Charterers will comply with all of their obligations pursuant to this clause.

1.2 In the event of any conflict between the provisions of this clause and any other clause of this Charter Party, this clause shall prevail.

Compliance with laws
1.3 Each party represents and warrants that it will comply in full with all applicable laws and regulations in force at the time of entry into this Charter Party and throughout the duration of this Charter Party and, in particular, that it will not engage in any act or omission which is penalised or prohibited under laws, rules or regulations of the United States of America, the EU, the UN or the United Kingdom.

Anti-Corruption
1.4 Owners represent and warrant that they and the Vessel's managers have a policy in place to prevent the commission of any offence under the UK Bribery Act 2010, the US Foreign & Corrupt Practices Act and/or any applicable equivalent anti-corruption legislation (collectively the "Anti-Corruption Legislation") and that this policy includes procedures which to the best of Owners' knowledge and belief are adequate to prevent any such offence by any member of their or the Vessel's managers organisation or by any person providing services for them or on their behalf, including without limitation the Master and crew of the Vessel.

1.5 Charterers represent and warrant that they have a policy in place to prevent the commission of any offence under the Anti-Corruption Legislation and that this policy includes procedures which to the best

of Charterers' knowledge and belief are adequate to prevent any such offence by any member of their organisation or by any person providing services for them or on their behalf.

1.6 Each party represents and warrants that: 1.6.1 to the best of its knowledge and belief, neither it, nor any of its directors, officers, agents or employees will pay, offer, promise, authorise or receive the payment of money or any financial or other advantage, directly or indirectly, to or from:
(a) any government official, political party or official thereof, or
(b) any candidate for political office, or
(c) any other person, company or organization
(collectively, the "Recipient"),

for the purpose of influencing any act or decision of such Recipient in favour of either party, or inducing such Recipient to act in violation of his lawful duty, or rewarding the Recipient for violating his lawful duty in order to obtain, retain or direct business to any person, or to secure any improper business advantage; and

FOR VOYAGE CHARTERS
1.6.2 it conducts (and will continue to conduct) its business in compliance with all Anti-Corruption Legislation to which it may be subject; and

1.6.3 it will make and keep books, records, and accounts which in reasonable detail accurately and fairly reflect the transactions and dispositions of their assets.

1.7 For the purposes of this clause, a "facilitation payment" means a payment of money, goods or other thing of value to any governmental official or other individual in a similar position of authority or influence in any country for the purpose of expediting or securing the performance of a routine service or action. This definition applies even where the payment or other benefit is nominal in amount.

1.8 Charterers confirm that their schedules allow time for Owners and/or the Master to review requests for payments which may be improper and to resist demands for bribes, including facilitation payments.

1.9 If the Master and/or crew are requested to pay any bribe or make any facilitation payment the Master shall have the right to issue a letter of protest. Any letter of protest issued in accordance with this sub-clause shall be copied to Charterers immediately.

1.10 It is understood that where a bribe or facilitation payment has been requested and has been refused by or on behalf of the Vessel, this may result in delay to the Vessel and/or to cargo operations, and that those parties whose requests have been refused may raise false or irrelevant allegations against Owners and/or the Vessel and/or Master and/or crew, and therefore it is agreed that if the Master shall have issued a letter of protest in accordance with sub-clause 1.9 above, in the absence of clear evidence to the contrary it shall be deemed that any delay ensuing is the result of the refusal of a bribe or facilitation payment.

1.11 All time lost as a result of a refusal by or on behalf of the Vessel to pay any bribe or facilitation payment shall count as laytime or (if the Vessel is already on demurrage) as time on demurrage unless laytime or demurrage has already been excluded for another reason not connected to the refusal to pay any bribe or facilitation payment.

1.12 Without prejudice to any of its other rights under this Charter Party, either party may terminate this Charter Party with immediate effect without incurring any liability to the other party if at any time one party believes in good faith that the other party has committed a breach of any Anti-Corruption Legislation, provided that the party seeking to rely on this clause has informed the other party that it considers that there has been a breach of this clause and the other party has not provided a satisfactory explanation and documentation within seven days (during which time the party seeking to rely on this clause may elect to suspend

performance of its obligations pursuant to this Charter Party, such election to be communicated to the other party by way of written notice).

Sanctions
1.13 Charterers agree that Owners shall not be obliged to comply with any orders for the employment of the Vessel in any carriage, trade or on a voyage which, in the reasonable judgement of Owners, will expose the Vessel, Owners, the Vessel's managers, crew, the Vessel's insurers, or their re-insurers, to any sanction or prohibition imposed by any state, supranational or international governmental organisation (collectively "International Trade Sanctions").

1.14 Charterers warrant as follows:

FOR VOYAGE CHARTERS
1.14.1 that the carriage of the cargo to be carried under this Charter Party (the "Cargo") is not prohibited by any International Trade Sanctions, including but not limited to:

(a) the Comprehensive Iran Sanctions, Accountability, And Divestment Act of 2010,

(b) Council Regulation (EU) No 267/2012 concerning restrictive measures in view of the situation in Iran, as amended, updated or replaced from time to time
("Regulation 267/2012"); and

(c) Council Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria, as amended, updated or replaced from time to time;

1.14.2 that the Charterers (as well as the shippers and the receivers of the Cargo) will fully comply with all International Trade Sanctions which apply to Owners and/or Charterers;

1.14.3 that neither they nor any person with any interest in the Cargo (including the shippers, the consignee, any endorsee of the Bill of Lading and the receivers of the Cargo at the port of discharge) are included on any list of prohibited persons under current US, EU and/or UN sanctions legislation; and

1.14.4 that no payment will be made to (or received from) any person included in any list of prohibited persons under current US, EU and/or UN sanctions legislations or to (or from) any other Iranian person, entity or body as that term is defined in Regulation 267/2012.

1.15 Charterers agree to indemnify Owners in full for any claims, losses or damages which Owners suffer as a result of any breach of the above warranties by Charterers or the shippers or the receivers of the Cargo.

1.16 Owners represent and warrant that neither they nor the Vessel have breached, or will breach during the duration of this Charter Party, any International Trade Sanctions.

1.17 Owners agree to indemnify Charterers in full for any claims, losses or damages which Charterers suffer as a result of any breach of the above warranty by Owners or the Vessel.

1.18 In the event that additional sanctions are imposed after the date that any cargo is loaded, which prohibit the voyage for which the cargo has been loaded, or the transportation of such cargo, or any necessary payments or receipt of funds or which include any other restrictions which relate to the cargo or the voyage, Charterers agree that Owners shall have the right to refuse to proceed with the employment and Charterers shall be obliged to issue alternative voyage orders within 48 hours of receipt of Owners' notification of their refusal to proceed. If Charterers do not issue such alternative voyage orders Owners may discharge any cargo already loaded at any safe port (including the port of loading). Charterers to remain responsible for all additional costs and

expenses incurred in connection with such orders/delivery of cargo. If in compliance with this paragraph anything is done or not done, such shall not be deemed a deviation.

1.19 Charterers shall indemnify the Owners against any and all claims whatsoever brought by the owners of the cargo and/or the holders of Bills of Lading and/or sub-charterers against the Owners by reason of the Owners' compliance with such alternative voyage orders or delivery of the cargo in accordance with this clause.

FOR VOYAGE CHARTERS
1.20 Charterers also undertake to provide all necessary assistance required (including the provision of a guarantee or other necessary security on behalf of the Vessel, Owners or the Vessel's managers to any authorities or any third parties) in respect of any demands or claims arising from any reason whatsoever including but not limited to pollution, fines, mooring/unmooring/cargo equipment alleged damages, arrests, cargo claims, casualties, collisions, groundings etc, if Owners' P&I Club or Hull & Machinery underwriters refuse to provide the required guarantee/security or refuse to provide insurance cover because of applicable sanctions. All time spent as a result of the refusal of Owners' P&I Club or Hull & Machinery underwriters to provide the required guarantee/security or cover of shall count as laytime or (if the Vessel is already on demurrage) as time on demurrage.

APPENDIX H – Shell Clause

Owners and Charterers (either directly or through any of their affiliates', directors, officers, employees, masters, crew members, agents, managers, representatives or parties acting for or on behalf of them or their affiliates) shall:

(a) comply with the applicable laws, rules, regulations, decrees and/or official government orders, including but not limited to the United Kingdom Bribery Act of 2010 as amended and the United States of America Foreign Corrupt Practices Act of 1977 as amended, or any other applicable jurisdiction, relating to anti-bribery and anti-money laundering and that they shall each respectively take no action which would subject themselves or the other to fines or penalties under such laws, regulations, rules, decrees or orders ("Relevant Requirements");

(b) not make, offer or authorise, any payment, gift, promise, other advantage or anything of value whether directly or through any other person or entity, to or for the use and benefit of any government official or any person where such payment, gift, promise or other advantage would comprise or amount to a facilitation payment and/or violate the Relevant Requirements;

(c) have and shall maintain in place throughout the term of this Charter its own policies and procedures to ensure compliance with this clause, and will enforce them where appropriate;

(d) promptly report to the other party any request or demand for any payment, gift, promise, other advantage or anything of value received by the first party in connection with the performance of the Charter; and

(e) have the right to audit the other party's records and reports in relation to this Charter at any time during and within seven (7) years after ter-

mination of the Charter. Such records and information shall include at a minimum all invoices for payment submitted by the other party along with complete supporting documentation. The auditing party shall have the right to reproduce and retain copies of any of the aforesaid records or information. If there are anti-trust issues with or a party objects to a direct audit, the auditing party may appoint an independent company who is approved by the audited party (such approval not to be unreasonably withheld and to be given within 7 days of the request) to conduct the audit and provide the auditing party with its findings on the audited party's compliance with the Relevant Requirements without disclosing the records or information to the auditing party.

Either Owner or Charterer may terminate the Charter at any time upon written notice to the other, if in their reasonable judgment supported by credible evidence the other is in breach of this clause or such a breach is imminent. The timing of this entitlement (which shall be at the non-breaching party's discretion) is either:

(i) with immediate effect at any time prior to commencement of loading; or

(ii) if the laden voyage has not been completed and the cargo discharged, once the laden voyage has been completed and the cargo discharged.

This right shall be without prejudice to any other rights the non-breaching party may have in respect of such breach.

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Wreck removal in Swedish waters

Who is liable and to what extent?

Ellinor Borén

Contents

1 Introduction

1.1 Presentation of the research question

This thesis is concerned with the legal issues arising when a ship becomes a wreck in Swedish waters. It aims to examine how Sweden can hold a person liable for a wreck removal. The question of liability will be of central importance. If a person can be held liable for a removal, that person will in some cases be exposed to a large economic burden. Therefore, this thesis will also examine whether liability for a wreck removal can be limited and if the liability is covered by an insurance. The research question to be addressed is more precisely: when is a person liable, and to what extent is that person liable, when a ship becomes a wreck in Swedish waters?

Sweden has been spared from larger accidents resulting in big losses and high costs. Therefore, it is rather unclear how the legal system in Sweden works when a wreck must be removed. It has been questioned if the Swedish system is solid enough to protect the state from environmental as well as economic losses in the event of a comprehensive wreck removal.[1]

Also on a global level, issues concerning wrecks have raised concerns. After many years of discussions, the *Nairobi International Convention on the Removal of Wrecks* (Nairobi Convention) eventually entered into force on the 14th April in 2015.[2] According to IMO, the Nairobi Convention provides "uniform international rules aimed at ensuring the prompt and effective removal of wrecks".[3] In the summer of 2017, Sweden decided to ratify the Convention.[4] The rules will be included in a separate chapter

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1 *See for example* Kern, "En svensk vrakrätt"

2 The Convention entered into force after it had been ratified by 10 states. At the submission of this thesis it was ratified by 37 states (November 2017), IMO, "Status of Treaties".

