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Content overview

Editor's Preface

The Institute's Yearbook aims at giving a representative picture of the activities and areas of law in which the Institute is involved, which is achieved through contributions by its own staff as well as those of external connections. This is so also this year.

We have two welcomed contributions from Finland: Felix Collin's article on product liability pertaining to autonomous ships, and Lauri Railas' article providing some overriding observations on English and Nordic legal traditions.

The remaining articles are by the Institute's staff:

Thor Falkanger's article, covering a core area of maritime and transport law; an analysis of a recent Norwegian Supreme Court case on stoppage in transit. Trond Solvang's article, tentatively introducing some legal philosophical topics into the area of autonomous ships and technological development. Trine-Lise Wilhelmsen's two articles on marine insurance, the first discussing insurability of ships being the subject of foreign state intervention; the other discussing loss of hire insurance when the ship which is off-hire is substituted by another ship. Hans Jacob Bull's article, presenting and discussing the Norwegian insurance and compensation schemes on damage caused by natural phenomena. Finally, Henrik Bjørnebye's article – representing the Institute's petroleum and energy law department – discussing the impact of the EU´s third energy market package on national energy sovereignty; the so-called 'ACER-debate'.

Trond Solvang

Maritime Product Liability at the Dawn of Unmanned Ships – the Finnish Perspective*

Felix Collin[1]

* Peer-reviewed article.

1 PhD Candidate, Faculty of Law, University of Turku. The study has been conducted within the Advanced Autonomous Waterborne Applications Initiative (AAWA) project funded by the Finnish Funding Agency for Innovation Tekes (now known as Business Finland). The author wishes to thank Mika Viljanen, Henrik Ringbom, and Lasse Collin for their valuable comments on earlier drafts. In addition, the author is grateful to the anonymous reviewer whose comments helped to improve the manuscript. Any views expressed in this study are solely those of the author. An earlier version of this article has been published in UTULAW Research Paper Series 2/2018.

Contents

Abstract

The development of unmanned ships has raised the question of whether product liability could end up having a more central role in shipping in the future. This article aims to conceptualise the Finnish product liability framework in shipping and explore its impacts on unmanned shipping. On the one hand, the article argues that product liability rules could already be applied today to many shipping accidents, but the absence of case law indicates that there has usually been no need to make use of them. On the other hand, the article argues that unmanned ships will lead to an increasing number of cases where aggrieved parties can invoke the product liability rules, but it remains unlikely that unmanned ships could drastically affect the position of the Finnish Maritime Code as being the most common approach to seeking compensation, unless the liability rules are significantly changed. However, recourse actions may become significantly more common, which highlights the importance of contractually defining how liability between shipowners, shipyards, and component manufacturers is ultimately allocated.

1 Introduction

'This is happening. It's not if, it's when. The technologies needed to make remote and autonomous ships a reality exists.' So said Rolls-Royce Vice President of Marine Innovation Oskar Levander at the Autonomous Ship Technology Symposium 2016.[1] Indeed, sophisticated technologies seem to be proliferating both on land, at sea, and in the air. Technological development has been most visible in road traffic, where several companies have already tested their self-driving car prototypes.[2] However, the same transformation is also underway in seafaring. Several companies are developing technologies that will make ships less crew dependent and—eventually—allow shipowners to operate vessels without having a crew on board at all.[3] Furthermore, this transition may happen sooner than many expect: several countries have already opened test areas where new technologies can be tested,[4] and the International Maritime Organization (IMO) has began to explore how unmanned ships could be addressed in IMO instruments.[5] The most optimistic technology suppliers expect that the commercial use of unmanned ships will begin during the 2020s.[6]

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1 See American Shipper, 'AAWA lays out vision for autonomous shipping' (27 June 2016) <http://www.americanshipper.com/main/news/aawa-lays-out-vision-for-autonomous-shipping-64477.aspx> accessed 12 March 2018.

2 See e.g. Financial Times, 'Waymo builds big lead in self-driving car testing' (14 February 2019) <https://www.ft.com/content/7c8e1d02-2ff2-11e9-8744-e7016697f225> accessed 1 March 2019.

3 See 'Global Marine Technology Trends 2030: Autonomous Systems' (Lloyd's Register; QinetiQ; University of Southampton 2017), p. 6.

4 At least Finland, Norway, and China have already created areas where unmanned ships can be tested. See SAFETY4SEA 'China builds Asia's first autonomous ship test area' (12 February 2018) <https://safety4sea.com/china-builds-asias-first-autonomous-ship-test-area/> accessed 7 April 2018.

5 See 'IMO takes first steps to address autonomous ships' (25 May 2018) <http://www.imo.org/en/mediacentre/pressbriefings/pages/08-msc-99-mass-scoping.aspx> accessed 28 February 2019.

6 See Oskar Levander, 'Autonomous ships on the high seas' (2017) 54 IEEE Spectrum 2, p. 31.

Because unmanned ships will have no crew on board, they will rely heavily on technical equipment, such as communication systems, sensors, and software.[7] Consequently, it is often wondered to what extent the parties who develop unmanned ships could—or should—be liable if an unmanned ship causes an accident, due to a technical failure. The question has, however, no easy answer. At least in the Nordic countries, product liability has played a very limited role in shipping, and legal scholars have most often bypassed product liability questions entirely. The main exception that can be cited is *Ulfbeck's* article from 2006.[8] Thus, before it is even reasonable to discuss whether product liability rules *should* be somehow changed due to unmanned ships, it is first necessary to explore the rules that already exist.

In manned shipping, liability for shipping accidents is usually determined according to the rules of shipowner's liability.[9] This situation arises from obvious reasons: shipping accidents are often caused by errors made by the master and crew, and even if the cause of an accident is a technical failure, the question is usually whether the shipowner has e.g. failed to maintain the vessel properly. In Nordic case law, courts have sometimes imposed very strict requirements on the standard of care that shipowners must follow,[10] and sometimes shipowners have even been held strictly liable if the root cause of an accident has been a technical failure.[11] Consequently, aggrieved parties usually have no need to invoke product liability rules if a manned ship causes an accident.

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7 See 'Global Marine Technology Trends 2030: Autonomous Systems', pp. 6–22.

8 See Vibe Ulfbeck, 'Maritime Product Liability' in *SIMPLY 2006 — Scandinavian Institute of Maritime Law Yearbook* (Sjørettsfondet 2007), pp. 65–79.

9 The definition of 'shipowner' slightly differs depending on the jurisdiction discussed. Under the Nordic maritime codes, the shipowner is most often the person who runs the vessel on his own account (in Finnish: 'laivanisäntä'; in Swedish: 'redare'; in Norwegian: 'reder' or 'rederi'). Most typically this person is the owner of the ship, but it may also be e.g. a bareboat charterer. See Thor Falkanger, Hans Jacob Bull, and Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (4th edn, Universitetsforlaget 2017), pp. 164–169. For the sake of simplicity, it is assumed in this study that the same person both owns and operates the vessel, and this person is called 'the shipowner'.

10 See e.g. ND 1995.163 DSC BRAVUR.

11 See ND 1921.401 NEPTUN and ND 1952.320 SOKRATES. However, it is important to note that both cases concerned Norwegian law. In Norway, courts have been

Nevertheless, the introduction of unmanned ships may change the status quo. Because an unmanned ship has no crew on board, the shipowner must rely on technical equipment more than ever before. Of course, human errors may still occur: humans may commit navigational errors if the vessel is meant to be remotely controlled, and even if the vessel is meant to act autonomously, the shipowner may still fail to maintain the vessel properly.[12] However, it is far from clear to what extent the current shipowner's liability rules would hold shipowners liable if the cause of accident is e.g. an algorithmic failure. In practice, the shipowner's possibilities for ensuring that algorithms function as they should are very limited, and in many cases the shipowner may just have to trust that an unmanned ship is as safe to use as its technology suppliers claim.[13] More importantly, this problem concerns all kinds of unmanned ships, no matter how they are meant to be operated. Basically, remote control is only possible as far as remote connection exists *and* the ship is following the orders that the human is giving. In other words, even a ship that is meant to be under remote control will have to survive on her own if the

significantly more willing to develop strict liability rules via case law than courts in the other Nordic countries have been. See Viggo Hagstrøm and Are Stenvik, *Erstatningsrett* (Universitetsforlaget 2015), pp. 146–147. Moreover, the exact scope of strict liability in maritime law seems to be unclear even in Norway. See e.g. Trond Solvang, 'Rederiorganisering og ansvar — rettslige utviklingstrekk' (2017) 484 MarIus, pp. 53–66 and Falkanger, Bull, and Brautaset, p. 193 and pp. 283–284.

12 As Wróbel, Montewka, and Kujala conclude, the possibility for human errors will exist 'as long as people are involved in either design or the operations themselves, in other words: forever'. See Krzysztof Wróbel, Jakub Montewka, and Pentti Kujala, 'Towards the assessment of potential impact of unmanned vessels on maritime transportation safety' (2017) 165 Reliability Engineering & System Safety, p. 164.

13 Shipowner's possibilities for detecting software bugs are limited due to several reasons. Besides the fact that software programming usually goes beyond the shipowner's own expertise, shipowners do not necessarily have access to the software's source code. In addition, revealing all existing software bugs is practically impossible even to software developers themselves, at least when sophisticated systems are being considered. As computing pioneer *Edsger W. Dijkstra* wrote already back in 1974, 'testing can be used very convincingly to show the presence of bugs, but never to demonstrate their absence, because the number of cases one can actually try is absolutely negligible compared with the possible number of cases'. See Edsger W. Dijkstra, 'Programming as a Discipline of Mathematical Nature', (1974) 81 The American Mathematical Monthly 6, p. 609.

possibility for remote control is suddenly lost.[14] This fact, in turn, gives more space for thought as to whether aggrieved parties could invoke product liability rules instead—or in addition to—shipowner's liability rules, if a ship is operated without having a crew on board.[15]

The main objective of this study is to conceptualise the product liability framework in shipping and to discuss its implications in the context of unmanned ships. On the one hand, the idea is to show that even if aggrieved parties have usually had no need to invoke the product liability rules in manned shipping, these rules could already see use in many shipping accidents today. On the other hand, the study will analyse whether it is realistic to suppose that unmanned ships will make product liability litigation more common in shipping, even if no legislative changes are made. The question of whether either the shipowner's liability rules or the product liability rules *should* be changed is left outside the scope of this study. Moreover, the study is limited to third party losses only; liability for damage caused to a ship itself will not be discussed. The study will focus on Finnish law in particular, but the results may obviously be valuable in the other jurisdictions as well, especially where the national rules are based on EU law.