3 IMO, "Nairobi International Convention on the Removal of Wrecks"

4 The Swedish Riksdag voted for the proposal "2016/17:CU18" to ratify the Convention on the 7th June 2017, *see* Prot. 2016/17:120 7 juni § 20, p. 78. At the submission of this

in the Swedish *Maritime Code* and are expected to enter into force early 2018.[5]

Even though the ratification of the Nairobi Convention may improve Sweden's legal ability to handle wreck removals, it does not answer all questions that may arise when a wreck shall be removed. For example, the question on whether a liable person is entitled to limit liability for a wreck removal is not affected by the Convention.[6]

In Norway, this question came to a head in early 2017 when the Supreme Court's decision on the *Server* case was announced.[7] *Server* was a cargo ship of nearly 180 meters, which ran aground on the west coast of Norway in 2007. The ship was severely damaged and eventually it broke in two. This resulted in rather extensive oil pollution. The forepart was towed from the wreck site immediately, but the aft section sank.[8] The Norwegian authority ordered the *redare*[9] and the shipowner to remove the aft section. But since the costs for such removal would exceed the amount to which the *redare* and shipowner could limit liability, no actions were taken. The *redare* and the shipowner, through their insurance company, argued that the authority had to bear costs in excess of the limitation amount. The authority did not agree on such solution.[10]

The question that arose was whether a liable person, who is subject to a wreck removal order, can limit his actions with the argument that the limit of liability will be exceeded. The Norwegian Supreme Court came to the same conclusion as the District Court and the Court of

thesis, the Swedish ratification is not yet completed. According to information given in a personal e-mail correspondence with legal adviser L. Petrelius at the Ministry of Justice, Sweden will officially ratify the Convention late 2017 or early 2018.

5 Personal e-mail correspondence with legal adviser L. Petrelius at the Ministry of Justice

6 The Convention shall not affect the limitation of liability regime under national law, Nairobi Convention article 10 (2).

7 HR-2017-331-1-A

8 Norwegian Coastal Administration, "Server"

9 *redare*- The Swedish word for the person/company who operates the ship for his or her own account. Typically, the same person/company as the shipowner but not necessarily. The same word is used in Norway and Denmark.

10 TOSLO-2014-9365, p. 7

Appeal.[11] The conclusion was that the liable person was bound by the obligation to remove the wreck even though the costs for executing the order would be in excess of the limitation amount. The Supreme Court based its decision on the preparatory works to the recent changes in the Norwegian rules on limitation of liability.[12] The Supreme Court claimed that it was a precondition for the changes to the rules, that the obligation to remove a wreck under public law falls outside the Norwegian limitation of liability regime.[13]

Since Sweden does not have any history of similar cases, the *Server* case will be referred to in this thesis primarily when discussing the issues on limitation of liability. It will be of particular interest for the discussion in part 3.3.

The ruling in the *Server* case seemed to have surprised parts of the maritime industry. Especially it seemed to have surprised the insurance industry. *Server*'s insurance company Gard, asserted throughout the legal process that the right to limit must be upheld.[14] The limitation of liability regime is claimed to be a prerequisite for the insurance companies' ability to calculate risks and by that, offering the assureds reasonable premiums. When examining what insurance covers costs for a wreck removal, this thesis will therefore look into what effect a lost right to limit may have on an assured's insurance cover.

It has been necessary to do a rather narrow delimitation of the topic; mainly in the sense of what kind of liability that will be examined. When a ship is involved in a casualty, various kinds of liabilities may arise. Collision liability, liability for personal injuries and pollution are just some examples. This thesis will only focus on the liability connected to the wreck removal itself.

In addition, it has been necessary to delimit the areas of law examined in this thesis. The Swedish *Maritime Code*'s rules on salvage, oil damages

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11 *See* TOSLO-2014-9365 and LB-2015-54634

12 *See* Norwegian governmental bill Ot.prp.nr.79 (2004-2005) and Norwegian official report NOU 2002:15

13 HR-2017-331-1-A, p. 19

14 TOSLO-2014-9365, LB-2015-54634 and HR-2017-331-1-A

and vicarious liability will not be discussed. Possibly, these rules could be applied in a situation where a ship becomes a wreck, but their primary areas of application are outside the scope of the thesis. Neither will the thesis discuss ordinary tort law.

1.2 Sources

To address the thesis problem, it has been necessary to consult a range of materials. The primary source is typically the text of the Swedish laws. Since some of the acts are not specifically intended to be applied to wrecks, it has been a rather common problem to see whether those can be applied to wreck removals and if so, under what conditions. The preparatory works have often offered a more in-depth understanding of the scope of the acts. For this purpose, where it is applicable, the international conventions which the Swedish legislation is based on, have been consulted as well.

Some of the issues which have arisen during the work with this thesis, have been dealt with in cases before the Swedish courts. These have contributed with valuable guidance on how the laws are interpreted and applied in practice. Since the Swedish *Maritime Code* corresponds to a great extent to other Nordic countries' maritime codes, it has been possible to refer to Nordic court cases when there has been a gap in Swedish case law. The reasoning behind the use of Nordic case law, also applies to the choice of literature. The moderate amount of Swedish literature on the topic, necessitates that foreign, primarily Nordic, literature is used.

Further, it has not been possible to examine each and every piece of Swedish legislation that may be applicable to wrecks and wreck removals. The examination aims to cover those most commonly used and those which may be applied in many different situations. The reasoning behind the selection of acts and ordinances is further elaborated in part 2.

The choice of insurance conditions has been delimited in order to achieve a clear overview of the insurance element. Due to the thesis's strong focus on Swedish legislation, the Nordic hull conditions and the P&I conditions of Gard and The Swedish Club were the obvious choices.

1.3 Structure

The thesis is further divided into four parts. Part 2 will examine on what legal basis the Swedish authorities may demand the removal of a wreck. The conditions for imposing such obligation and the person subject to that obligation, are two central questions that will be discussed.

Part 3 and part 4 address the consequences of a wreck removal, in terms of liability. Part 3 will start with an examination of the Swedish rules on limitation of liability. The examination will be followed by a discussion of the problems, related to limitation of liability, that may arise when a wreck shall be removed. Part 4 concerns the insurance element of a wreck removal. That a liable person will be reimbursed the costs may be a prerequisite for the performance of a wreck removal. A discussion around this is therefore required.

Lastly, some concluding remarks will be given in part 5.

2 The obligation to remove a wreck

2.1 Introduction

A ship which becomes a wreck within Swedish waters is subject to Swedish jurisdiction.[15] This part will examine when there is a legal basis to issue a wreck removal order; what conditions need to be fulfilled and to what extent can a complete wreck removal be ordered.

In addition to this, it is important to look into who may be subject to a wreck removal order. The structure of ownership and management is often complex in today's shipping and it may be difficult to determine

[15] Swedish territorial waters are the internal waters and the territorial sea, the Act concerning the Territorial Waters of Sweden, sections 1-3. The area where the Act on Measures taken against pollution from vessels is applicable is extended and comprises the Swedish Exclusive Economic Zone as well. The same applies to the new chapter 11a in the Maritime Code.

who is actually liable for a wreck. Questions relating to the competent authority and how far that competence extends will also be examined.

As shown below, it is sometimes necessary to discuss the term *wreck*. Since the term is generally not used in Swedish legislation one must see how related acts can be applied to wrecks and whether the absence of the use of the term has any significance.

Part 2 contains next an overview of the Swedish acts and ordinances applicable in a case of a wreck removal. The thesis will examine three of these acts more in detail. The reasons for this delimitation are described in the subsequent part. The examinations of the selected acts follow in part 2.3, part 2.4 and part 2.5. Part 2 is concluded with some summary remarks.

2.2 Legislation and delimitation

The Swedish legislation within the area of wrecks and wreck removals consists mainly of four acts and ordinances: the *Act on Measures taken against pollution from vessels,* the *Environmental Code,* the *Act on Removal of vessels in public port* and the *Ordinance on Removal of wrecks obstructing shipping and fishing activities*.[16] When Sweden ratifies the Nairobi Convention, the *Maritime Code* will be added to that list. Which act or ordinance that constitutes the legal basis for the issuance of a wreck removal order, is dependent on what kind of concern the wreck constitutes. A wreck can be of various kinds of concerns. Its presence may threaten the environment, it may hinder shipping and fishing activities or it can simply be aesthetically unsightly.

When it comes to wrecks which are not pollutive the *Act on Removal of vessels in public port* and the *Ordinance on Removal of wrecks obstructing shipping and fishing activities* may constitute a legal basis for the removal of a wreck. The latter authorizes the Maritime Administration (*Sjöfartsverket)* to remove a wreck which has sunken in a public fairway and obstructs shipping activities or which seriously obstructs fishing

[16] *Non-official translations*, apart from the Environmental Code.

activities in other waters.[17] However, it does not provide any basis for the issuance of a wreck removal order. The authority shall arrange for the removal itself and at its own expense.[18] Due to this, the Ordinance will not be examined further in this thesis.

Due to the limited scope of application of the *Act on Removal of vessels in public port,* it will not be subject to an extended examination.[19] In short terms, the Act gives the authority to a port proprietor to move a ship which obstructs the use of a public port.[20] If the shipowner or the *redare* does not move the ship, the port proprietor may move the ship at the expense of the shipowner or the *redare*.[21]

The remaining three acts, the *Act on Measures taken against pollution from vessels,* the *Environmental Code* and the *Maritime Code*, are less limited and comprise more types of wrecks. More detailed examinations of these are therefore required.

2.3 The Act on Measures taken against pollution from vessels

The primary focus of the *Act on Measures taken against pollution from vessels* is to prevent pollution resulting from the everyday operation of a ship. As a result of this, the Act consistently refers to *vessel*. The term *wreck* is not used. However, the choice of term has had little significance to the Swedish courts. In the case RÅ 1983 2:60, the Supreme Administrative Court, shortly concluded that a wreck is comprised by the regulations in the Act. Since the purpose is to prevent pollution to the environment,

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17 Ordinance on Removal of wrecks obstructing shipping and fishing activities, section 1

18 *See* JK 1990 C 7, Chancellor of Justice's report of a Supreme Administrative Court's decision on this issue.

19 The Act is only applicable to ships within a public port. The total number of public ports in Sweden amounts to 54 (2013), SJÖFS 2013:4. Even though the Act refers throughout to *vessels* and not to *wrecks*, the Act can probably be applied analogy to wrecks, *see* Tiberg, "Wrecks and Wreckage in Swedish Waters", p. 209 and the public inquiry SOU 1975:81, p. 84.

20 Act on Removal of vessels in public port, section 1

21 Ibid., section 5

even a sunken ship shall be subject to prohibitions and injunctions stated in the Act.[22] Thus, the state of the ship seems to be irrelevant.

In order for the Act to apply, the wreck must be pollutive. It follows from chapter 7 section 5 of the Act that the pollution can be caused either by oil or by another harmful substance. *Harmful substance* is defined in chapter 1 section 2 as "oil or other substance that may, if discharged into the water, entails a risk for the human health, damages the marine fauna or flora, damages beauty or recreation values or interferes with the legal exploitation of the sea or other waters".[23] The wide scope makes it possible to intervene not only when the wreck carries harmful cargos and bunkers, but also when the wreck is painted with toxic paint or constructed with harmful materials.

Chapter 7 section 5 states that if oil or any other harmful substance is discharged from a ship, a prohibition or an injunction that aims to limit or prevent pollution may be issued. The same section contains a list of examples of such prohibitions and injunctions. None of the examples includes a measure similar to wreck removal, but they are rather connected to the daily operation of the ship. However, the Act's preparatory work clarifies that the list is not exhaustive and other prohibitions and injunctions may be issued if the situation so requires.[24]

In the case RÅ 1983 2:60, the Supreme Administrative Court stated that an order to remove a wreck must be considered an injunction permitted by the Act. The case concerned the motor tanker *Sefir*, which sunk outside Öland. A potential discharge of the tanker's oil cargo was considered a threat serious enough to order the complete removal of the wreck. The shipowner opposed the order and requested its annulation. The Supreme Administrative Court did not approve and concluded that a wreck removal order was supported by the Act.

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22 *See also* ND 1997.53. The Act was applied to a sunken fishing boat, which contained oil. The Administrative Court of Appeal did not comment further on the analogy application of the Act, but referred to RÅ 1983 2:60.

23 *Non-official translation*

24 Prop. 1972:38, p. 70

The Act's focus is the prevention of pollution and an injunction must reflect that. An injunction authorized by chapter 7 section 5 may only be issued if the discharge of oil or another harmful substance threatens to cause *considerable* damage to Swedish interests. Smaller cases of pollution should not result in an injunction.

Further, the preparatory work states that an injunction must be considered reasonable and called for.[25] An injunction should not require a more comprehensive measure than what is necessary to prevent pollution. In the case ND 1997.53, the Administrative Court of Appeal concluded that a wreck removal order with the legal support in the *Act on Measures taken against pollution from vessels*, was justified if a complete removal was the *only* solution to prevent the pollution. In the mentioned case, the expertise did the assessment that the wreck of a sunken fishing boat containing oil could be rendered harmless just by emptying it and a complete removal was not necessary. The court annulled the wreck removal order. Thus, it should not be considered reasonable to demand the complete removal of a wreck if the pollution can be prevented in another way.

If the person subject to an injunction does not agree with the injunction, it can be appealed to a Swedish Administrative Court.[26] If the person in question is not satisfied with the decision of the Administrative Court, the decision may be appealed further to an Administrative Court of Appeal. A review permit is then required.[27]

The competent authority for the issuance of a wreck removal order under the Act is the Transport Agency (*Transportstyrelsen*).[28] The Coast Guard is authorized to issue the same prohibitions and injunctions, if the matter is urgent and the decision of the Transport Agency cannot be awaited.[29] However, it may be questioned if this concerns an order of a wreck removal. The Coast Guard normally deals with more acute

25 Ibid.

26 Act on Measures taken against pollution from vessels, chapter 9 section 2 paragraph 1

27 Ibid., chapter 9 section 2 paragraph 2

28 Ibid., chapter 7 section 5

29 Ordinance on Measures taken against pollution from vessels, chapter 7 section 3

threats.[30] In both cases mentioned above, RÅ 1983 2:60 and ND 1997.53, it was the Maritime Administration that issued the wreck removal orders and not the Coast Guard. The Maritime Administration was the competent authority under the Act before the Transport Agency was appointed that competence in 2009.[31]

The *Act on Measures taken against pollution from vessels*, chapter 7 section 9, gives the Transport Agency the right to execute an order which is not complied with. The authority may do so if the person subject to the order does not take actions within a defined time limit or if the notification of the order is delayed and such delay increases the risk of further pollution. When immediate actions are required and it is clear the person subject to the order will not take such actions, the authority may also execute the order.[32] Such execution was performed in the case RÅ 1983 2:60, when the shipowner made it clear from the start that he would not arrange for the removal of the wreck.

When the authority executes an order, it shall be at the expense of the shipowner or the *redare*.[33] No regard is taken to the question of culpa, but the liability for such costs is strict.

The *Ordinance on Measures taken against pollution from vessels,* chapter 7 section 6, clarifies that an injunction under the Act shall be issued to the master and to the shipowner or the *redare*. The reason that the master is mentioned as one of these persons, is due to the fact that the Act also enables injunctions more connected to the daily operation of the ship. In such cases, the master may be in best position to comply with an injunction. However, when the injunction is an order for the removal of a wreck, it is unlikely that a master will be considered the primary person executing the order.

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30 In a personal e-mail correspondence with N. Andersson, lawyer at the Swedish Coast Guard, the information was given that the Coast Guard does not generally deal with wrecks. It performs emergency tows for the purpose of the rescue service it provides.

31 SFS 2008:1127 Ordinance on changes in the Ordinance on Measures taken against pollution from vessels

32 Act on Measures taken against pollution from vessels, chapter 7 section 9

33 Ibid., chapter 7 section 9

The shipowner and the *redare* may be the same person and there is then no question of who is subject to the order and, if the order is not complied with, to be held liable for the costs incurred by the authority. When the ship has had a *redare* other than the shipowner, some uncertainty may arise. The preparatory work advocates that the *redare* should be the primary person to hold liable for the costs.[34] This is not further elaborated, but it may be due to the Act's strong focus on the ship's operation. Since the *redare* is responsible for the operation, it may be expected that the *redare* is liable for the consequences of such operation.

However, in practice this does not have any real importance. Since the Act gives the possibility to direct an order against both the *redare* and the shipowner, one person cannot escape liability if the other person is not in a position to remove the wreck.[35]

2.4 The Environmental Code

The Swedish *Environmental Code* is a comprehensive piece of legislation containing close to 500 sections. For the purpose of this thesis, chapter 15 section 26 concerning littering is the most relevant part of the Code. But before going into that section, a few words must be dedicated to what is called the *General Rule of Consideration* in chapter 2 section 8.[36]

The *General Rule of Consideration* in chapter 2 section 8 holds a person who has pursued an activity causing damage to the environment liable, until the damage ceases through rectification. Based on this section a person could potentially be held liable for the removal of a wreck which causes environmental concerns. But since the *Environmental Code* does not include rectification of damages caused by such oil which is covered

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34 Prop. 1972:38, p. 72

35 In the end, it may be determined by who is in best financial position and has an insurance that will cover the expenses.

36 General Rule of Consideration is a translation of the Swedish wording "Allmänna hänsynsregler", *see* the *official translation* of the Environmental Code published by the Swedish Ministry of the Environment and Energy, Ds 2000:61. An almost identical section is found in chapter 10 section 2 of the Environmental Code.

by the *Maritime Code* chapter 10 and 10a, its scope is limited.[37] Thus, in order to use the *Environmental Code*'s *General Rule of Consideration* as a basis for an order to remove a wreck, the environmental damage must be caused by another pollutive substance than oil.

The *Environmental Code* overlaps with the *Act on Measures taken against pollution from vessels* on these matters. Since the *Act on Measures taken against pollution from vessels* deals with all kinds of pollution from ships, it may be more correct and efficient to apply this Act to wrecks causing damage to the environment which is caused by another substance than oil.

A section which in fact is applied to wrecks, is section 26 of chapter 15 of the *Environmental Code*. It does not cover the pollution aspect, but prohibits littering outdoors. It is phrased as follows: "Leaving litter out of doors in places to which the public has access or which are within its view shall be prohibited".[38]

The concept of *littering* is not defined in the *Environmental Code*, but the preparatory work gives some guidance on how the concept shall be understood.[39] Litter is steel plates, glass, plastic, paper and waste or similar. Car wrecks are specifically mentioned as an example of steel plates.

In addition to the preparatory work, case law gives direction on how litter shall be defined. When it comes to ship wrecks, there are Swedish cases which have established that ship wrecks may be considered litter. First in NJA 1976 p. 547, where the Supreme Court considered a half-burnt ship, still visible, as litter. And in a more recent case, MÖD 2014:41, where a stranded ship was decided to be litter by the Environmental Court of Appeal.

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37 Environmental Code, chapter 10 section 19. The preparatory work states that the General Rule of Consideration in chapter 2 section 8 is dependent on chapter 10. Damages excluded in that chapter, are excluded from the general liability as well, Prop. 2006/07:95, p. 85.

38 *Official translation* Ds 2000:61. This is an older version, but the rules are phrased in the same way. The rule on littering is found in chapter 15 section 30.

39 Prop. 1997/98:45, part II p. 201

However, the wreck must fulfil some criteria in order to be considered litter. The first criteria are given in the section: the littering must take place outside and in places to which the public has access or which are within its view. This generally excludes wrecks which are totally submerged, since they are "not within its [i.e. the public] view".[40] In the case RH 1990:17, the Court of Appeal confirmed this criterion and dismissed the argument that a boat which was intentionally sunken was litter. It was located at a depth of 86 meters and thus not visible.

Further, the preparatory work states that there is no requirement that the litter causes damage or is displeasing to the public.[41]

In addition to the criteria stated above, case law has established two additional conditions that need to be fulfilled. First, the object must have been left in nature.[42] Thus, a wreck is not litter until it is rather clear that the liable person has no intention of removing it. Second, the object must be considered *worthless*.[43] It could be said that a wreck is per se worthless. But since there is no unambiguous definition of a *wreck*, this gives little direction. Case law shows that objects which still serve some kind of purpose, are not considered litter. In the case RÅ 1964 Jo 23, a body of bus used as a building was not considered litter. It was clearly not possible to drive the bus, but since it still served a purpose the court concluded that the old bus was not worthless and it was, therefore, not litter.[44]

When evaluating whether an object is worthless, the courts seem to take due regard to what purpose the object serves to the user. If it can be reasonably justified that the object is not worthless to the user, the object is probably not considered litter. However, it is not only the user's

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40 It may be discussed if some submerged wrecks may still be considered litter if the wreck's location is frequently used for fishing or diving. In theory, these are places "to which the public has access".

41 Prop. 1997/98:45, part II p. 201

42 *See for example* RÅ 1984 2:58 (car wrecks were left at an old scrap yard) and NJA 1986 p. 546 (a large quantity of hay was left in the nature by reindeer herders).

43 In RÅ 1993 ref. 41, the Supreme Administrative Court referred to this, by case law, established condition.

44 *See also* RÅ 1968 Jo 14. An old barge was filled with stones and put close to a beach. It was not considered litter, since the old barge was now said to be used as a breakwater and a mooring point.

point of view that is taken into account. In the case MÖD 2014:41, the court did a more objective evaluation of the value. The stranded ship *Sundland* had been left aground in Öresund for many years. The owner had claimed that he intended to take care of the ship. At first, the ship could therefore not be considered worthless. However, after 4 years the deterioration of the ship finally reached a stage where it could be decided that the ship objectively was unusable and without any value. The ship was then considered litter.

In the case MÖD 2014:41, the owner of *Sundland* did not have any insurance cover. *Sundland* was a small ship. It is not established how a total loss declaration under a ship's hull insurance corresponds to the condition "worthless". It may be assumed that a ship is considered worthless when it is declared a total loss and a total loss compensation is paid to the assured. In such case, the ship does not have any value to the assured and the assured cannot reasonably claim that the ship still serves a purpose for him. The evaluation of the ship's status made by the insurance company and the assured may be enough to establish that a ship is worthless.

If a wreck is decided to fall within the definition of *litter*, chapter 26 section 9 gives the supervisory authority the right to issue an injunction requiring the person who littered to remove the litter.[45] It means that a wreck removal order is supported by the *Environmental Code*. The authority's injunction shall clearly state what needs to be done.[46] The authority may allow the liable person to decide how it shall be done.[47] In case of littering, the implication of an injunction will be that the liable person must remove the litter. This should in most cases necessitate a complete removal of the wreck. However, in theory, if the wreck can be made non-visible, i.e. parts of the wreck above surface are eliminated,

[45] *See also* Prop. 1997/98:45, part II p. 201

[46] Rubenson, *Miljöbalken,* p. 188

[47] Ibid.

the wreck is theoretically no longer litter. Thus, it is in compliance with Code and an injunction shall be deemed to be fulfilled.[48]

Here, a brief reference may be made to the Norwegian case *Server*[49], where visible parts were in fact removed. The Norwegian Pollution Control Act contains a section similar to the Swedish section on litter. Section 28 of the Norwegian Act states that "[n]o person may empty, leave, store or transport waste in such a way that it is unsightly […]".[50] The District Court stated in the *Server* case, that since no parts of the wreck were visible over the water surface, the wreck did not comply with the condition "unsightly".[51] Even though parts of the wreck were visible directly after the casualty, those parts were removed before the decision that the wreck must be removed was taken. Therefore, the court concluded that the authority could not base its decision on that condition.[52]

An injunction issued under the *Environmental Code* chapter 26 section 9 can be appealed by the person subject to the injunction.[53] County administrative boards and other administrative authorities, municipalities and environmental courts deal with matters governed by the Code.[54]

Under the *Environmental Code* several authorities may be assigned the competence to exercise supervision of the compliance with the Code.[55] Supervision concerning local matters shall be performed by the municipality.[56] In the case MÖD 2014:41, the municipal authority

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48 The supervisory authority shall never use more coercive measures than required to ensure the compliance with the Code, Prop. 1997/98:45, part II p. 273.

49 *Server* was a cargo ship which ran aground in 2007 on the west coast of Norway. It was questioned whether the order of removal issued by the Norwegian authority was valid. *See* part 1.1, where the case is further described.

50 Norwegian Pollution Control Act, chapter 5 section 28. *Official translation* from the Norwegian Ministry of Climate and Environment.

51 TOSLO-2014-9365, p. 19

52 Neither the Court of Appeal nor the Supreme Court did discuss the issue of "unsightly" further.

53 Environmental Code, chapter 16 section 12

54 Ibid., chapter 16 section 1 and chapter 19 section 1

55 Ibid., chapter 26 section 3. E.g. Swedish Environmental Protection Agency, Swedish Agency for Marine and Water Management, County Administrative Boards, other government agencies and municipalities.