In Finland, the product liability framework is relatively fragmented. The most important source of law is the Finnish Product Liability Act (694/1990) which is based on the EU Product Liability Directive.[16]

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[14] Of course, it can be argued that a problem in remote control should cause no major problems if the ship is able to maintain her current position and wait until a human reaches the vessel. In reality, however, the situation is more complicated. Imagine an unmanned ship sailing in bad weather in the middle of a congested and narrow fairway, when remote control possibility is suddenly lost. If the only action that the ship is then capable to perform is just to maintain her position, a hazardous situation may occur. See Esa Jokioinen, 'Introduction' in Esa Jokioinen and others, *Remote and Autonomous Ships — The next steps* (Rolls-Royce plc 2016), p. 8.

[15] Remote control has of course other limitations as well. For example, humans need data of adequate quality to make the right decisions. However, if a ship provides incorrect data, it may be extremely difficult to blame the person who remotely controls the vessel, especially if the data *seems* to be correct.

[16] Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

However, these rules only apply to personal injuries and damage caused to property that the aggrieved party has used in non-commercial activities.[17] Consequently, damage to or destruction of property used in commercial activities must be evaluated based on other rules. Because no special legislation exists on this matter, the existence of product liability in these cases depends on the Finnish Tort Liability Act (412/1974)—which provides the general tort liability rules in Finland—and the general principles of tort law.[18] In addition, product liability may actualise after a third party has received his compensation. For example, a shipowner—or his liability insurer—may have compensated for the loss because he has been strictly liable under the Finnish Maritime Code (674/1994), and the question is then whether the shipowner has the right of recourse against the party whose fault the accident had been. In such cases, contractual rules and practices must also be explored, as they may affect how liability is allocated.

The study is structured as follows. In Section 2, I will discuss whether the Finnish Product Liability Act can be applied in the maritime context and analyse when—and to what extent—the parties who have contributed to damage or injury can be liable under the Act. In Section 3, I will discuss in turn how the basis of liability changes if an aggrieved party must instead base his claim on the Finnish Tort Liability Act, and on the general principles of tort law. In Section 4, I will focus on recourse actions and explore how liability is ultimately allocated between shipowners, shipyards, and component manufacturers. Since this study presumes that the product liability rules are the same no matter whether a ship is manned or unmanned, the study is written with both ship types in mind. However, Section 5—which provides the conclusions—will focus on unmanned ships in particular and analyse whether unmanned ships may change how liability for shipping accidents is allocated, even if no legislative changes are made.

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17 See the Product Liability Directive's Article 9 and the Finnish Product Liability Act's Section 1.

18 See Marko Mononen, *Yritysten välinen tuotevastuu* (Talentum 2004), pp. 153–196.

2 Finnish Product Liability Act

In the following, the analysis of the Finnish Product Liability Act is divided into four subsections. The first subsection will determine the range of objects that can be considered as 'products' in the shipping context. The second subsection, in turn, will discuss the basis of liability, while the third subsection will determine the range of persons that may be liable. Finally, the fourth subsection will discuss the level of compensation that an aggrieved party is entitled to obtain under the Finnish Product Liability Act.

2.1 What is a product?

According to Section 1 of the Finnish Product Liability Act, the Act only applies if there is 'a product' that causes personal injury or damage to or destruction of property used in non-commercial activities. The notion of product clearly includes ordinary consumer goods, such as bicycles and kitchen machines, but the position of ships may seem less clear. Commercial vessels are exceptional by their scale, and they are used by enterprises. This section aims to determine whether ships and their components are products under the Finnish Product Liability Act. The position of software will be discussed as well.

In the Act, the concept of product receives a very wide definition. Section 1 of the Act, which closely follows Article 2 of the Product Liability Directive, states that the concept of product extends to 'all movables with the exception of buildings on land owned by others'. Furthermore, the Act applies to losses caused by a product 'even if the product has been incorporated into another movable or real property'. A component of a product is, therefore, also a product. According to the same section, a component means 'raw materials and parts of a product as well as

materials used in the manufacture or production of a product'. Electricity is also deemed a product.[19]

The wide-reaching definition of the concept of product means that all kinds of movable objects can be products, no matter how they are produced or who uses them.[20] According to Section 7 of the Act, however, they must be 'put into circulation' in the course of producer's business. With the exception of electricity, the object must also be tangible.[21] This restriction excludes e.g. services outside the scope of the Act. However, if a product causes damage in the course of providing a service, the Act may still apply; a product cannot be disguised as a service to avoid product liability.[22]

In the shipping context, it seems clear that the ship itself must be regarded as a product. It is a movable and tangible object that is put into circulation in the course of the producer's, i.e. shipyard's, business.[23] It is also obvious that ships consist of an enormous number of components which are products as well, even if they are incorporated into a ship. The position of software is, however, less clear and must be discussed in more detail.

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19 In this study, I quote Finnish legislation several times. Unless otherwise stated, the quotations are always from unofficial translations made by the Finnish Ministry of Justice.

20 See Thomas Wilhelmsson and Matti Rudanko, *Tuotevastuu* (2nd edn, Talentum 2004), pp. 67–68.

21 See Duncan Fairgrieve and others, 'Product Liability Directive' in Piotr Machnikowski (ed), *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies* (Intersentia 2016), pp. 41–42.

22 See *Case C-203/99, Veedfald v Århus Amtskommune*, para. 12. See also Fairgrieve and others, pp. 43–44.

23 Support for this conclusion can also be found from the preparatory works of the Finnish Product Liability Act. In its proposal, the government considered whether there was a need to exclude losses caused by defective transportation vehicles outside the scope of the Act. With the exception of road traffic, however, the goverment saw no such need. See 'Finnish Government Proposal 119/1989: Hallituksen esitys Eduskunnalle tuotevastuulaiksi', pp. 21–22. See also Ulfbeck, pp. 67–68. She refers to the history of the Norwegian Product Liability Act, which originally excluded i.a. damage caused by a ship outside the scope of the Act. This exclusion was, however, abolished when Norway joined the European Economic Area. According to *Ulfbeck*, the exclusion was seen to be inconsistent with the Product Liability Directive.

Generally, legal scholars have presented varying opinions on the question of whether software can be classified as a product. This discussion originates from the observation that the Product Liability Directive only extends to tangible objects. Because of this fact, some scholars have argued that software cannot be a product, unless it is delivered in a tangible object such as a DVD or a USB stick. According to this viewpoint, software downloaded from the Internet cannot be regarded as a product under the Directive.[24] The treatment of *embedded software* may, however, be different. Embedded software is incorporated into tangible goods, and it may be difficult to distinguish it from the object itself. As *Fairgrieve and others* state, e.g. '[t]he flight operation software of an aeroplane (...) must be treated as a product within the meaning of the Directive, given its inextricable link with the product itself'.[25] Defective software may, therefore, result in manufacturer's liability. Nevertheless, it remains somewhat unclear as to whether embedded software can in itself be regarded as a product, or whether it is just *a part* of a product. This question is, however, only relevant if the manufacturers of the tangible object and the embedded software are different persons.[26]

As a result, there may clearly be at least two types of products in the shipping context: first, the vessels themselves, and second, the tangible components of a vessel, such as engines, propellers, and bolts. In addition, if e.g. an auto-pilot system is supplied as a package that contains not only software but tangible objects as well, that package is clearly a product. Defective software may then cause the system—and the ship herself—to be defective, as the software is necessary for the functioning of the system. Nevertheless, it still seems questionable as to whether the software itself can be regarded as a product, since algorithms themselves are intangible. This question does not, however, only affect ships; it affects all kinds of

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24 See Fairgrieve and others, pp. 46–47.

25 See Fairgrieve and others, p. 47.

26 *Wilhelmsson and Rudanko*, for example, seem to argue that e.g. a defective operating system of a computer may cause *the computer* to be defective, but the software in itself still cannot be regarded as a product. See Wilhelmsson and Rudanko, pp. 79–80.

machines that utilise software. Thus, it is quite likely that this issue will sooner or later be clarified, either via case law or legislative means.[27]

2.2 Basis of liability

The previous section explored the range of items that may be considered as 'products' in the shipping context. However, merely the fact that a product has caused damage does not result in liability under the Finnish Product Liability Act; instead, Section 3 of the Act requires that the product must have been 'defective'. This section discusses what this requirement means in general and explores the interpretation problems that may occur in the context of shipping.

According to Article 6 of the Product Liability Directive, a product is defective when it does not provide 'the safety which a person is entitled to expect, taking all circumstances into account'. In the Finnish Product Liability Act, the formulation of this rule differs slightly, but is for practical purposes the same: according to the Act's Section 3, compensation shall be paid if 'the product has not been as safe as could have been expected'. Consequently, a product is not automatically defective even if it is dangerous. Take a sharp chef's knife as an example: a person may cut his or her finger with a knife when cooking, but the knife is still working as intended. But if the grip of a knife suddenly detaches, so leading to a personal injury, the knife may, of course, be defective. A person must be aware that a knife may be sharp and may, therefore, cause damage, but he also has a right to expect that the knife does not abruptly break down.[28]

The evaluation of the defectiveness of a product is meant to be objective: a product is defective if it does not meet the safety expectations that a normal person is entitled to have of it. In addition, the criterion

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[27] On the need for such clarification, see e.g. Piotr Machnikowski, 'Conclusions' in Piotr Machnikowski (ed), *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies* (Intersentia 2016), pp. 700–701. See also 'Evaluation of Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products' (European Commission 2018), pp. 74–76.

[28] See Wilhelmsson and Rudanko, p. 146.

for establishing defectiveness is also normative: a court must establish the level of safety the public is entitled to expect, regardless of whether its actual safety expectations are higher or lower.[29] In practice, the safety rules and standards imposed by regulatory bodies and other organisations often provide certain guidelines for this evaluation, but it is highly important to note that courts cannot automatically base their assessments on these. For example, if the rules and standards are outdated, the level of required safety may exceed the level of safety that the rules and standards would indicate.[30] At the same time, the normative nature of the concept of defectiveness also prevents the public from having unrealistic expectations of product safety. The concept of defectiveness aims, therefore, to determine *the legitimate safety expectations that a normal person is entitled to have.*[31]

In addition, the evaluation of a product's defectiveness is sometimes difficult because Section 3 of the Finnish Product Liability Act ties the required level of safety to the time when the product was put into circulation. Products are obviously constantly developed further, and new technical innovations may even lead to the prohibition of older technologies. Think e.g. of car manufacturing: nowadays every new car must have an anti-lock braking system (ABS). Such cars are undoubtedly much safer than cars that are not equipped with such a system. This fact alone does not, however, automatically mean that an older car without an ABS system would be defective, especially if such systems did not even exist when the car was put into circulation.[32] Consequently, technical development may affect the level of safety that the public is entitled to

[29] See Fairgrieve and others, pp. 51–52.