56 Prop. 1997/98:45, part II p. 268

the Environmental Committee (*Miljönämnden)* in Malmö did issue the order for the removal of a wreck which was considered litter. All Swedish municipalities have a corresponding committee and it is a reasonable assumption that wrecks within municipality's waters will be subject to their supervision. Wrecks which cause concern beyond municipality level are subject to the supervision of an authority managing environmental matters on a more regional level. In Sweden, the County Administrative Boards (*Länsstyrelserna*) are assigned that task.[57]

If the person who littered fails to comply with an injunction, the supervisory authority may arrange for rectification at the expense of that person.[58] In urgent matters, the supervisory authority may do so even before an injunction is issued.[59] Whether this concerns a case of littering, is doubtful. Littering is seldom of such urgent nature.

Under the *Environmental Code* it is rather unclear who is the liable person. Specially, ambiguity arises when the shipowner and the *redare* are two different persons. The Code is based on the general "Polluter Pays Principle".[60] It is no requirement, neither given in the Code nor in the preparatory work, that the polluter is the owner of the litter. In both NJA 1976 p. 547 and MÖD 2014:41, the shipowner was held liable for the litter. However, these cases give little further guidance. Since the shipowner and the *redare* appear to be the same person in both cases, it did not result in any further discussion on who may be liable for a wreck considered litter.

The crucial question is who is the *polluter.* The owner of the object or the person operating the object? In RÅ 1984 2:58, the Supreme Administrative Court concluded that the person having control of an object (in this case scrap cars) was the person liable for the littering. The ruling in MÖD 2006:63 points in the same direction. In this case, an unknown person had littered a piece of land owned by a company. The court stated that the company could not be held liable for the littering, with the only

57 Rubenson, *Miljöbalken,* p. 190

58 Environmental Code, chapter 26 section 17 and 18

59 Ibid., chapter 26 section 18 paragraph 2. *See also* Rubenson, *Miljöbalken,* p. 189

60 Prop. 1997/98:45, part I p. 213

argument that it was their piece of land. The company was not in control of the littering.[61] J. Ebbesson refers to this as an overarching principle: the person who has the actual and legal ability to control the activity, shall be deemed to be the liable person.[62] Hence, in a case where a wreck is considered litter, one should look at who had the actual and legal ability to control the ship's activities. The *redare*, as the operator, may be claimed to be the one controlling the activity. Based on this, it may therefore be reasonable to hold the *redare* liable. On the other hand, a *redare* may claim that since he does not own the ship the actual control remains with shipowner. In any case, it must be determined if, and in such case to what extent, a shipowner has the ability to interfere with the ship's activities.

It is clear that the circumstances are particular in cases where the *redare* and the shipowner are two different persons. It is uncertain how the question of liability would be resolved in practice. The established principle, that the person controlling the activity is the one liable for the littering, will provide some guidance. But the relationship between the *redare* and the shipowner, in terms of control, must be evaluated in each individual case.

2.5 The Maritime Code

Due to the coming Swedish ratification of the *Nairobi International Convention on the Removal of Wrecks*, a new chapter will be included in the *Maritime Code*, viz. chapter 11a *On liability for Wrecks*.[63] In addition to rules on the duty to report wrecks and on the marking of wrecks, the

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61 *See also* NJA 1986 p. 546. A chairman of a Saami village was held liable for the littering, consisting of a large quantity of hay. It was argued that he, as a chairman, was responsible for the activity and therefore he was held liable for the littering.

62 Ebbesson, *Miljörätt,* pp. 135-136. *See also* Rubenson, *Miljöbalken,* p. 122

63 At the submission of this thesis the date when the chapter will enter into force was still not set. According to information given in a personal e-mail correspondence with legal adviser L. Petrelius at the Ministry of Justice, chapter 11a is planned to enter into force in the beginning of 2018 (January or February). L. Petrelius stated that Sweden must first ratify the Convention.

chapter's main aim is to establish when a wreck shall be removed and who is liable for a wreck.

With the implementation of chapter 11a, the concept of *wreck* will be included in Swedish jurisdiction to a greater extent. The definition of *wreck* will be found in the *Maritime Code* chapter 11a section 1 and is in line with the definition given in the Convention article 1(4). A *wreck* means a ship which has sunken or stranded following a maritime casualty.[64] The Convention, as well as the *Maritime Code*, has widened the meaning of what is general considered a wreck by including "a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken".[65] One can see that the definition of *wreck* is not related to the value of the ship. It does not require any form of deterioration. This should increase the possibilities to take action against a wider range of ships. Possibly it may also include ships that are not yet technically considered wrecks by the shipowner or by its insurance company.

Chapter 11a section 11, states that "the shipowner shall remove a wreck which constitutes a hazard or take any other measure to eliminate that hazard […]".[66] The way the section is drafted, sets the focus on the hazard and not on the wreck as such.

Hazard, in the context of the chapter, means "any condition that poses or may pose a danger or impediment to navigation, or may reasonably be expected to result in significant damage to the marine environment, damage to the coastline or related interests of one or more states".[67] This definition of hazard necessitates that some wordings are explained further.

Firstly, it can be established that chapter 11a of the *Maritime Code* encompasses not only the environmental aspect but also the aspect

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64 *Maritime casualty* means "a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo", Maritime Code chapter 11a section 1. The section corresponds to the Nairobi Convention article 1(3).

65 Nairobi Convention, article 4(d), Maritime Code, chapter 11a section 1

66 *Non-official translation*

67 Maritime Code, chapter 11a section 1. *Non-official translation*

of obstruction of shipping activities. The wording "poses a danger or impediment to navigation", refers primarily to that danger the physical presence of a wreck constitutes.[68] The area in which a wreck can constitute an obstruction is not limited. The scope is therefore wider in the *Maritime Code*, compared to the other legal instruments shortly described in part 2.2.[69] A wreck may be considered an obstruction even outside a public port, a public fairway and waters used for fishing.

Further, the meaning of "damage to the marine environment" is not given in Code. However, the preparatory work emphasizes that not any damage shall be considered a hazard, but it has to be of *significant* extent. The cause of the damage is not limited to any specific substance, but seems to include all substances which can be harmful. Even ecological damages, which normally are difficult to put a monetary value on, shall be taken into consideration when evaluating the hazard.[70]

The last part of the definition of hazard refers to "damage to the coastline or related interests of one or more states". Fishing activities, tourism and the wellbeing of the population are examples given of "related interests".[71] A wreck located in a way which is visible and displeasing to the public, could probably fall under this definition.

When a wreck is decided to constitute a hazard, the shipowner shall be notified.[72] Chapter 11a section 11 obliges a shipowner to remove a wreck which constitutes such hazard or to take any other measure to eliminate that hazard. Since section 11 opens up for a sole elimination of the hazard, a complete wreck removal will not always be required. The competent authority may instruct the shipowner on what type of actions that shall be undertaken in order to remove the hazard.[73]

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68 Prop 2016/17:178, p. 55

69 Act on Removal of vessels in public port and Ordinance on Removal of wrecks obstructing shipping and fishing activities

70 Prop. 2016/17:178, p. 55

71 Maritime Code, chapter 11a section 1

72 Ibid., chapter 11a section 10 paragraph 1. Such notification shall include a time limit for the removal of the hazard, chapter 11a section 10 paragraph 2

73 Ibid., chapter 11a section 11 paragraph 2

Chapter 11a section 13 stresses that the required actions must be reasonable in relation to the actual hazard. The preparatory work clarifies this further by stating that if it is the cargo that entails the hazard, it shall be enough to just remove the cargo. The authority shall never require the complete removal of a wreck if a less extensive action is enough to eliminate the hazard.[74]

The *Maritime Code* chapter 11a does not explicitly allow a liable person to appeal the authority's decisions that a wreck constitutes a hazard and that the hazard shall be removed. Generally in Swedish law, the right to appeal is laid down in the applicable act.[75] But case law has established that in cases where this is not explicitly stated in the act, the person whom the decision concerns may still be entitled to appeal such decision.[76] Whether this applies to a decision in accordance with the *Maritime Code* chapter 11a, is left to decide.[77]

The competent authority under the Code's chapter 11a is the Maritime Administration (*Sjöfartsverket*). It shall be noted that the Maritime Administration did not completely agree with the decision on giving the competence to the authority. The Maritime Administration argued that the tasks which shall be performed by the competent authority under chapter 11a, are not compatible with the role of the Maritime Administration today.[78] The Maritime Administration argued that the Transport Agency would be a more appropriate choice of competent authority.[79]

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74 Prop. 2016/17:178, p. 67

75 Warnling-Nerep, *Förvaltningsbeslut,* pp. 39–40

76 Hellners och Malmqvist, *Förvaltningslagen,* p. 273

77 The thesis will not discuss this issue further. *For further reading* regarding decisions that may be appealed *see* Hellners och Malmqvist, *Förvaltningslagen,* pp. 268-286 and Warnling-Nerep, *Förvaltningsbeslut,* pp. 39-48.

78 Prop. 2016/17:178, p. 33

79 When the Transport Agency was established in 2009, many tasks which were previously performed by the Maritime Administration were transferred to the Transport Agency. Today, the Maritime Administration primary provides services to ensure safe shipping routes. It offers services such as pilotage, fairway service, traffic information, ice breaking and maritime search and rescue.

However, little account was taken to this objection. Instead, it is advised that the Maritime Administration consults other relevant authorities. Since it is the competent authority that shall establish whether the wreck constitutes a hazard[80], a problem may arise when the wreck is of environmental concerns. This is an area in which the Maritime Administration has very limited knowledge. The Maritime Administration is recommended to consult the Transport Agency, the Coast Guard or other authorities when assessing such hazard.[81]

The authority of the Maritime Administration is rather far-reached under chapter 11a. First, the authority is given the right to interfere with actions taken by the shipowner if they are considered harmful to the marine environment or if they endanger maritime safety.[82] Further, section 12 states that the Maritime Administration shall remove a wreck or take any other measure to eliminate a hazard, if the hazard is not eliminated within the time limit, if the shipowner cannot be notified or if immediate actions are required. In any case, the liability for the costs of such measures will remain with shipowner. Section 16 gives the authority the right to claim compensation from the shipowner for the costs incurred.[83] No regard is taken to the question of culpa, but the liability for such costs is strict.

In the *Maritime Code* chapter 11a, the person liable is well-defined and unambiguous. Only the shipowner can be subject to the obligation to remove a wreck and liable for costs incurred when a wreck or hazard is removed. The *shipowner* means the person registered as the owner, or in the absence of such registration the person who owns the ship, at the time of the casualty.[84]

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80 Maritime Code, chapter 11a section 8

81 Prop. 2016/17:178, p. 34

82 Maritime Code, chapter 11a section 11 paragraph 2

83 The shipowner is free from liability if the casualty was caused by an act of war, intentionally by a third party or if the authority, Swedish or foreign, responsible for navigational aids fails to comply with its duty to maintain such aids, Maritime Code chapter 11a section 16 paragraph 2.

84 Maritime Code, chapter 11a section 1

2.6 Summary remarks

The examination in part 2 shows that a wreck, regardless of what concern it constitutes, often can be subject to an order of removal. The only gap in the Swedish legislation today is wrecks which hinder shipping or other activities at sea. The scopes of the *Act on Removal of vessels in public port* and the *Ordinance on Removal of wrecks obstructing shipping and fishing activities* are limited to public ports, public fairways and waters used for fishing. However, this gap will be filled when the new chapter 11a of the *Maritime Code* enters into force. The scope of this chapter is wide and should encompass more types of wrecks.

Further, there is no single authority which is authorised to issue a wreck removal order. It differs depending on which legal act the order is based. Common for all three acts which are examined more in detail, is that the authorities are given the right to execute the wreck removal order under certain circumstances at the expense of the liable person.

When it comes to the question of the liable person, the acts provide different solutions. In the *Maritime Code* chapter 11a only the shipowner can be liable. The *Act on Measures taken against pollution from vessels* and *Act on Removal of vessels in public port* open up for holding both the shipowner and the *redare* liable, whereas the *Environmental Code* is not drafted from the perspective of shipping and therefore does not refer to these persons.[85] The person controlling the activity will probably be held liable for the littering. Who that is must be decided on a case-to-case basis.

[85] Since the Ordinance on Removal of wrecks obstructing shipping and fishing activities does not support the issuance of a wreck removal order, no person will be held liable under this Ordinance.