[30] See Wilhelmsson and Rudanko, pp. 165–169.

[31] See Fairgrieve and others, pp. 51–53. It is worth noting that sometimes the legitimate safety expectations may arguably be even higher than it is possible to achieve in the real world. In the English case *A and others v. National Blood Authority and another [2001] 3 All ER 289,* for example, the court concluded that a patient receiving transfused blood has the right to expect that the blood contains no harmful viruses, even if there is always a small statistical chance of infection. Of course, it is a completely different question as to how widely this approach can be utilised in other contexts than injuries caused by medical products.

[32] See Fairgrieve and others, pp. 60–61.

expect, but the defectiveness of a particular product is still evaluated based on the legitimate safety expectations that existed when the product was put into circulation.

Furthermore, Article 7(e) of the Directive includes a provision that allows the liable party to avoid liability if he can prove that 'the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered'. At first sight, this defence could be a major limiting factor for liability in the case of new technical innovations such as unmanned ships. It is evident that our knowledge e.g. of artificial intelligence is still limited and will increase during the coming years. The practical relevance of this 'development risks defence' may, however, be more limited, due to two reasons.

First, Article 15 of the Directive allows a Member State to decide whether it incorporates the development risks defence into national law at all. Although the vast majority of the Member States have incorporated the provision, Finland is one of the countries that implemented the Directive without it. The development risks defence is not, therefore, available under Finnish law.[33]

Second, even if the defence were available, its practical relevance could still be more limited than it might at first appear. As *Taschner* emphasises, the defence should be understood as only protecting the liable party 'in respect of the unknown' and nothing more. As he puts it, we are then dealing with 'an objectively harmful product, which would have been considered as defective at the time of manufacturing, if only the damaging properties had been known, but where there are no means available in science and technology for discovering them'.[34] However, the problem with new technologies is that we often *know* that there are

[33] As a comparison on the way in which the Directive is implemented in relation to the development risks defence, see Mark Mildred, 'The Development Risks Defence' in Duncan Fairgrieve (ed), *Product Liability in Comparative Perspective* (Cambridge University Press 2005), pp. 168–169.

[34] See Hans Claudius Taschner, 'Product Liability: Basic Problems in a Comparative Law Perspective' in Duncan Fairgrieve (ed), *Product Liability in Comparative Perspective* (Cambridge University Press 2005), pp. 163–164. As an example, he refers to a German case where a company had imported blood from the United States to be used as raw material for a medicine. Unfortunately, the blood was contaminated with HIV, but

problems that have just not been discovered yet. Sophisticated software, for example, almost always has bugs, no matter how thoroughly it has been tested.[35] Sometimes e.g. security issues are discovered only years—or even decades—after the software release.[36] Our current knowledge may very well be theoretically sufficient to discover these issues, but due to economic reasons it may in practice be impossible. Consequently, it may be questionable whether the development risks defence is available in such cases.[37]

Furthermore, the evaluation of a product's defectiveness may be difficult if a product uses embedded software that may receive updates during the product's life cycle. Two problems, in particular, arise. The first of these concerns the question of whether the public is entitled to expect that software is updated when e.g. a security issue is discovered. In such a case, the software appeared to be safe to use when it was released, but, due to the development of external threats, it has later become vulnerable to criminal attacks. Although these threats have only materialised afterwards, it may seem reasonable to consider the product to be defective, since the product itself has not changed since it was first released.[38] The second question, in turn, relates to this observation. Basically, a software update may also create *new* problems. Even if a product was safe to use when it was put into circulation, a software update may thereafter turn the product into being defective. If the updated software then causes an accident, it is a difficult

at the time the virus was unknown and was only discovered years later. As a result, numerous people got sick and died.

35 About the limitations of software and testing, see Gerald M. Weinberg, *Perfect Software: And Other Illusions About Testing* (Dorset House Pub 2008), pp. 3–12, 22–28.

36 For example, it was revealed in January 2018 that Intel's processor chips manufactured during the past decade have a severe design error that makes security breaches possible using normal user programs. This design flaw forced the operating system manufacturers to disable certain features from their systems, which in practical terms slowed down Intel-powered computers. See The Register, 'Kernel-Memory-Leaking Intel Processor Design Flaw Forces Linux, Windows Redesign' (2 January 2018) <https://www.theregister.co.uk/2018/01/02/intel_cpu_design_flaw/> accessed 23 February 2018. Although this particular design error concerned hardware instead of software, it is a good example of how difficult discovering even severe bugs may sometimes be.

37 Similarly, see Machnikowski, pp. 701–702.

38 See Machnikowski, pp. 700–702.

question as to who should be liable to pay compensation, since only the intangible part of the product has changed. The current product liability rules seem to provide no clear-cut answer to this question.

The above discussed rules—and problems—are of course also present in shipping. The question of whether a ship is defective depends on the legitimate safety expectations that a normal person is entitled to have. However, it is very difficult to provide more clear-cut guidelines for the evaluation of ship's defectiveness, because the legitimate safety expectations are always linked to case particulars. In the end, it is always a court who decides what these legitimate expectations are in the particular case. The maritime safety regulations usually provide the minimum level of safety that must be followed, but as I have noted above, it is possible that a ship may still be defective, even if these requirements are fulfilled.

In addition, it seems that interpretation problems become even more complicated when ships become more sophisticated. For example, let us imagine an unmanned ship being allowed to operate autonomously without any active human supervision at all. It is obvious that regulators would set strict safety requirements for such vessels, and they would not be allowed at all unless they are at least as safe as manned ships.[39] However, the problem is that unmanned ships would most probably cause *different kinds of accidents* than those caused by manned ships, and it is also unrealistic to suppose that autonomous systems would *never* fail.[40] Furthermore, it is not clear that accidents could only occur due to design or manufacturing errors. Because ships have to operate in an open world, there are always uncertainties that cannot be fully predicted. This fact, in turn, means that the decisions that autonomous systems make are nearly always based on *probabilities;* they are just best guesses that will hopefully turn out to be the correct ones.[41] Thus, it is

[39] See Robert Veal and Henrik Ringbom, 'Unmanned ships and the international regulatory framework' (2017) 23 The Journal of International Maritime Law 1, p. 115.

[40] See Wróbel, Montewka, and Kujala, pp. 163–165.

[41] Generally on the problem of uncertainty when using artificial intelligence, see e.g. Stuart J. Russell and Peter Norvig, *Artificial Intelligence: A Modern Approach* (3rd edn, Prentice Hall 2010), pp. 480–483. On the question how the scope of challenge depends on the type of environment, see Russell and Norvig, pp. 40–46.

very likely that severe design errors cause ships to be defective, but if an autonomous system has just made a wrong decision in a complex and uncertain environment, the concept of defect suddenly becomes significantly more open to interpretation.

2.3 Liable party

This study has now explored the range of objects that are considered 'products' in the shipping context and discussed the general principles of the evaluation of a product's 'defectiveness'. The next question is who is liable if a defective ship causes damage. Generally, there are numerous persons involved in shipbuilding, including ship designers, shipyards, component manufacturers, software houses, and classification societies. Under the Finnish Product Liability Act, however, there are only four types of persons who may be liable: first, the producer of the product; second, the person who presents himself as a producer; third, the importer of the product; and fourth, the supplier of the product.[42] The objective in the following is to determine what these different types of persons may be in the context of shipping.

a) The producer

According to the Finnish Product Liability Act's Section 5, the producers of products are the first group of persons that may be liable. The Act provides no explicit definition of the concept of producer, but according to Article 3 of the Product Liability Directive it means 'the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part'. The question is, therefore, who these parties are in the context of shipping.

In shipbuilding, the producer of a finished product—i.e. a ship—is most often a shipyard. Although the shipyard's role is often only to assemble the ship, the shipyard is the party who produces the finished product and puts it into circulation. From a risk allocation perspective,

[42] See the Finnish Product Liability Act's Section 5 and Section 6.

this approach may obviously sometimes seem questionable. Ships are usually designed by enterprises other than shipyards, and a shipyard may have little to no influence on what components will be used in a particular ship. Under the Finnish Product Liability Act, however, this observation seems to have no relevance. Even if the party does nothing more than assemble the finished product from components manufactured by other producers, it is still considered as the producer of the finished product.[43]

Nevertheless, it is important to note that the producer of a defective component or raw material may also be liable. According to the Finnish Product Liability Act's Section 4, '[i]f an injury or damage is attributable to a defect in a component, the injury or damage shall be considered to have been caused by both the component and the product'. More importantly, if there are two or more persons liable for the same damage, they shall be 'liable jointly and severally'.[44] Thus, if a ship causes an accident due to a defective steering system, the aggrieved party may have the right to choose whether to claim damages from the shipyard or from the producer of the system, or from both of them. This rule contains, however, two important exceptions: according to the Act's Section 7, the producer of a component shall be exempted from liability if 'the defect which caused the injury or damage is attributable to the design of the product into which the component has been incorporated or to the instructions given by the product manufacturer'.

The concept of producer requires, however, that the person has been involved in the actual manufacturing or producing process of the product. Persons that are involved only in the product's design phase are, therefore, left outside the scope of the Act.[45] Thus, even if the defectiveness of a ship can be traced back to the decisions made by a ship designer, the designer cannot be held liable unless it has been involved in the actual manufacturing process of the ship.[46] Similarly, it is obvious the producer

43 Generally, see Wilhelmsson and Rudanko, pp. 109–116.

44 See the Product Liability Directive's Article 5. The Finnish Product Liability Act contains no such rule, but it is incorporated to the Finnish Tort Liability Act's Chapter 6 Section 2.