3 Limitation of liability in connection with a wreck removal

3.1 Introduction

Wreck removal claims are known to be some of the most extensive claims a *redare* or a shipowner can be exposed to. Without the right to limit liability, these claims will imply a large burden on the industry. The right is unique for the maritime industry; land based activities do not generally enjoy the same privilege.[86] The *Convention of Limitation of Liability for Maritime Claims 1976* (LLMC 1976) including its amendment *Protocol of 1996*, is the latest internationally agreed convention governing limitation of liability. Sweden is among the contracting states.

This part aims to examine how the liable person can limit liability for a wreck removal under Swedish jurisdiction. Part 3.2 contains a presentation of the Swedish limitation of liability regime. The presentation provides a basis for the discussion in part 3.3. That part will discuss what the problems may be when a wreck shall be removed, in terms of limitation of liability.

Where it is necessary, the differences between the Swedish and the Norwegian systems will be examined. In order to better understand the issues surrounding the question, it is useful to look at how problems that may arise in connection with a wreck removal have been dealt with in Norway.[87] The *Server* case will be of particular interest.[88]

Part 3.4 contains some summary remarks.

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86 Falkanger and Bull, *Sjørett,* p. 169

87 The Norwegian perspective of some of the issues discussed in this part, has been examined in the thesis "Ansvar for opprydningstiltak etter sjøulykker" by Ann-Sofie Stigum Kvalø (2017).

88 Part 1.1 contains a presentation of the case.

3.2 The Swedish rules on limitation of liability

The two main questions that will be examined in this part are who may limit liability and what claims may be limited. It will be concluded with a short discussion of how the right to limit can be lost.

Starting with the person entitled to limit liability, chapter 9 section 1 of the *Maritime Code* gives a number of persons that right. In the first sentence, it is stated that the *redare* is entitled to limit liability. It is then further stated that the same right is given to an owner of a ship who is not the *redare*, the charterer, the sender of the cargo and anyone performing services directly connected with salvage.[89]

In cases where more than one person is liable, the total liability shall not exceed the limits of liability calculated in accordance with chapter 9 section 5 number 1-3.[90] This means that if the *redare* is primarily held liable for the removal, the claimants cannot turn to the shipowner when the limit of liability of the *redare* is reached, hoping to get the remaining claims covered. The system also offers protection when the right is lost by any of the persons. If one of the persons, e.g. the *redare,* loses the right to limit liability pursuant to chapter 9 section 4, it does not mean that the shipowner loses that right as well. In such case, the right to limit is retained for the other persons not having lost their right.[91]

The second question concerns the claims that can be limited. Chapter 9 section 2 includes an enumeration of all claims subject to limitation. They are divided into six categories. Number 1 concerns personal injuries and property damages. Number 2 concerns claims resulted from delay in the carriage of goods or passengers. Number 3 includes other claims, not comprised by number 1 or 2. Number 4 provides a right to limit liability for claims arisen following "the raising, removal, destruction or the rendering harmless of a ship which is sunk, stranded, abandoned or

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89 If liability is asserted against any person for whom any of these mentioned persons are responsible, this person may also limit liability. Further, the insurer may limit its liability to the same extent as the assured, chapter 9 section 1.

90 Prop. 1982/83:159, p. 114

91 Wetterstein, *Globalbegränsning av sjörättsligt skadeståndsansvar,* pp. 90–91

has become a wreck, including anything that is or has been on board".[92] Under number 5 the same applies to cargo that needs to be removed from an intact ship. Finally, number 6 gives the right to limit liability for claims in respect of measures taken to avert or minimize losses.

The system in the Norwegian *Maritime Code* differs somewhat from the Swedish system.[93] Number 4 and 5 are lifted out from the main section, section 172, and inserted into a new section, i.e. section 172a. This section includes claims which have arisen as a consequence of clean-up efforts after marine accidents.

The fact that these claims are lifted out from the main section, becomes important when calculating the maximum limit of liability. Under the Swedish system all claims, except claims in respect of personal injuries, are subject to the same limit.[94] This is given by chapter 9 section 5 number 3 of the Swedish *Maritime Code*. Pursuant to chapter 9 section 6 paragraph 1 of the Swedish Code, the amount will be distributed proportionally among the competing claims.[95] This means that all claims arisen under chapter 9 section 2 number 2, 3, 4, 5 and 6, will compete under the same amount.

In Norway however, there will two limitation amounts.[96] One for claims arisen under section 172 and one for claims arisen under section 172a of Norwegian *Maritime Code*. Claims arisen under 172a will only compete with similar claims, whereas claims arisen under section 172, will compete with other claims arisen under section 172.

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92 *Non-official translation*

93 The Norwegian rules on limitation of liability are, just like the Swedish rules, based on LLMC 1976 and the Protocol of 1996. Norway has made a reservation according to article 18 of LLMC 1976. Article 18 allows a state to exclude claims in respect of wreck removals and include own rules for such claims in its national regime.

94 Swedish Maritime Code, chapter 9 section 5 number 3. If claims under chapter 9 section 5 number 2 are not covered in full, the remaining part will be subject to the amount under section 5 number 3 and they will there rank equally with other claims, Swedish Maritime Code, chapter 9 section 6 paragraph 2.

95 Claims concerning personal injuries are normally not included in this amount, *supra* note 94.

96 Personal injuries are subject to a third and a fourth separate amount, Norwegian Maritime Code section 175 number 1 and 2.

Chapter 9 section 5 number 3 of the Swedish *Maritime Code*, describes how the maximum limit of liability for all claims other than personal injuries claims shall be calculated. It shall be noted that the limit includes only those claims arising from "one and the same event".[97] The limit depends on the ship's gross tonnage: the higher the tonnage, the higher the limit will be.

The wrecked cargo ship *Server*[98], which had a tonnage of 19 864 gross tonnage[99], represents an average ship sailing along the Swedish coasts and can be taken as an illustration. The maximum liability for claims other than personal injuries that a *redare* or a shipowner of a ship like *Server* may incur under the Swedish system is 12,3 million SDR.[100]

If calculating the maximum liability a *redare* or a shipowner of a ship like *Server* may incur under the Norwegian system, one would get another result. Pursuant to the Norwegian *Maritime Code* section 175, the limit is calculated in the same way as in the Swedish *Maritime Code* for claims arisen under section 172. But as stated, claims arisen under section 172a are subject to a separate limit. This limit is considerable higher and it is given in section 175a. Again, if using *Server* as an illustration, the maximum liability calculated in accordance with section 175a is 53,9 million SDR.[101] This means that the *redare* or the shipowner of *Server* would be liable up to 53,9 million SDR plus 12,3 million SDR under the Norwegian system.[102]

Another important difference between the Swedish and the Norwegian systems is the liable person's right to include his own expenses

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97 Swedish Maritime Code, chapter 9 section 5 number 4

98 *Server* was a cargo ship which ran aground in 2007 on the west coast of Norway. The accident resulted in high costs, mainly due to an oil spill and a wreck removal. *See* part 1.1, where the case is described further.

99 Ship's particular is taken from the website: Norwegian Coastal Administration, "Server".

100 Calculated as follows: 1,51 million SDR + (604 SDR x (19864-2000)) ≈ 12,3 million SDR.

101 Calculated as follows: 2 million SDR + (2000 SDR x 1000) + (5000 SDR x 8000) + (1000 SDR x (19 864-10 000)) ≈ 53,9 million SDR. Server was subject to lower limits. Since the incident in 2007, the Norwegian limits have been raised further.

102 *Supra* note 96

in the limitation fund. This right is given in the Norwegian *Maritime Code* section 179, but it is not included in the Swedish *Maritime Code* chapter 9. In Norway, when the person which is entitled to limit liability undertakes clean-up measures in accordance with section 172a, those expenses shall be ranked equally with other claims in the fund. Some of the liable person's expenses will then be covered by the fund, with the consequence that other claims in the fund will be reimbursed to a lesser extent.

Finally, a few words on how the right to limit is lost. Although the LLMC 1976 is described as a "virtually unbreakable system of limiting liability", this right can still be lost.[103] Here the Swedish and Norwegian systems are in line. The right to limit is lost when the person entitled to limit liability causes the loss intentionally or by gross negligence *and* with the knowledge that such loss would probably result.[104]

Both negligence and knowledge must be proven. The question of negligence has to be evaluated on a case-to-case basis. Generally, it can be said that if the act is associated with high risk, and if the person performing the act is aware of that high risk, the act is likely to be considered grossly negligent.[105] In addition, it must be noted that the rule concerns knowledge of "such loss". The right to limit will not be lost if the loss that actually occurs is very different from the predicted loss. But on the other hand, it cannot be required that the actual loss corresponds exactly to the predicted loss. It should be enough that they are of the same kind.[106]

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103 IMO, "Convention of Limitation of Liability for Maritime Claims (LLMC)" and Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims,* p. 3

104 Swedish Maritime Code chapter 9 section 4, Norwegian Maritime Code section 174

105 Falkanger and Bull, *Sjørett,* pp. 175–176

106 Prop. 1982/83:159, p. 110 and Blom, *Sjölagens bestämmelser om redaransvar,* p. 100

3.3 The right to limit liability for a wreck removal

3.3.1 Overview of the problems arising

The presentation above shows that the person subject to a wreck removal order, i.e. the *redare* or the shipowner, is entitled to limit liability. A claim for a wreck removal falls under chapter 9 section 2 number 4, and is therefore, as a starting point, subject to limitation.

However, several issues may arise in connection with a wreck removal. Part 3.3 aims to discuss some of the scenarios that may occur when a wreck shall be removed. It is primarily the problems arising when the costs for the removal will burst the liable person's limit of liability that will be examined here.

The first scenario occurs when there is an acute situation and the authority must remove the wreck before a wreck removal order is issued. Part 3.3.2 will discuss whether such recourse claim can be limited or if the authority can request reimbursement of the total amount.

When an order is in fact issued, the liable person faces an obligation to remove the wreck. If the costs for the removal will be in excess of the limit of liability, the liable person may assert his right to limit and wants to refrain from removing the wreck. This scenario did arise in the *Server* case. The Norwegian Supreme Court concluded that the liable person could not omit to take actions and that the liable person was bound by the obligation to remove the wreck.[107]

Part 3.3.3 will discuss a scenario where the Swedish authority accepts the omission of the liable person and removes the wreck itself. Part 3.3.4 will look at an opposite scenario where such omission is not accepted and the liable person is bound by the obligation to remove the wreck. These discussions aim to see how the right to limit differs in these two scenarios.

In a case where the liable person is bound by the obligation to remove the wreck, a scenario may arise where the liable person refuses to comply with the order. May such failure affect the right to limit? This question is examined in part 3.3.4.1.

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[107] *See* part 1.1, where the case is described more in detail.

Part 3.3 will be concluded with a discussion of what the Swedish approach is when the person subject to the order faces liability in excess of the limitation amount. Will the conclusion be the same as in Norway, i.e. that the liable person is bound by the obligation to remove the wreck even though the costs for the removal will exceed the limit of liability? Or will the Swedish authorities allow the liable person to omit to arrange for the removal of the wreck? This is discussed in part 3.3.5.

3.3.2 When the authority's removal is not preceded by an order

A Swedish authority is sometimes given the possibility to remove a wreck prior a wreck removal order is issued. Foremost, this concerns circumstances where there is an acute risk of damage and the issuance of an order risks to delay the removal.[108] The acts opening up for this, state that when such actions are taken, they shall be at the expense of the liable person.[109] This means that a recourse claim will probably be directed against the liable person after the authority has removed the wreck.

When the authority's recourse claim risks to exceed the amount to which the liable person is entitled to limit liability, the question whether the liable person may limit that recourse claim arises.

There should not be any difference between an authority's claim for a wreck removal and another claim realized by the authority under Swedish jurisdiction. The recourse claim for the wreck removal falls under the definition in chapter 9 section 2 number 4 in the *Maritime Code* and should therefore be a claim subject to limitation. This assumption is line with the legal literature discussing the issue. Both B. Blom and P. Wetterstein argue that a recourse claim following a wreck removal can be limited.[110]

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[108] Act on Measures taken against pollution from vessels, chapter 7 section 9, Environmental Code, chapter 26 section 18 paragraph 2 and Maritime Code, chapter 11a section 12.

[109] Ibid.

[110] Blom, *Sjölagens bestämmelser om redaransvar,* p. 81 and Wetterstein, *Redarens Miljöskadeansvar,* p. 335

The consequence of the authority's removal of a wreck prior the issuance of an order, is that the authority may have to bear costs in excess of the liable person's limitation amount.