45 See Wilhelmsson and Rudanko, p. 114.

46 The designer may, of course, still be liable under some other liability system such as the general tort liability rules. However, the basis of liability is then most likely to be

must have produced something that can be categorised as 'a product'. Thus, if software is not seen as a product, a software house cannot be liable under the Finnish Product Liability Act either.[47]

b) The person who presents himself as a producer

According to the Finnish Product Liability Act's Section 5, the second group of persons includes every person who has 'marketed the product which has caused the injury or damage as his/her own if the product is labelled with his/her name, trade mark or other distinguishing feature'. The purpose of this rule is to offer protection for the aggrieved party if he experiences difficulties in discovering the identity of the actual producer.[48] In the shipping context, however, this rule has limited significance, since the identity of the producer is most often known.

c) The importer

According to the Finnish Product Liability Act's Section 5, the group of persons that may be liable also includes 'the party which has imported the product into the European Economic Area with the intention of putting it into circulation there'. This rule is extremely important because products are often manufactured by foreign producers. Ships, for example, are often built in Asian countries,[49] and it is usually very difficult for an aggrieved party to achieve compensation from an Asian shipyard. Although an aggrieved party may be able obtain a judgment in Finland even against a foreign producer,[50] it is often impossible to enforce it in the country where the manufacturer is located. Instead, the only real possibility for an aggrieved party to achieve compensation from a foreign producer will

based on the concept of fault. Generally on the role of the general liability rules in shipbuilding, see Section 3 of this study.

47 On the question whether software can be deemed a product, see Section 2.1 of this study.

48 See Fairgrieve and others, p. 64.

49 See The Shipbuilders' Association of Japan, 'Shipbuilding Statistics — March 2018'.

50 The Finnish Product Liability Act can usually be applied if the aggrieved party domiciles in Finland *and* the loss has incurred there. However, the latter requirement may sometimes cause difficult interpretation problems. See Juha Lappalainen, 'Tuomioistuinten toimivalta siviiliasioissa' in Dan Frände and others, *Prosessioikeus* (4th edn, Sanoma Pro 2012), pp. 315–317.

often be to sue him in his home country under the rules that apply in that jurisdiction.[51] Thus, the purpose of importer's liability is to protect consumers in such cases.[52]

A challenge in the shipping context is that there are very few companies—if any—whose main business is the importing of vessels, with the exception of small vessels such as private yachts, into the EU. Instead, the shipowner usually buys the vessel directly from a foreign shipyard or foreign shipowner and then imports it into the EU. Consequently, the key question here is whether shipowners may be considered as being importers. Answering this question requires an in-depth analysis of the concept of 'importer'.

The Act and the Directive define the concept of importer in slightly different ways. According to the Act's Section 5, a person is only deemed to be an importer if he has imported the product into the European Economic Area 'with the intention of putting it into circulation there'. According to Article 3 of the Directive, in turn, the concept extends to 'any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business'. It is somewhat unclear as to whether there is any practical difference between these two definitions, but it seems reasonable to suppose that they should be interpreted in the same way, since the Act is based on the Directive.

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51 For an overview on the choice of law and forum in product liability matters, see e.g. Wilhelmsson and Rudanko, pp. 100–108. As an illustrative example of complexity that may be present in transnational product liability litigation, the Überlingen mid-air collision can mentioned. 71 people died when two airplanes collided with each other in Germany. Many lawsuits were filed, including one claim based on product liability rules. In that case, the relatives of Russian victims claimed damages from two manufacturers of the aircraft's collision avoidance system. Although the accident had occurred in Germany, and the victims were Russian citizens, the case was brought into a court in Spain which had been the destination of the flight. However, the Spanish court applied the laws of Arizona and New Jersey which where the principal places of manufacturers' businesses. See Hanna Schebesta, 'Risk Regulation Through Liability Allocation: Transnational Product Liability and the Role of Certification' (2017) 42 Air & Space Law 107.

52 See 'Finnish Government Proposal 119/1989: Hallituksen esitys Eduskunnalle tuotevastuulaiksi', p. 48.

In principle, it seems relatively clear that the shipowner must be considered to be the importer of the product if he imports a vessel from a foreign country and then immediately leases it out. The action is clearly taken 'in the course of his business' with an intention to distribute—in this case by leasing—the vessel onwards.[53]

If the shipowner imports a ship and intends to use it himself, the question seems more difficult. On its face, the concept of importer does not extend to persons who import products for their personal use. The intention that the person had when the product was imported is decisive: even if he later decides to sell or lease the product, the person is not considered to be an importer if he has first used the product for his personal use.[54] However, it is sometimes difficult to distinguish 'personal use' from 'any form of distribution'. As *Fairgrieve and others* state, "the mere fact of placing a product at one's disposal—even for a very limited period in time—is sufficient to qualify the product as being imported for 'any form of distribution'". According to the authors, a hotel that imports hairdryers for its guests is considered to be the importer of the products. They even argue that an airline company that imports an aeroplane into the EU should be deemed the importer, since the plane is intended to carry passengers.[55] *Ulfbeck,* in turn, argues that a shipowner who imports a vessel into the EU and puts it on time or voyage charter could be considered to be the importer of the vessel, since the ECJ has interpreted the concept of 'put into circulation' very broadly.[56]

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53 Similarly, see Ulfbeck, pp. 76–77.

54 See 'Finnish Government Proposal 119/1989: Hallituksen esitys Eduskunnalle tuotevastuulaiksi', p. 48.

55 See Fairgrieve and others, p. 66.

56 See Ulfbeck, pp. 76–77. She refers to *Case C-203/99, Veedfald v Århus Amtskommune* which concerned the manufacturer's liability for damage caused to a kidney that was meant to be used in transplantation. A hospital had manufactured a perfusion fluid to flush the kidney, but due to the defectiveness of the fluid, the kidney was damaged and became unusable for transplantation. Although the fluid never left the medical 'sphere of control', the ECJ argued that the fluid was still put into circulation as the person for whom the product was intended was required to 'bring himself within that sphere of control'. Although the case did not specifically concern importer's liability, *Ulfbeck* argues that it shows how broadly the concept of 'put into circulation' has been interpreted.

As a result, it seems that a shipowner may indeed be considered to be the importer of a vessel. The exact boundaries of the concept of importer are nonetheless unclear.

d) The supplier

Finally, the Finnish Product Liability Act's Section 6 states that the party which has put the product into circulation shall be liable '[i]f the product does not indicate its manufacturer or producer'. This person—the supplier—may nonetheless avoid liability by notifying within a reasonable time 'the injured party of the identity of the party liable for the injury or damage'. In addition, the Act's Section 6 continues by stating that the same rule applies when the importer of the product is unknown. Supplier's liability is, therefore, a secondary alternative that is only triggered if the manufacturer—or the importer—of the product cannot be identified. Since these persons are usually known in shipping, this provision has a rather limited importance here.

2.4 Amount of damages

The previous section explored the range of persons who may be liable to pay compensation if a defective ship causes an accident. The result was somewhat surprising: a number of persons—under certain circumstances even the shipowner—could be liable under the Finnish Product Liability Act. However, the question arises of why an aggrieved party would want to raise a claim under the product liability rules. In the following, it is argued that the rules on the amount of damages may be such an incentive.

There is a long tradition in maritime law that shipowners and certain other persons have the right to limit their liability when the loss exceeds a specified limit.[57] However, the approach under the product liability rules is different. The Finnish Product Liability Act is based on the principle of full compensation, which means that an aggrieved party is usually

[57] For the history of the concept of limitation of liability, see Peter Wetterstein, *Globalbegränsning av sjörättsligt skadeståndsansvar: en skadeståndsrättslig studie* (Åbo Akademi 1980), pp. 18–48.

entitled to get his losses fully compensated, no matter the size of the loss.[58] This approach is further strengthened by the Act's Section 10, that states that any 'contractual term, agreed upon before the injury or the damage occurred, which limits the right of the injured party to compensation laid down in this Act shall be null and void'. Consequently, the key question here is whether the rules on limitation of liability may be relevant within the product liability framework, or whether it may, in fact, be beneficial for an aggrieved party to base his claim on the Finnish Product Liability Act instead of on the Finnish Maritime Code.

It is natural to begin this discussion by exploring how the right to limit liability is currently regulated. In the Finnish Maritime Code, these rules are divided into several chapters: one of them providing the general rules and the others only applying to certain specified types of damage.[59] However, it is important to note that these rules are based on several international conventions enacted within the IMO.[60] Consequently, it seems reasonable to begin the analysis with these conventions. For the sake of simplicity, the following discussion only focuses on the general rules on limitation of liability, which are established by the Convention on Limitation of Liability for Maritime Claims (hereafter 'the LLMC Convention').[61]

Article 2(1) of the LLMC Convention includes a list of losses to which the Convention is meant to be applied. Among other things, the list includes 'claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins

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58 See Wilhelmsson and Rudanko, pp. 236–237.

59 As an overview on the rules on limitation of liability in the Nordic maritime codes, see Falkanger, Bull, and Brautaset, pp. 212–230.

60 For the full list of conventions that Finland has ratified, see 'Chronological List of Imo Instruments and Entry into Force Dates' <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/status-x.xlsx> accessed 20 June 2018.

61 The reader should note that the LLMC Convention has been updated by the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims. Nonetheless, the 1996 Protocol is not discussed in this study as it did not change any relevant rules in this context. Generally on the international conventions regarding limitation of liability, see e.g. Norman A. Martínez Gutiérrez, *Limitation of Liability in International Maritime Conventions* (Routledge 2011).

and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom'. The important thing here, however, is that according to Article 2(1), the LLMC Convention is meant to apply to such losses 'whatever the basis of liability may be'. Even if the claim is brought as a recourse action in a contractual relation, Article 2(2) states that the right to limit liability is still available. Consequently, it seems relatively obvious that the LLMC Convention is also meant to apply to product liability claims, if the incurred loss otherwise falls within its scope. This outcome gives rise to a potential conflict between the rules: on the one hand, the LLMC Convention allows a shipowner to limit his liability, but on the other hand, the product liability rules require the loss to be compensated to its full extent if the shipowner is also the importer of the ship.[62]

Nevertheless, the position is different for vessel manufacturers, such as shipyards and component manufacturers. According to Article 1 of the LLMC Convention, the right of limitation of liability is only available to four types of persons: first, the shipowner, meaning the owner, charterer, manager, and operator of a seagoing ship; second, the salvor, meaning any person rendering services in direct connection with salvage operations; third, any person for whose act, neglect, or default the shipowner or salvor is responsible; and fourth, the liability insurer to the same extent as the assured himself. Consequently, because the LLMC Convention does not specifically mention vessel manufacturers, their position depends on whether they can be categorised as 'any person for whose act, neglect or default the shipowner or salvor is responsible'. Unfortunately, the LLMC Convention provides no definition for this expression. As *Martínez Gutierrez* notes, 'with the exception of the salvor and the liability insurer, it seems that all other categories of persons listed in Article 1 can be interpreted in several ways'. The interpretations also vary between jurisdictions.[63] In Finland, the government has read the term 'responsible'

[62] Similarly, see Ulfbeck, pp. 77–79.

[63] See Martínez Gutiérrez, pp. 202–203.

as referring to the rules of shipowner's vicarious liability. These rules, in turn, depend on national law.[64]

According to the Finnish Maritime Code's Chapter 7 Section 1, the extent of the shipowner's vicarious liability is defined as follows (translated by the author):

> 'The shipowner shall, unless otherwise stated in this or other law, be liable for damage caused by the fault or neglect in the service by the master, crew, pilot, or by any other person who, without belonging to the crew, performs work on behalf of the shipowner or the master in the service of the ship.'

The scope of shipowner's vicarious liability is broad as it extends even to independent contractors.[65] However, it is still unlikely that a vessel manufacturer could usually be included to the scope of the rule. As *Falkanger and others* state on Norwegian law—which quite closely corresponds to Finnish law on this matter[66]—only work that can be categorised as 'a typical shipowner's activity' may fall into the scope of shipowner's vicarious liability. Consequently, if a person employed by a shipyard causes damage while performing ordinary maintenance activities onboard the ship, the shipowner may be vicariously liable for the damage caused by that person. As the authors state, however, '[m]ajor works carried out at a shipyard are a good example of work' which do not result in shipowner's liability under the vicarious liability rules.[67] Thus, it is obvious that a shipowner cannot be vicariously liable for errors that e.g. a shipyard has made when the ship was built. It is mainly the

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64 See 'Finnish Government Proposal 10/1984: Hallituksen esitys Eduskunnalle laiksi merilain muuttamisesta ja eräiksi siihen liittyviksi laeiksi', pp. 14–15.

65 See Falkanger, Bull, and Brautaset, p. 200.

66 The maritime codes of Finland, Sweden, Norway, and Denmark were drafted in co-operation, and they are very similar—albeit not identical—to each other. See Falkanger, Bull, and Brautaset, pp. 28–29. According to Section 151 of the Norwegian Maritime Code, the shipowner 'shall be liable to compensate damage caused in the service by the fault or neglect of the master, crew, pilot, tug or others performing work in the service of the ship'. The quotation is from the Code's unofficial translation published in MarIus no. 435.

67 See Falkanger, Bull, and Brautaset, p. 207.

ordinary repair and maintenance activities that may fall into the scope of shipowner's vicarious liability.

As a result, the rules on the amount of damages seem to differ significantly between the Finnish Maritime Code and the Finnish Product Liability Act. Although the LLMC Convention applies in theory to product liability claims, its practical relevance seems limited. It is mainly shipowners who may be subjected to two sets of rules; for the producers of a vessel the right to limit liability is very seldom available. Thus, it seems evident that it may, under certain circumstances, be beneficial for an aggrieved party to base his claim on the Finnish Product Liability Act, instead of the Finnish Maritime Code.

Of course, it could be argued that attempts to circumvent the rules on limitation of liability would be rare. However, the existing case law shows that such attempts are not purely imaginary, and, more importantly, they may even succeed. In *Case C-188/07, Commune de Mesquer v Total France SA and Total International Ltd,* the oil tanker MV *Erika* had sunk and caused one of the worst oil disasters in the history of Europe. Since the amount of damage exceeded the limits that were established in the applicable IMO conventions, a French municipality attempted to circumvent these limits by basing its claim on the French waste legislation which, in turn, was based on the EU Waste Framework Directive.[68] The claimant argued that heavy fuel oil had become waste when it had spilled into the sea and that the oil company Total should reimburse the costs to their full extent. Interestingly, the ECJ reached the conclusion that the EU was not bound to the IMO conventions, as neither the EU nor all of its Member States had ratified them. Consequently, the right to limit liability did not extend to the area of the EU Waste Framework Directive.[69]

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[68] Council Directive 75/442/EEC of 15 July 1975 on waste.

[69] For an analysis of ECJ's judgement, see Christina Eckes, 'Case C-188/07, Commune de Mesquer v. Total France and Total International Ltd., Judgment of the Court (Grand Chamber) of 24 June 2008 [2008] ECR I-4501; Case C-301/08, Irène Bogiatzi v. Deutscher Luftpool, Société Luxair, European Communities, Luxembourg, Foyer Assurances SA, Judgment of the Court (Fourth Chamber) of 22 October 2009, not yet Reported' (2010) 47 Common Market Law Review 899.

In conclusion, it is possible that aggrieved parties may receive a more comprehensive compensation under the Finnish Product Liability Act than under the Finnish Maritime Code, and this possibility should be taken seriously. Even if this possibility is utilised very rarely, in an isolated case it may cause severe financial problems to the liable party if he has not taken this possibility into account in his risk management, e.g. by having liability insurance.[70] In addition, in the future this possibility will most likely become available more often as the usage of sophisticated technologies becomes more and more common. Especially in the case of unmanned shipping where there is no crew on board to ensure that technical equipment functions as it should, the root cause of accident may be a technical failure more frequently than before.

3 General tort liability rules

In the previous section it was discovered that the Finnish Product Liability Act may apply to damage caused by a ship. However, it was also noted that the Act has one important limitation: it does not apply to damage to property that the aggrieved party has used in commercial activities. In shipping, this limitation is significant. For example, if a defective ship collides with a commercial vessel, the shipowner who has suffered the loss cannot claim damages under the Finnish Product Liability Act, since he has used the vessel in a commercial activity. The objective in this section is to explore which rules may apply in such cases.

[70] It is worth noting that the amount of damages may still be adjusted under the Finnish Tort Liability Act's Chapter 2 Section 1 (2) if 'the liability is deemed unreasonably onerous in view of the financial status of the person causing the injury or damage and the person suffering the same, and the other circumstances'. However, when a loss is caused while seeking financial gain, this possibility is rarely available, and it is completely excluded if the liable party has liability insurance that covers the loss. See Pauli Ståhlberg and Juha Karhu, *Suomen vahingonkorvausoikeus*, (6th edn, Talentum 2013), pp. 478–479 and Wilhelmsson and Rudanko, pp. 236–238.

In *Case C-285/08, Moteurs Leroy Somer v Dalkia France and Ace Europe,* the ECJ stated that the Product Liability Directive does not affect the way a Member State is allowed to regulate product liability for damage to property used in commercial activities.[71] Consequently, a national legislator may extend the national product liability regime to apply to such losses—as has been done in France[72]—or regulate them in some other way. In Finland, there is no special legislation on this matter. This means that manufacturer's liability in these cases must be evaluated based on the Finnish Tort Liability Act, which contains the general rules of liability, and on the general principles of tort law.[73]

According to the Finnish Tort Liability Act's Chapter 2 Section 1, '[a] person who deliberately or negligently causes injury or damage to another shall be liable for damages, unless otherwise follows from the provisions of this Act'. In other words, liability is based on the concept of fault. This observation is important since it highlights the fact that a manufacturer may be able to avoid liability even if the product is defective. The claimant must prove that the manufacturer had acted negligently. Especially in the case of sophisticated technology, this requirement may constitute a major obstacle to recovery. In order to prove that a manufacturer was negligent, an aggrieved party may need access to the manufacturer's internal data, which is most often unavailable to third parties.[74] In fact, the challenges related to fault liability were one of the reasons why the Product Liability Directive was conceived in the first place.[75]

Furthermore, proving the existence of negligence may be difficult even if the aggrieved party has access to the manufacturer's internal data. Consider e.g. software defects: as was stated in Section 2.2, sophisticated software will almost inevitably contain bugs, and these bugs may sometimes have serious consequences. Nevertheless, it is a difficult question as to whether they exist because someone has acted *negligently*.

71 See Case C-285/08, Moteurs Leroy Somer v Dalkia France and Ace Europe, paras. 14–32.

72 See Article 1245 of the French Civil Code.

73 See Mononen, pp. 153–196.

74 Generally, see Wilhelmsson and Rudanko, p. 145.

75 See Recital 2 of the Product Liability Directive.

The software may have passed the ordinary tests, but, under some very rare circumstances, an undiscovered bug may still be triggered and cause an accident. Since fault liability focuses on what 'a reasonable person' would have done[76], it may be extremely difficult to show that the bug has been caused by someone's negligent conduct.

Nevertheless, it is somewhat uncertain whether the difference between these two forms of liability is as significant as it seems at first. As was explained in Section 2.2, the Finnish Product Liability Act sets the defectiveness of the product as the basis of liability; it is not, therefore, strict liability in its purest form. In certain jurisdictions the evaluation of the defectiveness of a product may even include elements that resemble the evaluation of fault.[77] Even in Finland, some legal scholars have argued that the defectiveness of a product often indicates that the manufacturer of the product had acted negligently.[78] In addition, it is important to note that a court may—at least in Finland—reverse the burden of proof if the defendant is in a better position to provide evidence.[79] Although it is unclear how often this possibility is utilised in product liability litigation, it is clear that a need to reverse the burden of proof may exist if the aggrieved party has e.g. no access to the manufacturer's internal data. It is also worth noting that some of the EU Member States had, in fact, reversed the burden of proof in their national product liability legislation before they implemented the Directive.[80]

In addition, it is important to note that the general principles of tort law may also affect the basis of manufacturer's liability. Although the Finnish Tort Liability Act requires negligence to be triggered, the preparatory works of the Act explicitly state that the courts are allowed

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76 See Mika Hemmo, *Vahingonkorvausoikeus* (WSOYPro 2005), p. 27.

77 See e.g. discussion in Geraint Howells, 'Defect in English Law — Lessons for the Harmonisation of European Product Liability' in Duncan Fairgrieve (ed), *Product Liability in Comparative Perspective* (Cambridge University Press 2005).

78 Mononen, pp. 157–160.

79 See Antti Jokela, *Pääkäsittely, todistelu ja tuomio. Oikeudenkäynti III* (2nd edn, Talentum 2015), p. 349. See also Wilhelmsson and Rudanko, p. 22.