3.3.3 A wreck removal order is issued, but the limit of liability will be exceeded – the authority removes the wreck

In part 3.3.2, it was stated that a recourse claim from the authority can be limited. That discussion concerned a scenario where the authority's removal was not preceded by an order. However, that right to limit a recourse claim should not be limited to include only such scenario: the right should not depend on whether an order is issued or not.

If a Swedish authority voluntarily removes a wreck after an order has been issued, such recourse claim should also be subject to limitation. The authority may decide to do so, when the liable person would be faced with liability in excess of the limitation amount if that person removed the wreck. To protect the right to limit, the authority accepts to bear costs in excess of the limitation amount and removes the wreck itself. A recourse claim that may then be directed against the liable person, falls under the definition in chapter 9 section 2 number 4 of the *Maritime Code,* and may thereby be limited.

A short addition to what now has been said may made. To voluntary remove a wreck and then direct a claim against the liable person, is one way for the authority to uphold that person's right to limit liability. Another way to protect that right is to let the liable person arrange for the removal with an agreement that the costs in excess of the limitation amount shall be covered by the authority. The outcome will be the same as for in a situation where the authority removes the wreck: the liability of the liable person will be limited. In this way, the owner of *Server* hoped to retain the right to limit liability. However, this was denied by the Norwegian authority.[111]

[111] TOSLO-2014-9365, pp. 6 and 7

In summary, in a scenario where the costs for a removal will burst the limit of liability and the Swedish authority accepts that the liable person omits to remove the wreck, the liable person can limit his liability since the authority's recourse claim following the removal is subject to limitation.

3.3.4 A wreck removal order is issued, but the limit of liability will be exceeded – the person subject to the order removes the wreck

The discussion below concerns a scenario where the authority does not accept the liable person's omission and the liable person cannot limit his actions, but is bound by the obligation to remove the wreck. This scenario is opposite to the scenario in part 3.3.3. The outcome in the *Server* case corresponds to the scenario described below.

If the liable person is bound by the obligation, that person must arrange for the removal himself. When the liable person enters into a contract for a wreck removal with a wreck removal company, the remuneration pursuant to the contract must obviously be paid in full. Such claim can never be limited.[112]

This means that when the person subject to the order cannot limit his actions, but must arrange for the wreck removal himself, that person has to be prepared to bear costs in excess of the limitation amount.

Here, a comparison may be made with the Norwegian system. Under the Swedish system, the liable person shall cover claims, realized by third parties, up to the amount to which he may limit liability. In addition to these, the liable person shall cover the costs for the wreck removal. Since the liable person is not entitled to include his own expenses in the limitation fund under the Swedish system, the costs for the wreck removal will be separated from other claims following the same casualty. Potentially, the liable person will have to pay the amount for the limitation fund plus the costs for the wreck removal in full.

In Norway, the outcome will be slightly different. Under the Norwegian system, the liable person can include his own costs incurred

[112] Maritime Code, chapter 9 section 3 number 1

in connection with the wreck removal in the limitation fund.[113] Some of the wreck removal costs will then be covered by the fund and the costs in excess of the fund will therefore be reduced. The Norwegian Supreme Court referred to this possibility as a "discount" in the *Server* case.[114] However, the total liability under the Norwegian system will most probably be higher, since there is a separate higher limit of liability for wreck removal costs and other clean-up costs.

The examination above shows that if the person subject to the order must arrange for the wreck removal himself, that person will potentially have to cover costs in excess of the limitation amount. The liable person cannot limit liability in such scenario.

3.3.4.1 How is the right to limit affected when the person subject to a wreck removal order fails to comply with the order?

In a scenario, as described above in part 3.3.4, where the liable person cannot limit liability but must arrange for the removal, the liable person may be tempted to intentionally fail to comply with the order. Since the authority may be forced to remove the wreck itself in such case, the failure can be encouraged by the belief that a recourse claim will be able to limit. The question that then arises is if the liable person can rely on its right to limit liability. Does the liable person retain the right to limit a recourse claim in such case?[115]

When the liable person is bound by the obligation to remove a wreck but fails to comply with the order, questions relating to the chain of events following a casualty arise. As stated in part 3.2, it is crucial in relation to the limits of liability from which event a claim arises. A limitation amount, established in accordance with the *Maritime Code* chapter 9 section 5, applies only to those claims that have arisen from "one and

[113] Norwegian Maritime Code, section 179

[114] HR-2017-331-A, p. 19

[115] The premise for the discussion below is that the limit of liability will be exceeded if the liable person arranges for the wreck removal. Obviously, the liable person can fail to comply with a wreck removal order even in other circumstances, but these will not be discussed here.

the same" event.[116] When losses occur, it must therefore be determined if they result from the same event or if they are independent of each other.

As a starting point, the wreck removal is a consequence of the casualty causing the ship to become a wreck. All other claims arisen as a consequence of that casualty will therefore be deemed to have arisen from the same event as the wreck removal. If it would be possible to separate the failure to comply with the order from the initial casualty and regard the failure as a *new* event, claims arising out of that failure will be subject to a separate limitation amount, provided the right to limit has not been forfeited.

The question of what constitutes "one event" has been discussed on various occasions. It is not as simple as saying that if the second loss is dependent on the occurrence of the first loss, it is one and the same event. Even though a failure to comply with a wreck removal order would not be possible without the casualty, the failure as such may theoretically still be a separate event.

An important factor in case law has often been if it would have been possible to avoid the second loss. The time factor is important but not always decisive. In a comment to the British Merchant Shipping Act, it is stated that if the losses (here losses due to collisions) are the result of the same act, then those should be regarded as resulting from one and the same event.[117] Here, the main focus is the actions of the involved persons. This reasoning is in line with the decision in the Norwegian case ND 1984.129. The trawler *Tønsnes* damaged several fishing nets under a period of 70 minutes. The court decided that this has to be considered one event, since the losses all resulted from the same action: namely to set the trawl.

Conversely, under English law two events have be deemed to exist if a second loss could have been avoided if averted measures would have been taken after the first loss.[118] This way of reasoning has also been applied in Nordic cases. For example, in the Danish case ND 1971.199.

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[116] Maritime Code, chapter 9 section 5 number 4

[117] Thomas and Steel, *The Merchant Shipping Acts,* pp. 179-180

[118] Selvig, *Redaransvaret § 4 Ansvarsbegränsning Del II*, § 4.31 p. 4

The warship *Esbern Snare* collided with a trawler twice within a few minutes. The trawler sank as a consequence of the damages it suffered. The court concluded that the two collisions should be considered two separates events. The motive behind that decision was that it could not been ruled out that the trawler would have remained afloat if the warship could have avoided the second collision.

Two events have also been deemed to exist when one casualty has occurred but the losses have worsened due to a new poor decision. That decision has then been considered a new event. The arbitration award ND 1987.274 can be given as an example. The ship *Balduin* grounded and leaked bunker oil. When the leakage was stopped, the ship was taken to a repair yard. The decision to dock the damaged ship by a certain method was accompanied with several risks and did result in an additional spill. The arbitrator E. Selvig concluded that the spill occurring at the yard was primarily a consequence of the choice of docking method and not of the initial casualty. These were, therefore, deemed to be two separate events.

Common for the cases where it has been deemed to exist two separate events, the second event has resulted in additional losses. In contrary, in cases where it only has been considered to exist one event, the source of the losses is the same for all losses.

When evaluating whether a failure to comply with a wreck removal order can be separated from the initial casualty, one may look at the loss the wreck removal constitutes. The wreck removal is a consequence of the casualty. It is realized before the liable person refuses to comply with the order. Thus, the source of the loss is the casualty and not the failure to comply with the order. This suggests that the failure cannot be separated from the initial event, and the casualty and the non-compliance with the order shall be deemed to be only one event.

If it would be asserted that the failure is an event of its own, one assumes that by complying with the order the loss would not have occurred. This is not true in case of a wreck removal.[119] It is true that the authority would not have had to remove the wreck, if the liable person

[119] The failure to comply with a wreck removal order may result in other losses. Such losses may be the result of the delay the non-compliance causes, e.g. environmental

would have complied with the order. But it should not be a question of when the recourse claim was realized. The decisive factor should be when the loss was realized. The loss shall be considered realized when the casualty occurred.

Before concluding this part of the discussion, a remark may be made regarding whether it is the failure to comply with the order or the order as such that could be considered the "new event". In this thesis, the discussion is based on the presumption that the failure to comply could potentially be the new event. The reasoning behind this presumption is that the order as such is merely a way to deal with existing losses; it cannot result in any additional losses. A case of pollution may more clearly illustrate this reasoning: When the authority takes a decision to clean polluted coastlines, the costs for such clean-up efforts are considered to result from the event that caused the oil to escape. The authority's decision to clean the coastlines is not considered an event of its own. The same reasoning should probably be applied in a case of a wreck removal.

If the failure to comply with the order would be an event on its own, it would be rather easy to claim that the liable person has forfeited the right to limit liability for the recourse claim. The failure would probably constitute such grossly negligent act as referred to in the *Maritime Code* chapter 9 section 4. The result would be that claims, including the claim for the wreck removal, arising out of the failure to comply, would not be subject to limitation. On the other hand, if the conclusion is that the failure cannot be separated from the initial event and there is only one event, does that lead to a situation where the liable person retains the right to limit liability?

The casualty may have been caused without any intent or gross negligence. As a starting point, the right to limit claims arising out of the casualty is therefore retained. In order to take away the liable person's right to limit a recourse claim following the authority's removal of the wreck, it must be possible to attach blame at a later stage in the chain of

damages may worsen or the number of ships for which the wreck is an obstruction increases. Hence, those losses may be considered to have resulted from a *new* event.

events. It must be possible to isolated a particular event, here the failure to comply, and then evaluated that event on the same premises as the casualty, in terms of blame. It shall be noted that if this is allowed, the liable person will only lose the right to limit the recourse claim for the removal, but will retain the right to limit other claims which are not connected to the failure to comply with the order.

However, whether this can be done is uncertain. The problem was not discussed in the *Server* case, but it was touched upon in a comment by the fund administrator. The fund administrator claimed that the if the authority decided to remove the wreck after the liable person had failed to do so, the recourse claim would still be able to limit.[120] His conclusion may be logical in view of the discussion above: it is a claim arising out of the initial casualty.

However, Falkanger and Bull state that this conclusion may be "disputable".[121] The statement of the fund administrator raises, undoubtedly, a dilemma. Shall the liable person achieve benefits by intentionally not complying with the wreck removal order? The liable person can clearly not limit liability when he arranges for the wreck removal himself. If he may do so when a recourse claim is directed against him following a non-compliance with the order, an undesirable situation has arisen.

The way the rules on limitation is phrased does not really support that the chain of events is broken down and that an isolated event is evaluated separately. If it is not possible to evaluate the question of blame only for the failure to comply, it should be difficult to deny the liable person the right to limit liability for the recourse claim even though he has intentionally failed to comply with the wreck removal order.

[120] Falkanger and Bull, *Sjørett,* p. 214. The fund administrator suggested that, even though the recourse claim could be limited, the authority could take punitive measures, e.g. impose fines.

[121] Ibid. The Norwegian word "diskutabelt" is used.

3.3.5 The Swedish approach when the person subject to the order faces liability in excess of the limitation amount

The discussion below aims to see which of the scenarios examined in part 3.3.3 and part 3.3.4 is the most probable outcome under Swedish jurisdiction. Does Swedish law support a solution where Swedish authorities accept that the liable person omits to comply with the order and remove the wreck themselves? Or will the person subject to an order be bound by the obligation to remove the wreck even though the limit of liability will be exceeded?

Sweden does not have any history of cases similar to *Server.* Therefore, it is uncertain how a similar case would be addressed in Sweden. The question boils down to whether the right to limit liability is superior to the liable person's obligation to comply with a wreck removal order.

The question has been touched upon in the preparatory work to the new chapter 11a *On liability for wrecks* in the *Maritime Code*.[122] A premise of this chapter is that the rules on limitation of liability, i.e. chapter 9 of the Code, will apply to the shipowner's liability for a wreck.[123] When discussing what economic consequences the new regulations could have on the shipping industry and here specifically on insurance premiums, it was pointed out that, since the right to limit liability will be kept, the raise of premiums will be insignificant if any.[124] It will be explicitly stated in the text of the Code, chapter 11a section 23 paragraph 2, that the liability of the insurer shall never exceed the limitation amount pursuant to chapter 9 section 5.