80 See e.g. Magdalena Sengayen, 'Product Liability Law in Central Europe and the True Impact of the Product Liability Directive' in Duncan Fairgrieve (ed), *Product Liability in Comparative Perspective* (Cambridge University Press 2005), p. 282.

to develop strict liability rules via case law. Product liability was even mentioned as being an example of an area where such a development could occur.[81] However, in the existing case law there are no signs that strict liability would—with the exception of the Finnish Product Liability Act—apply to product liability.[82] Even in general, the Finnish Supreme Court has been cautious to extend the area of strict liability via case law.[83] Consequently, it is evident that under the general tort liability rules of Finland, the basis of manufacturer's liability is currently based on the concept of fault.

In conclusion, an aggrieved party may face significant challenges when seeking compensation from a vessel manufacturer for damage that a ship has caused to property used in commercial activities. The aggrieved party may need to prove the existence of manufacturer's negligence, which may often be too difficult. More importantly, the product liability framework for these losses is significantly more fragmented between the EU Member States than in the area where the Product Liability Directive applies. In shipping, this observation provides a major uncertainty factor, as shipping activities, by their very nature, are remarkably international.

4 Recourse actions

The study has now explored the product liability rules from a third party's perspective. However, it is a completely different question to consider how liability is allocated between shipowners, shipyards, and component manufacturers after one of them has compensated the aggrieved party. This section aims to provide an overview of this question. The discussion will be divided into two subsections. The first subsection will canvass

81 See 'Finnish Government Proposal 187/1973: Hallituksen esitys Eduskunnalle vahingonkorvausta koskevaksi lainsäädännöksi', p. 12.

82 See Wilhelmsson and Rudanko, pp. 12–17.

83 See Ståhlberg and Karhu, p. 176.

the legal basis of recourse claims. The second subsection, in turn, will explore how contractual arrangements may affect the eventual liability allocation between shipowners, shipyards, and component manufacturers.

4.1 Legal basis of recourse actions

In shipping, aggrieved parties usually bring their claims against shipowners, because it is most often the easiest way to obtain compensation. However, the question of whether an aggrieved party *could* have had the right to claim compensation from other persons may still be important. Consider the following example: a ship runs aground, and numerous passengers get injured or lose their lives. The shipowner—i.e. the carrier—is held strictly liable according to the Finnish Maritime Code's Chapter 15 Section 1 and compensates the aggrieved parties. However, the root cause of the accident was a severe design error in the ship's steering gear. Let us also assume that the ship and its steering gear are considered defective under the Finnish Product Liability Act. The question is whether the shipowner has the right of recourse against the shipyard and the manufacturer of the steering gear, and, if he has, on what rules can a recourse action then be based.

Under Finnish law, it is a clear starting point that if two or more persons have caused the same loss, they are s*olidarily liable* to compensate the aggrieved party. For example, the Finnish Tort Liability Act's Chapter 6 Section 2 states that '[w]here the injury or damage has been caused by two or more persons, or they otherwise are liable in the same damages, the liability shall be joint and several' and adds that 'a person who has not been rendered liable in full damages shall be liable only to the amount of the award'.[84] Consequently, it is irrelevant whether they have caused the damage together or whether the basis of their liabilities is different.

[84] The Finnish Ministry of Justice uses the term 'joint and several liability' in its unofficial translation, but it means the same as 'solidary liability'. The difference between these is that the first mentioned term usually refers to common law, whereas the latter is typically used in civil law systems. See e.g. Bjarte Askeland, 'Plurality of Liable Persons and Prescription of Recourse Actions' in Helmut Koziol and Barbara C. Steininger (eds.), *European Tort Law 2007* (Springer 2008), p. 95.

For example, the Finnish Supreme Court's case 2008:62 considered an accident where the roof of a building had collapsed because of bad construction. Two persons had contributed to the construction error: first, the contractor, and second, the city whose building inspector had not ensured that the roof fulfilled the safety requirements. Both tortfeasors were deemed liable: the contractor under the contractual liability rules and the city under the Finnish Tort Liability Act. Although the Supreme Court did not consider the existence of solidary liability in particular but instead only considered the existence of city's liability, e.g. *Norros* has seen the case as a prime example of what solidary liability means. Since an aggrieved party cannot get the same loss compensated twice, tortfeasors' liability is 'automatically' solidary.[85]

In our example, an aggrieved party had three alternative routes to seek compensation. He could claim damages from either: 1) the shipowner, 2) the manufacturer(s) of the product, or 3) the shipowner *and* the manufacturer(s) of the product. All three tortfeasors had contributed to the same loss, even if they had not acted together and their basis of liability was different. Consequently, if the aggrieved party had claimed damages from all of them, it seems clear that they would have been considered solidarily liable. In that case, the eventual liability allocation between the tortfeasors would have been made after the aggrieved party had been compensated. Although there is no clear rule on how liability allocation is made when tortfeasors' liabilities are based on different liability regimes, it is probable that the court would follow the Finnish Tort Liability Act's Chapter 6 Section 3 which expresses the general principle on this matter. According to the Act, '[t]he damages payable shall be allocated to those liable as is deemed reasonable in view of the guilt apparent in each person liable, the possible benefit accruing from the event and other circumstances'. Of course, it is a very difficult question as to what would be deemed 'reasonable' in our example if none of the parties have acted negligently. The general starting point seems nevertheless relatively clear. For example, if the defectiveness of the steering gear has resulted from component manufacturer's gross negligence and there is no

[85] See Olli Norros, *Velvoiteoikeus* (2nd edn, Alma Talent 2018), pp. 302–303.

negligence on the shipowner's part, the shipowner could probably have a wide or even full right of recourse against the manufacturer.

However, the problem in our example is that the aggrieved party had only claimed damages from the shipowner. It remains a question whether the aggrieved party's decision to only claim damages from one of the tortfeasors affects how liability is allocated between them. Although there is no precedent under Finnish law on this matter, there are strong arguments that support the existence of the right of recourse. As *Askeland* notes, solidary liability is 'a wonderful institution in the eyes of the victim', but it cannot function 'without granting the tortfeasor who has paid a right of recourse'. If no right of recourse existed, the eventual liability allocation would be completely coincidental, as it would then fully depend on the decisions made by the aggrieved party. In other words, the idea of the solidary liability institution is to protect the aggrieved party, not to affect the eventual liability allocation between the tortfeasors.[86] Thus, in our example the shipowner would most probably have the right of recourse against the shipyard and the component manufacturer to the extent that is deemed 'reasonable', even if the aggrieved party made no claim against them.[87]

4.2 Effects of contractual arrangements

Nevertheless, the eventual liability allocation between shipowners, shipyards, and component manufacturers does not necessarily depend on the above discussed rules. Although e.g. the Finnish Product Liability Act's Section 10 states that '[a] contractual term, agreed upon before the injury or the damage occurred, which limits the right of the injured party

[86] See Askeland, pp. 98–99.

[87] Of course, the right of recourse may also be available because of the contractual liability rules. For example, if a defective vessel causes damage, it may indicate that the shipyard has breached the shipbuilding contract, and the eventual liability allocation is then determined according to the contract. However, it is important to note that at least under Finnish law, liability for loss caused by a product is usually not dealt under the contractual liability rules. See 'Finnish Government Proposal 93/1986: Hallituksen esitys Eduskunnalle kauppalaiksi', p. 128. In addition, two tortfeasors may obviously be held solidarily liable, even if there is no contractual relationship between them.

to compensation laid down in this Act shall be null and void', nothing prevents the tortfeasors from agreeing how liability is allocated between them after the aggrieved party has been compensated.[88] Such agreements are also commonly used between industrial partners. However, it is very difficult to provide a comprehensive view on arrangements that are used in shipbuilding. At least three problems exist: first, there are many alternative standard contracts that are commonly used; second, the interpretation of terms depends on the applicable law; and third, the contracting parties may agree on terms that differ from the standard terms. Thus, the following discussion is limited to certain commonly used terms that may potentially affect the eventual liability allocation between shipowners, shipyards, and component manufacturers.

In principle, it is possible to imagine at least three types of terms that may potentially affect the eventual liability allocation: first, the contracting parties may expressly agree on who compensates losses caused by a product; second, the contracting parties may agree on a guarantee and exclude liability for any other loss that may occur; and third, the contracting parties may exclude liability for consequential and indirect losses. However, the impacts of these three alternatives may differ from each other.

The first alternative—the contracting parties expressly agree on who compensates losses caused by a product—may often be present in component supply contracts. Section 40 of the Orgalime General Conditions S 2012, for example, states that '[t]he Supplier shall not be liable for any damage to property caused by the Product after it has been delivered and whilst it is in the possession of the Purchaser'. Section 40 even adds that '[i]f the Supplier incurs liability towards any third party for such damage to property as described in the preceding paragraph, the Purchaser shall indemnify, defend and hold the Supplier harmless'. According to the official Orgalime commentary, the purpose of this term is to agree on liability allocation in cases where an aggrieved party may directly claim

[88] See Wilhelmsson and Rudanko, pp. 282–283.

damages from the supplier, e.g. under the product liability rules.[89] Thus, if we assume that a component manufacturer has directly sold his product to a shipowner and the Orgalime General Conditions S 2012 are applied, it is clear that the shipowner's right of recourse is excluded if the component causes damage to property while it is in the possession of the shipowner.

The second alternative—the contracting parties agree on a guarantee and exclude liability for any other loss that may occur—is often present in shipbuilding contracts. According to Article X of the Standard Form Shipbuilding Contract 2000, for example, the shipbuilder issues the buyer with a guarantee, whose length is typically 12 months. During the guarantee period, the builder has a duty to 'repair and rectify at its own cost and expense and free of charge to the Buyer, any defects—including latent defects or deficiencies—concerning the Vessel or parts thereof, which are caused by faulty design, defective material and/or poor workmanship on the part of the Builder, its servants, employees or Subcontractors'. Furthermore, if the builder has rectified the deficiencies within a reasonable time, the builder shall have 'no other liability for any damage or loss caused as a consequence of the defect, except for repair or renewal of the Vessel's part/parts that have been damaged as a direct and immediate consequence of the defect without any intermediate cause, and provided such part or parts can be considered to form a part of the same equipment or same system'. However, it may sometimes be unclear whether such clauses affect how non-contractual liability is divided between the contracting parties. In Finland, *Saarnilehto* has argued that liability exclusions do not necessarily apply to liability that is not based on a contract, but instead on the Finnish Product Liability Act. According to his view, liability exclusions only concern liability that has resulted from a breach of contract, unless something indicates that the exclusion is meant to apply to product liability as well. He also notes that liability exclusions are not the most typical way to agree on the allocation of product liability, as specific indemnity clauses are often used

[89] See Mats Bergström and others, *Orgalime General Conditions S 2012: Guide on their use and interpretation* (The European Engineering Industries Association 2014), p. 111.

in this purpose.[90] Thus, if *Saarnilehto's* view was accepted, the intention of the parties would be decisive here if Finnish law were to be applied. The very comprehensive wording: 'no other liability for any damage or loss caused as a consequence of the defect', could nonetheless suggest that the right of recourse would also be excluded when it is based on the non-contractual liability rules.[91]

The third alternative—that the contracting parties exclude liability for consequential and indirect losses—is arguably the most controversial way to agree on the allocation of product liability. For example, the official Orgalime commentary notes that even if Section 40 of the Conditions does not for some reason apply, the seller of a product may still be able to avoid product liability claims if the type of loss falls into the scope of Section 45, which states that '[s]ave as otherwise stated in the General Conditions there shall be no liability for either party towards the other party for loss of production, loss of profit, loss of use, loss of contracts or for any other consequential or indirect loss whatsoever'.[92] However, the problem is that the interpretation of the term 'consequential or indirect loss' depends heavily on the applicable law. In some jurisdictions a loss caused by a product may be considered as a consequential and indirect loss, whereas in others it may be a direct loss.[93] Sometimes it may even be

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90 See Ari Saarnilehto, 'Sopimuskumppanit, vastuunrajoitus ja tuotevastuu' 2011 Lakimies 7–8, p. 1404.

91 Compare to Ulfbeck, p. 74. According to her, under Danish law Article X of the Standard Form Shipbuilding Contract 2000 clearly covers 'actions brought by the shipowner against the shipyard' but she seems uncertain as to whether the liability exclusion is valid if the recourse action is based on the fact that the shipowner has become liable for personal injury. As she notes, under the product liability rules it is not allowable to limit liability in relation to the aggrieved party. However, the existence of this problem seems unlikely at least under Finnish law. Basically, under Finnish law, a contractual term in a shipbuilding contract does not limit liability against a third party but only determines how liability is allocated *after* the aggrieved party has been compensated.

92 See Bergström and others, p.115.

93 See e.g. Simon Curtis, *The Law of Shipbuilding Contracts* (4th edn, Routledge 2012), p. 185. He discusses the scope of Article IX.4 of SAJ Form and notes that 'the buyer's liability for damage to the vessel or injury to a passenger or crew member consequent upon the failure of a defective item of machinery is likely to be direct rather than consequential and therefore not excluded by the terms of Article IX.4'.

unclear which one it is.[94] Consequently, the exclusion of 'consequential and indirect losses' may be a very uncertain way of agreeing upon the eventual liability allocation in product liability, unless it is clear that the contracting parties have meant the exclusion to apply in such claims.

In addition, it is important to note that contracts are usually only binding between the contracting parties.[95] If e.g. a shipowner who has bought a vessel from a shipyard then sells the vessel onwards, it is a question whether the shipbuilding contract may affect the eventual liability allocation between the shipyard and the new owner of the vessel, if they are held solidarily liable under the non-contractual liability rules. In principle, it could be argued that the new owner should not be in a better position against the shipyard than the old owner could have been.[96] However, the problem is that if the new owner undertakes a recourse action against the shipyard, it is not based on the contractual liability rules, but instead on the non-contractual liability rules. At least under Finnish law, it seems somewhat unclear whether the shipbuilding contract may then affect the eventual liability allocation between the tortfeasors, unless the new owner has somehow agreed to respect its terms.

For example, the Finnish Supreme Court's case 2009:92 considered a situation where a manufacturer had sold a yacht to a person who had later sold the vessel to a third person. Thirteen years after the manufacturer had put the yacht into circulation, the yacht sank due to her defective design. Under the contractual liability rules, the manufacturer was

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94 In Finland, for example, Section 67(2) of the Sale of Goods Act (355/1987) states that 'loss due to damage to property other than the goods sold' is deemed an indirect loss. However, the problem is that the Act does not apply to personal injuries, and even damage caused to property is only compensable if the damaged property has had a close connection to the use of the product. See 'Finnish Government Proposal 93/1986: Hallituksen esitys Eduskunnalle kauppalaiksi', p. 128. Thus, it may sometimes be unclear exactly what losses are excluded if a contract only states that 'consequential and indirect losses' are not compensable.

95 See e.g. Ari Saarnilehto and Vesa Annola, *Sopimusoikeuden perusteet* (8th edn, Alma Talent 2018), pp. 37–40.

96 This principle can be deduced e.g. from the Finnish Promissory Notes Act (622/1947). According to Section 27 of the Act, '[w]hen a non-negotiable promissory note is transferred or assigned, the transferee shall not have a better right against the debtor than the transferor had unless expressly otherwise stipulated.'

only liable for defects occurring during the first ten years after the yacht was put into circulation. However, the Supreme Court noted that the defectiveness of the yacht had resulted from manufacturer's negligence, as it had not followed safety regulations that were in force at the time of manufacture, regardless of the contract. Consequently, the new owner of the yacht was entitled to compensation under the Finnish Tort Liability Act, even if claiming damages under the contractual liability rules was no longer possible. Although this conclusion has been criticised because liability was extended to damage caused to the yacht itself,[97] the case shows that a contract between a manufacturer and the original owner does not necessarily affect the rights that the new owner may acquire, regardless of contract. Consequently, at least under Finnish law it can be argued that if a vessel has been sold to a third party and the new owner and the manufacturer become solidarily liable to compensate a loss that the vessel has caused, the terms of the shipbuilding contract do not *necessarily* affect the eventual liability allocation between the tortfeasors, unless the new owner has somehow agreed to respect those terms.

In conclusion, it is evident that contracts affect how liability is eventually allocated between shipowners, shipyards, and component manufacturers. On the one hand, the above discussed examples indicate that shipyards and component manufacturers are probably at least partially protected against shipowner's recourse claims, even if the right of recourse is based on the non-contractual liability rules. On the other hand, there are many uncertainties, and the freedom of contract provides wide possibilities for agreeing on a liability allocation that the contracting parties perceive as being appropriate. In any case, it is worth highlighting that under Finnish law, liability exclusions are only valid against losses caused by ordinary negligence; in the case of gross negligence, liability exclusions do not apply.[98]

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97 See Olli Norros, 'KKO 2009:92 — Valmistajan vastuu veneen vahingoittumisesta' 2010 Lakimies 3, pp. 439–442.

98 Generally on the effects of gross negligence on liability exclusions, see Mika Hemmo, *Sopimusoikeus III* (Talentum 2005), p. 254.

In unmanned shipping, a key question will obviously be how the contractual relationship between shipowners, shipyards, and component manufacturers will be arranged. As the role of technical equipment increases, shipowners—or their liability insurers—may have incentives to seek as extensive a right of recourse as possible against vessel manufacturers.[99] Manufacturers, in turn, will probably try to avoid liability as far as possible.[100] Shipyards, for example, may find it unacceptable to bear the consequences caused by software defects, if the role of a shipyard is just to assemble the parts together. Consequently, it is a very central question in the development of unmanned ships of how to contractually strike a balance between the interests of shipowners, shipyards, component manufacturers, and any other party who will be somehow involved in the development of unmanned ships.

5 Conclusion

The previous sections of this study showed that the product liability rules could be applied even today in relation to many shipping accidents. The absence of case law, however, indicates that there has usually been no need to utilise them. Many reasons may exist for why this is the case, but, in my view, it most likely results from the way the shipowner's liability

[99] Liability insurers may sometimes even find it difficult to insure technology risks. See e.g. Mika Viljanen, 'Robotteja vakuuttamassa — autonomiset alukset esimerkkinä', 2018 Lakimies 7–8, pp. 962–973.

[100] Of course, it is theoretically possible that manufacturers would voluntarily take liability as it is one way to convince the public that new technologies are safe to use. In the context of self-driving cars, Volvo already announced back in 2015 that they will hold themselves 'liable for everything the car is doing in autonomous mode' and even added that 'if you are not ready to make such a statement, you shouldn't try to develop autonomous system'. See Autoblog, 'Can't Accept Autonomous Liability? Get Out of the Game, Says Volvo' (9 October 2015) <https://www.autoblog.com/2015/10/09/volvo-accept-autonomous-car-liability/> accessed 18 April 2018. However, it is a completely different question whether such an approach could work in the maritime context.

framework is arranged. Basically, the Finnish Maritime Code includes many advantages that make the Code attractive to an aggrieved party. For example, the shipowner often has a duty to obtain liability insurance,[101] and in some cases an aggrieved party may even have a right to make direct claims against the insurer.[102] In product liability, in turn, the producer of a product has no duty to obtain liability insurance,[103] and even if an insurance policy exists, it is a completely different question as to what kind of losses it covers. In addition, Section 9 of the Finnish Product Liability Act requires that the claim must be made 'within ten years from the date on which the liable party (...) put the product which caused the injury or damage in circulation'. Although the general tort liability rules do not have this kind of limitation, the requirement of fault makes claiming damages difficult under those rules as well. When one takes into account that the area of strict liability has also grown within the Finnish Maritime Code,[104] it is unsurprising that the aggrieved parties have most often based their claims on the Finnish Maritime Code, rather than on the product liability rules.

In theory, unmanned ships could change the status quo. Because the role of technical equipment will become more central than ever before, it is clear that there will also be more situations where aggrieved parties could invoke the product liability rules. In reality, however, I find it unlikely that the introduction of unmanned ships could drastically affect the position of the Finnish Maritime Code as being the main way to seek compensation, *unless* the Finnish Maritime Code or the product liability rules are signifi-

[101] According to the Finnish Maritime Code's Chapter 7 Section 2, liability insurance must be obtained if the gross tonnage of the vessel is at least 300.

[102] Direct claims against the insurer are possible at least in the cases of oil pollution and passenger injuries. See Article VII(8) of the International Convention on Civil Liability for Pollution Damage and Article 4bis(10) of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea.

[103] The question of whether manufacturers should have a duty to obtain liability insurance was considered when the Finnish Product Liability Act was enacted. Nevertheless, the government saw no need for such an approach. See 'Finnish Government Proposal 119/1989: Hallituksen esitys Eduskunnalle tuotevastuulaiksi', p. 17.