Further, the preparatory work states that the competent authority may have to bear parts of the costs for a wreck removal or for other actions taken in accordance with chapter 11a. According to the preparatory work, the authority may have to do so when the costs for the removal exceed the amount to which the shipowner is entitled to limit his liability.[125]

122 *See* Prop. 2016/17:178

123 Maritime Code, chapter 11a section 18

124 Prop. 2016/17:178, p. 50

125 Ibid., p. 51

This should mean that if the shipowner would incur costs in excess of his limitation amount in connection with a wreck removal, those should be covered by the authority. It indicates that the right to limit shall be upheld. The result of this should then be that a shipowner, when the wreck removal risks to burst the limit of his liability, may limit his actions and await an agreement with the authority allocating the exceeding expenses.

The conclusion of these statements should be that when a wreck removal order will be based on the *Maritime Code* chapter 11a, the right to limit is superior to the liable person's obligation to comply with the order.

What is now said is based on the preparatory work to a piece of legislation which is not yet entered into force. Whether the same applies to a situation where the wreck removal order is issued on the basis of some of the other acts, is unclear.

The preparatory work to the *Maritime Code* chapter 9 *On Limitation of Liability* does not discuss what possible effects an obligation to comply with an order may have on the right to limit liability. However, it was discussed whether Sweden should make a reservation according to article 18 of LLMC 1976.[126] The recommendation was not to exclude claims arising after a wreck removal from the Swedish limitation regime. According to the preparatory work, there were no rules concerning an obligation to remove a wreck in Swedish waters at the implementation of the new rules on limitation of liability.[127] It was stated that even if such rules would be implemented in the future, there should be no reason to distinguish claims for wreck removals.[128] This suggests that the right to limit liability is absolute. A person's right to limit shall not be dependent on the type of damage he has caused; a claim in respect of a wreck removal shall not be treated differently than any other claim.

[126] LLMC 1976 article 18 gives any state the right to exclude article 2 (1)(d) (claims in respect of wreck removals) from the national limitation of liability regime.

[127] Prop. 1982/83:159, p. 61. This statement probably refers to the fact that there was no strict liability for wrecks in Swedish waters. A wreck removal order would probably have been supported by the predecessor of the *Environmental Code* (i.e. *Naturvårdslagen (1964:822)*) where the concept of litter was already included or by the predecessor of the *Act on Measures taken against pollution from vessels* (i.e. *Lag (1980:424) om åtgärder mot vattenförorening från fartyg*).

[128] Prop. 1982/83:159, p. 61

The question whether Sweden should make a reservation according to article 18 of LLMC 1976, has been discussed on numerous occasions.[129] But the conclusion has consistently been that such reservation could not be deemed necessary. It is argued that since there is no evidence that the compensations have been significantly reduced due to the rules on limitation, there is no reason to exclude claims for wreck removals from the Swedish limitation regime.[130]

The discussions on whether Sweden shall make a reservation according to article 18 do not answer the question of how the right to limit liability is affected by an authority's order. But they tell something about the Swedish approach to the rules on limitation, and specifically in connection with a wreck removal. It has been decided not to distinguish claims following a wreck removal from other claims, even though it has been acknowledged that wreck removal claims can be extensive.[131]

The Swedish approach seems to be that wreck removal claims shall be treated in the same way as other claims. The focus is not on the type of claim, but on the liable person's right to limit. This may suggest that the authority will bear costs in excess of the amount to which the liable person may limit liability when the circumstances so require.

Lastly, there should be little support for the Norwegian approach in the *Server* case in Swedish legislation. The liable person should not be bound by the obligation to remove the wreck when the costs will be in excess of the limitation amount. The right to limit should be upheld.

3.4 Summary remarks

The examination of the Swedish rules on limitation shows that the person subject to a wreck removal order, i.e. the *redare* or the shipowner, is entitled to limit liability. As a starting point, a claim for a wreck removal

[129] Prop. 1982/83:159, p. 61, Prop. 2003/04:79, pp. 21-22, Prop. 2012/13:81, p. 35 and Prop. 2016/17:178, pp. 40-41

[130] Prop. 1982/83:159, p. 61, Prop. 2003/04:79, p. 22, Prop. 2012/13:81, p. 35 and Prop. 2016/17:178, p. 40

[131] Prop. 2003/04:79, p. 22

may be limited. The amount to which the liable person may limit liability for a wreck removal under the Swedish system is low in relation to the Norwegian limits.

The discussions in part 3.3, show that the outcome, in terms of limitation of liability, will depend on who removes the wreck. If the authority removes the wreck, both before and after an order has been issued, the liable person may limit such recourse claim. If the liable person must arrange for the removal himself, the liability cannot be limited.

It is not entirely clear which of these scenarios that is the most probable solution under Swedish jurisdiction. Assuming that the Swedish courts reach the same conclusion as the Norwegian courts did in the *Server* case, one may be faced with the problematic situation where the liable person could obtain benefits by intentionally failing to comply with the obligation to remove the wreck. As the legal position seems to appear today, it may be difficult to take away the liable person's right to limit liability for a recourse claim which the authority may direct against the liable person in such case.

However, based on discussions when these issues have been touched upon in Sweden, it may be assumed that the right to limit will be upheld and that Swedish authorities will cover costs in excess of the liable person's limitation amount. There seems to be a general protection of the right to limit in Sweden.

4 The insurance element

4.1 Introduction

A wreck removal can be a very costly operation and may imply a large economic burden on the person liable for a wreck. To what extent is dependent on whether that person is entitled to limit liability or not.

Regardless, the person subject to an obligation to remove a wreck is often in need of an insurance that will cover such expenses.

Part 4 aims to clarify if the costs for the removal of a wreck in Swedish waters are covered by an insurance. The main purpose is to examine what insurance covers such removals and on what conditions. In addition, the intention of this part is to see what the consequences may be if the liable person loses the right to limit liability under Swedish jurisdiction. Part 4 is concluded with some summary remarks.

First, however, a brief presentation of the rules on compulsory insurance that apply to certain ships sailing in Swedish waters is given.

4.2 Requirement to maintain insurance

Through the European Parliament's Directive 2009/20/EC, rules on compulsory insurance were included in the Swedish *Maritime Code* in 2012. Chapter 7 section 2 of the Code contains a requirement on a *redare* of a Swedish ship of 300 gross tonnage or more to maintain insurance. The insurance requirement also applies to a *redare* of a foreign ship of 300 gross tonnage or more, when such ship arrives or departs from a port or a place of anchorage within Swedish territory.[132] It does not apply to foreign ships which only conduct passage through Swedish territorial waters.[133]

The insurance shall cover such liability as may be limited pursuant to the *Maritime Code* chapter 9 sections 1 to 4.[134] As shown in part 3 of this thesis, claims for a wreck removal may, as a starting point, be limited pursuant to chapter 9 section 2. Hence, the compulsory insurance shall cover such liability. The compulsory insurance shall cover liabilities up to an amount equal to the limits of liability calculated in accordance with chapter 9 section 5 of the Code.[135]

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[132] Maritime Code, chapter 7 section 2 paragraph 2

[133] However, since this is an EU Directive that shall be enforced by all EU states, there is great possibility that ships trading in Europe are subject to this insurance requirement. Norway, as an EEA state, has also enforced this requirement, *see* Norwegian Maritime Code section 182a.

[134] Maritime Code, chapter 7 section 2 paragraph 1

[135] Ibid.

When chapter 11a *On Liability for Wrecks* enters into force, a requirement to maintain insurance covering specifically wreck removal will be included in the *Maritime Code*. The insurance shall cover liability arising under chapter 11a section 16 up to the limitation amount stated in chapter 9 section 5 of the Code.[136] The requirement to maintain such insurance applies to the same ships as the general requirement under chapter 7 section 2.[137]

The requirement to maintain insurance under chapter 11a differs from the general requirement under chapter 7, mainly in two ways. First, the requirement is directed to the shipowner instead of the *redare*. Second, chapter 11a section 23 includes the right of direct actions against the insurer. This right is not included in chapter 7. On these issues, the insurance requirement under chapter 11a corresponds to the requirements on compulsory insurance given in chapter 10 *On Liability for Oil Damage* and chapter 10a *On Liability for Bunker Oil Damage* of the Code.

4.3 Insurance covering wreck removal

A ship's normal insurance cover can be divided into two main insurances: a Hull insurance and a Protection and Indemnity (P&I) insurance. The Hull insurance is foremost a property insurance and does have a very limited element of liability cover.[138]

The P&I insurance is a liability insurance. The leading P&I insurers name risks and losses covered under the insurance. Wreck removal is one of the named losses. Due to the Pooling Agreement between the P&I insurers in the *International Group*[139], the phrasing of their wreck removal clauses corresponds to a great extent. Here, Gard rule 40a is given as an example:

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136 Ibid., chapter 11a section 20

137 Ibid., chapter 11a sections 20 and 21

138 *See further* part 4.3.1

139 The International Group is a group of 13 P&I Clubs, which together insure 90% of the world's ocean-going tonnage.

> The Association shall cover costs and expenses relating to the raising, removal, destruction, lighting and marking of the Ship or of the wreck of the Ship or parts thereof or of its cargo lost as a result of a casualty, when such raising, removal, destruction, lighting and marking is compulsory by law or the costs or expenses thereof are legally recoverable from the Member.

All P&I insurers set the requirement that the removal must be "compulsory by law" or that the costs for such removal are "legally recoverable from the Member". "[C]ompulsory by law" should mean that the assured must be subject to an obligation to remove the wreck. Part 2 of this thesis shows on what conditions Swedish authorities may impose such obligation on a shipowner or on a *redare*. In short terms, the assured may be subject to an obligation to remove a wreck when the wreck poses an environmental hazard, is considered litter or obstructs a public port.[140]

"[L]egally recoverable from the Member" means that in order for the compensation under the P&I insurance to come into effect, the party that removes the wreck must have a legally valid claim against the assured. This condition is applicable when someone other than the assured arranges for the wreck removal. Costs for actions taken by a Swedish authority with the legal support in any of the examined acts under part 2.3 – 2.5, are, as shown, legally recoverable from the liable person. Thus, if a Swedish authority claims reimbursement of the expenses for its removal of a wreck, the assured will normally get those covered by its P&I insurer.

It should not matter whether the order necessitates the complete removal of a wreck or a mere elimination of a hazard. "[R]aising, removal, destruction […] of the wreck of the Ship or parts thereof or of its cargo" should encompass all those measures that may be necessary according to the obligation. The insurer and the assured agree with the authorities on what actions that eventually are necessary to take in order to fulfil

[140] When Maritime Code chapter 11a enters into force more types of wrecks can be subject to a wreck removal order, *see* part 2.5.

the order.[141] The insurance will cover those costs necessary to comply with the wreck removal order.[142]

When it comes to the performance of the wreck removal operation, it is in the interest of the insurer to have an active role in such operation. Particularly since it is often associated with high costs. The P&I insurer generally prefers to retain control over the wreck removal, rather than leaving it to the authority.[143] The insurer often assists when negotiating the terms of the wreck removal contract.[144] Some insurers even require that the contract is approved by them.[145] This is to avoid that the assured incurs liability in excess of what is necessary. If the assured disregards the insurer's advices or in any other way seriously delays or complicates the removal, the cover may be jeopardized.[146]

4.3.1 Collision causes the ship to become a wreck

As a starting point, the removal is covered by the P&I insurance of the ship which became a wreck. However, the cover may be slightly different if the ship has become a wreck as a result of a collision. If the "other ship"[147] is to blame for the collision, that ship and its insurances shall cover parts of the costs for the wreck removal.[148] To what extent will depend on the proportion of blame that can be attached to the other ship.

Due to historical reasons, Hull insurances normally include an element of collision liability.[149]

141 Personal correspondence with J. Kahlmeter (Area Manager) and M. Birgersson (Senior Claims Executive), The Swedish Club Gothenburg.

142 Williams, *Gard Guidance to the Rules*, p. 298

143 Williams, *Gard Guidance on Maritime Claims and Insurance,* p. 354

144 Williams, *Gard Guidance to the Rules*, p. 298

145 The Swedish Club, rule 10 section 2. *See also* The Swedish Club, *P&I Rules and Exceptions 2012,* p. 230

146 Gard rule 82(2)(a), The Swedish Club rule 10 section 4

147 The "other ship" is intended to mean the ship, which the ship that becomes wreck has collided with.

148 *See for example* Maritime Code, chapter 8 section 1

149 In cases where the other ship's Hull insurance does not include this element of collision liability or if that liability is limited in another way, such liability is covered by the other ship's P&I insurance, *see* NMIP Commentary p. 312.

Liability for a wreck removal is a kind of liability that may arise after a collision. Provided that the other ship's Hull insurance is based on Nordic hull conditions, that insurance will cover liability for the wreck removal of the ship which the other ship collides with.

The other ship's Hull insurance will cover collision liability up to an amount equal to the sum insured under its insurance contract.[150] If the liability for the wreck removal exceeds that amount, so called excess collision liability, the exceeding part will be covered by the other ship's P&I insurance.[151]

Even though another ship is to blame for a collision, the actual wreck removal is often handled by the P&I insurer of the ship which became a wreck.[152] The final settlement between the parties is done after the wreck removal has been performed.[153]

At last, it shall be noted that under Nordic hull conditions, the collision liability does not only cover a recourse claim from a party with an interest in the wreck. If the Swedish authority removes the wreck and then directs a claim for the wreck removal directly against the other ship, the other ship's hull insurer shall cover such liability as well.[154]

4.3.2 The relationship between the wreck's Hull insurance and its P&I insurance

There is no prerequisite for the wreck removal cover under the P&I insurance, that the ship is a total loss under its Hull insurance.[155] However,

150 NMIP, clause 13-1 sub-clause 1 and clause 13-3

151 Gard rule 36(b), The Swedish Club rule 7 section 2(b). If the other ship has a Hull interest insurance based on Nordic conditions as well, some part of the liability in excess is covered by that interest insurance, NMIP clause 14-1(b).

152 Personal correspondence with J. Kahlmeter (Area Manager) and M. Birgersson (Senior Claims Executive), The Swedish Club Gothenburg.

153 This thesis will not discuss how the final settlement between the parties is calculated. The other ship may be entitled to limit the collision liability and the outcome will partly depend on whether single or cross liability principle is used. *For further reading see* Wilhelmsen and Bull, *Handbook on Hull insurance,* chapter 11.

154 Brækhus and Rein, *Håndbok i Kaskoforsikring,* p. 543

155 Personal correspondence with J. Kahlmeter (Area Manager) and M. Birgersson (Senior Claims Executive), The Swedish Club Gothenburg.

if actions like "raising" and "removal" are performed to a ship which is not yet a total loss, those actions will most probably be considered a salvage operation. Salvage is a measure taken to minimise or avert loss of a ship and those costs are therefore covered by the Hull insurance.[156] A salvage operation is usually performed on the premise "no cure – no pay".[157] This means that when the value of the ship is lost, i.e. it is a total loss, the salvage operation is terminated. If the ship then needs to be removed, that operation should be considered a wreck removal.

When a ship is declared a total loss under its Hull insurance, the hull insurer pays a total loss compensation to the assured. By paying this, the hull insurer is subrogated to the rights in the ship.[158] This means that the ownership is transferred to the hull insurer. However, this right can be waived.[159] This is normally done in cases where the costs for the removal are expected to exceed the value of the wreck. When the hull insurer waives this right, the ownership remains with the assured.

If the hull insurer does not waive this right but acquires title to the wreck, the assured's P&I cover is no longer available.[160] The hull insurer will then be liable for the removal of the wreck. However, it shall be noted that some obligations to remove a wreck are based on pieces of legislations that hold only the person owning the ship at the time of the casualty liable for the wreck removal.[161] In such cases the assured will remain liable and the P&I insurer will then have to cover the costs for the removal.[162]

4.4 When the assured's right to limit liability is lost

As discussed in part 3 of this thesis, the liable person may lose the right to limit liability for a wreck removal under certain circumstances when

156 NMIP, clause 4-7
157 Falkanger and Bull, *Sjørett,* pp. 486–487
158 NMIP, clause 5-19
159 Ibid.
160 Gard rule 40(i), The Swedish Club rule 7 section 5
161 This will be the case in the new chapter 11a of the Maritime Code.
162 Williams, *Gard Guidance to the Rules*, p. 301

Swedish jurisdiction governs the right to limit liability. Firstly, the right is lost if the casualty is caused intentionally or by gross negligence.[163] In such situation, the assured may have lost its right to insurance cover as well. The insurance conditions exclude losses caused by *wilful misconduct* on the part of the assured.[164] However, in some cases, the question of culpa may be evaluated differently from the perspective of the insurer. For example, it may differ how the question of identification between the assured and his servants is judged under the insurance compared to Swedish jurisdiction. Therefore, the assured may be entitled to insurance compensation even though the right to limit liability is lost.

Secondly, the right to limit liability may be lost if it is concluded that a liable person is bound by its obligation to remove the wreck even though the limit of liability will be exceeded.[165] In such scenario, there should be little room for the insurer to avoid liability. The assured shall retain the right to compensation under the P&I insurance.

When the assured loses the right to limit, but is still entitled to insurance compensation, the insurer's liability may potentially exceed the assured's limitation amount. Generally, the compensation under the P&I insurance shall not exceed the amount to which the assured may limit liability.[166] However, this is only applicable *when* the assured is entitled to limit liability.[167] If the right to limit liability is lost for any reason but the assured is still entitled to compensation under the insurance, the insurer's liability is unlimited.[168] P&I insurance does not have, like Hull insurance, a sum insured which limits the insurer's liability.

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163 Maritime Code, chapter 9 section 4

164 Gard rule 72. *See also* The Swedish Club rule 11 section 1

165 *See* the discussion in part 3.3. This was the result of the ruling in the *Server* case.

166 Gold, *Gard Handbook on P&I insurance*, p. 506

167 Gard rule 51, The Swedish Club rule 2

168 Gold, *Gard Handbook on P&I insurance*, p. 114. In theory, there is an upper limit. This limit is decided by the International Group's collected capacity, *see further* Gold, *Gard Handbook on P&I insurance*, p. 118

4.5 Summary remarks

If a ship becomes a wreck in Swedish waters and the wreck must be removed, costs for the removal are, as a starting point, covered by the ship's P&I insurance. Due to the requirement to maintain insurance which applies to Swedish ships and to foreign ships trading on Swedish ports above 300 gross tonnage, there is a great probability that the ship has an insurance covering this liability.

In cases where the assured loses the right to limit liability without having forfeited the right to insurance compensation, the cover under the insurance is not affected. The P&I insurer will cover such unlimited liability.

5 Concluding remarks

The aim of this thesis was to answer the question: when is a person liable, and to what extent is that person liable, when a ship becomes a wreck in Swedish waters?

The examination of the Swedish legislation within the area of wreck removals shows that the legislation is somewhat fragmented today. Which piece of legislation that is applicable depends on the kind of concern the wreck constitutes. The environmental aspect must be deemed to be well covered by the *Act on Measures taken against pollution from vessels* and the *Environmental Code*. But when it comes to wrecks which obstruct activities at sea, there is a gap in the Swedish legislation. The only possibility to hold a *redare* or a shipowner liable today, is if the wreck is located within a public port.

However, when Sweden ratifies the Nairobi Convention and the new chapter 11a in the *Maritime Code* enters into force, this gap will probably be filled. The new rules seem to provide an overarching regime for the removal of wrecks in Sweden. These new rules should be welcome improvements of the Swedish legal ability to handle wrecks. How effec-

tive these new rules will be, will partly depend on how the competent authority deals with its new role. Some question marks concerning its competence within the area of wrecks may be raised.

Concerning the right to limit liability for a wreck removal, the Swedish approach seems to be that the right to limit shall be upheld even though the liable person is subject to a wreck removal order. By upholding the right to limit, Sweden must accept to bear costs in excess of the liable person's limitation amount. Sometimes those may be extensive.

On the other hand, the value of upholding the right to limit is that the idea of the rules on limitation of liability is guarded. It is often said that the rationale behind the limitation regimes is that the *redare* and the shipowners shall be able to insure their activities to reasonable premiums. If the right to limit is not upheld, that right risks to be undermined which potentially may weaken the insurance cover of the ships sailing in our waters. From this perspective, the Swedish approach is logic and sound.

The questions that have been raised in this thesis and which not have been able to answer in full, will probably remain unanswered until Sweden is faced with a real case on these issues. Sweden has luckily been spared from severe accidents in its waters, but unfortunately it is often not until those occur that the gaps in the legislation are revealed.

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International Conventions

LLMC 1976	Convention on Limitation of Liability for Maritime Claims, 1976
Nairobi Convention	Nairobi International Convention on the Removal of Wrecks, 2007
Protocol of 1996	Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976

Statutes

Sweden

Act concerning the Territorial Waters of Sweden	Lag (1966:374) om Sveriges sjöterritorium
Act on Measures taken against pollution from vessels*	Lag (1980:424) om åtgärder mot förorening från fartyg
Act on the Removal of vessels in public port*	Lag (1986:371) om flyttning av fartyg i allmän hamn
Environmental Code	Miljöbalk (1998:808), English version: Ds 2000:61
Maritime Code	Sjölag (1994:1009)
Ordinance on Measures taken against pollution from vessels*	Förordning (1980:789) om åtgärder mot förorening från fartyg
Ordinance on Removal of wrecks obstructing shipping and fishing activities*	Förordning (2011:658) om undanröjande av vrak som hindrar sjöfart eller fiske
SFS 2008:127, Ordinance on changes in the Ordinance on Measures taken against pollution from vessels*	Förordning om ändring i förordningen (1980:789) om åtgärder mot förorening från fartyg

* *Non-official translations*

Norway

Norwegian Maritime Code	Lov 24. Juni 1994 nr. 39 om sjøfarten
Norwegian Pollution Control Act	Lov 13. mars 1981 nr. 6 om vern mot forurensninger og om avfall

European Union

Directive 2009/20/EC	Directive 2009/20/EC, of the European Parliament and of the Council, of 23 April 2009, on the insurance of shipowners for maritime claims

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Prop. 2006/07:95	Proposition Ett utvidgat miljöansvar
Prop. 2012/2013:81	Proposition Skadeståndsansvar för oljeskador till sjöss
Prop. 2016/17:178	Proposition Skärpt ansvar för fartygsvrak
SOU 1975:81	Utredning Farliga Vrak

Norway

NOU 2002:15	Ansvar for oppryddingstiltak etter sjøulykker
Ot.prp.nr.79 (2004–2005)	Om lov om endringar i lov 24. juni 1994 nr. 39 om sjøfarten (sjøloven) (ansvar for oppryddingstiltak etter sjøulukker m.m.)

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MÖD 2014:41 (*Sundland*)	Environmental Court of Appeal (Mark- och miljööverdomstolen)
ND 1997.53 (*Opus*)	The Administrative Court of Appeal (Kammarrätten) Jönköping
NJA 1976 p. 547	The Supreme Court
NJA 1986 p. 546	The Supreme Court
RH 1990:17	The Court of Appeal for Western Sweden
RÅ 1964 Jo 23	The Supreme Administrative Court (Regeringsrätten)
RÅ 1968 Jo 14	The Supreme Administrative Court (Regeringsrätten)
RÅ 1983 2:60 (*Sefir*)	The Supreme Administrative Court (Regeringsrätten)
RÅ 1984 2:58	The Supreme Administrative Court (Regeringsrätten)
RÅ 1993 ref. 41	The Supreme Administrative Court (Regeringsrätten)

Nordic

HR-2017-331-A (*Server*)	The Norwegian Supreme Court
LB-2015-54634 (*Server*)	Borgarting Court of Appeal (Norway)
ND 1971.199 (*Esbern Snare*)	The Danish Maritime and Commercial High Court
ND 1984.129 (*Tønsnes*)	The Norwegian Supreme Court
ND 1987.274 (*Balduin*)	Norwegian Arbitration award
TOSLO-2014-9365 (*Server*)	Oslo District Court (Norway)

Insurance Conditions and Commentaries

Gard	Gard Rules 2017, P&I
NMIP	The Nordic Marine Insurance Plan of 2013, version 2016
NMIP, Commentary	The Nordic Marine Insurance Plan of 2013, version 2016, Commentary
The Swedish Club	The Swedish Club Rules, Rules for P&I Insurance 2017/18
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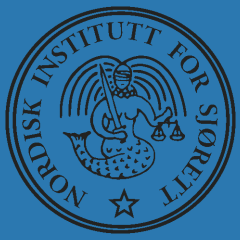

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