[104] On the position of strict liability in the Nordic maritime codes, see Falkanger, Bull, and Brautaset, pp. 192–193.

cantly changed. Even in unmanned shipping, the root cause of an accident may often still—at least partially—be the shipowner's negligent behaviour, and in such cases the Finnish Maritime Code will usually be a significantly easier way for an aggrieved party to seek compensation. If the basis of shipowner's liability is strict, there are even less incentives for aggrieved parties to invoke the product liability rules. Consequently, I believe the current product liability rules seem attractive to an aggrieved party mainly in two situations: first, if the shipowner is not liable to compensate the loss at all, and second, if the scale of the loss is exceptionally large, and the shipowner is not liable to compensate the loss to its full its extent, due to the right of limitation of liability.

The first situation—the shipowner is not liable at all—mainly concerns cases where shipowner's liability requires negligence.[105] As I have discussed in this study, unmanned ships may cause situations where finding negligence, at least on the shipowner's part, may be extremely difficult.[106] However, it is not clear that product liability should be the instrument to use for filling the potential gaps in shipowner's liability. If a decision to use an unmanned ship creates liability gaps, the solution may also be a wider adoption of strict liability within the shipowner's liability framework.[107]

The second situation—the shipowner is not liable to compensate the loss to its full extent—may be a more difficult challenge. It seems that an aggrieved party may be able to secure a more comprehensive recovery by basing his claim on the product liability rules instead of, or in addition, on the Finnish Maritime Code. In theory, this problem could be solved in two ways: first, the right to limit liability could be extended to vessel manufacturers, and second, the right to limit liability could be abolished completely. However, it may be difficult to get enough support for either approach. On the one hand, regulators have been reluctant to extend

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105 Of course, certain force majeure situations may release a shipowner from liability even under the strict liability rules. See e.g. the Finnish Maritime Code's Chapter 10 Section 3. However, the force majeure defence can also be invoked under the product liability rules. See Wilhelmsson and Rudanko, p. 244.

106 See Section 1 of this study.

107 See e.g. Peter Wetterstein, 'Redaransvaret och autonom sjöfart – några synpunkter', 2019 Tidskrift utgiven av Juridiska Föreningen i Finland 1, pp. 32–35.

the range of persons that have the right to limit liability,[108] and this approach could also be difficult to accept under EU law, as the product liability rules are meant to protect consumers.[109] On the other hand, the complete abolition of limitation of liability also seems unlikely. Although the existence of this right has been criticised many times, the majority of the international maritime community has only been willing to increase the limits, rather than abolish the right entirely.[110]

In any case, unmanned ships may affect the eventual liability allocation between the liable parties. An increasing number of cases where aggrieved parties can invoke the product liability rules also means that shipowners—or their liability insurers—may more often have the right of recourse against shipyards and component manufacturers. To some extent manufacturers are most probably already protected against such claims under the current contractual practices, but it is likely that these practices will also be contested more frequently if the role of technical failures significantly increases as the root cause of accidents. Consequently, the introduction of unmanned ships will make it more important than ever before to clearly define in contracts how liability for losses caused by defective products is allocated between the contracting parties. In addition, the liability allocation that the parties agree will have to be compatible with the terms of their insurance policies. Without sufficient insurance coverage, many contractual arrangements may be difficult or even impossible to adopt.

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[108] On the position of shipyards, see e.g. Wetterstein, *Globalbegränsning av sjörättsligt skadeståndsansvar: en skadeståndsrättslig studie*, pp. 99–102.

[109] See Recital 4 of the Product Liability Directive. The importance of the principle of full compensation has been noted by the ECJ as well. In *Case C-203/99, Veedfald v Århus Amtskommune*, the ECJ stated that although it is left to national legislatures to determine the precise content of compensable damage, 'full and proper compensation for persons injured by a defective product must be available' for 'damage resulting from death or from personal injuries and damage to, or destruction of, an item of property'. See paras. 25–27 of the judgment.

[110] See Martínez Gutiérrez, p. 201.

Going the Nordic way – an alternative to English hegemony?

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Contents

I Brexit may set the stage for new markets

This article is based on an oral presentation for lawyers and law students, some of whom come from distant countries and are not always fully aware of the traditions of Nordic cooperation. For many Nordic readers, the contents of this text are pretty obvious, but it is nevertheless worth putting these traditions down in writing once in a while. Cooperation between national states is not self-evident, as the story of Brexit shows us.

The starting point for this presentation is indeed Brexit. As the United Kingdom is supposed to be taking a new position in the world, the preconditions for the provision of services, especially those related to the maritime industries, may also change. Many service providers based in the UK in other fields, such as financial services, may move to Continental Europe.

London has been the undisputed centre of maritime arbitration, and English maritime and insurance laws have, at times, enjoyed a virtual hegemony. Every vacuum is filled, as we have learned from physics. The political stumbling of Britain may encourage service providers in other areas to try to take bigger pieces of the cake, if they become available. In the Nordic countries, the establishment of the Nordic Offshore and Maritime Arbitration (NOMA) a couple of years ago coincided with Britain´s plan to leave the EU and is reported to have been inspired by it.

Brexit seems to be an unrewarding topic to write about. Every time it is covered it in one way or another, the situation changes or remains unresolved. It reminds the author of the Greek mythological figure Tantalus and his eternal punishment. He was made to stand in a pool of water beneath a fruit tree with low branches, with the fruit ever eluding his grasp, and the water always receding before he could take a drink.

II The predominance of English law

"*Rule, Britannia! Britannia rule the waves: Britons never will be slaves.*" This British patriotic song from 1740 in fact described the British maritime might, both military and commercial, that was predominant from the 18th and 19th centuries until up to the 1920s. The conquest of colonies around the world, the industrial revolution in the 19th century, the technical developments in shipping and telecommunications that facilitated faster crossings of the Atlantic to the United States, legal developments making bills of lading documents of title, the development of marine insurance and use of trade terms such as FOB and CIF, all of these paved the way or represented this might. At the beginning of the 20th century, one quarter of the world trade passed through British ports, most of it traded to or from North America.

These developments made it natural to subject contracts of af-freightment to English law. As the maritime and legal community was acquainted with English law, it was easy to stick to it. As English law is based on precedents, its extensive application also generated case law and, thereby, further developed the legal framework. "Nothing succeeds better than success itself", as the saying goes.

In marine insurance, the role of English underwriting in both primary insurance and reinsurance has been substantial. The United Nations Commission on Trade and Development (UNCTAD) stated a few decades ago that the use of the policy forms for both hull and cargo insurance had become so widespread that the policy forms had become virtually *de facto* international insurance conditions.[1] At Lloyd´s, individual investors participating in underwriting formed syndicates many of which have now been underwriting risks for over three centuries. Obviously corporate insurers operating in London have gained a larger proportion of the risks over the years. One of the advantages of the London insurance market has been the cooperation in drafting insurance conditions. The standard

[1] UNCTAD document ´Legal and documentary aspects of a marine insurance contract´ (tdbc4ISL27Rev.1_en.pdf) at para. 45

insurance conditions for hull & machinery and cargo, amongst others, are common to all or most underwriters in the market, although these may be supplemented by more ´tailor (or broker) made´ clauses. As at least reinsurance takes place in the London market, it has been natural to use English conditions throughout the world. An estimate, quoted for decades, has been that two thirds of world trade is insured by English cargo clauses. As for the shipowners´ liability, many of the world´s largest P & I clubs are based in Britain.

In terms of sales law, English law has had a widespread influence in countries once colonized by Britain. The United Kingdom has remained outside the United Nations Convention on Contracts for the International Sale of Goods (the CISG or the Vienna Convention) of 1980. As such it remains aloof, since many other Commonweath countries, including Canada and Australia, are Convention states like the United States, China and Russia. In the European Union, only Portugal and Ireland, in addition to the UK, have remained outside the Convention. The British government has on several occasions sent inquiries to the country´s business circles with a view to accelerating the UK´s ratification of the Convention but there has been a widespread opposition among the country's legal circles to doing that. One explanation is that English sales law has been applied by reference in standard form contracts, most notably the GAFTA commodity contract forms.

The use of English law has obviously been very lucrative for English and other lawyers familiar with English law. As maritime and commercial law disputes are frequently settled by arbitration, London has become one of the centres of commercial arbitration. In maritime arbitration, London, or the UK in general, are by far the most important seats for arbitral proceedings. The website[2] of The London Maritime Arbitrators Association boasts that its members get more appointments than all the arbitrators in other maritime arbitration centres of the world combined. The number of awards rendered annually in London exceeds 500 and the number of appointments is around 3000. The LMAA has also developed

[2] http://www.lmaa.london/

several optional arbitration rules in order to be able to be instrumental in the settlement of minor disputes.

As a member state of the European Union, the United Kingdom has been able to combine its own rich legal traditions, based on common law and equity, with European law. This has been beneficial for the business community, since much of substantive law is harmonized. Moreover, dispute settlement has been easier, due to common provisions on jurisdiction and the mutual recognition and enforcement of judgments.[3]

III Nordic cooperation in maritime and sales laws

In order to cover the legal history of the Nordic countries in this area, one must bear in mind their state history as well. These countries nowadays enjoy a high standing in the world in the fields of peace keeping and settlement of armed conflicts, but their own history is nevertheless rather belligerent, even between themselves, if we look back in time.

For those not familiar with the state history of the Nordic States over the modern period, it can be said that only Denmark and Sweden have always been independent national states, although they fought bloody wars over the the ownership of South Sweden a few centuries ago.

Norway was part of Denmark until 1814 when it gained independence for a few months, but was soon conquered by Sweden. The countries formed a personal union with the same kings ruling both, although with different regent names. Their legislations and interests were ultimately different, and in 1905 Norway became fully independent for the second (or third) time in its history. A referendum had been organized and

[3] See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 351, 20.12.2012, p. 1–32,* as well as the Lugano Convention.

independence was supported by over 300,000 voters, whilst maintaining the union with Sweden gained barely 500 votes.

Although Finland was nominally a Grand Duchy established by Sweden in the 1560s, this did not have any administrative implications. Encouraged by Emperor Napoleon I, Czar Alexander I conquered the territory of Finland in the war of 1808–09 against Sweden. Alexander I then became the Grand Duke of Finland and granted the country autonomy in running its own affairs. Legislation emanating from the Swedish era (1155–1809) was to be applied unless new legislation was passed. In 1812, Alexander I merged the Eastern regions into the newly established Grand Duchy of Finland, including the Carelian Isthmus, as well as Vyborg and the Kexholm Administrative District (Län), the latter of which Sweden had gained in the Peace Treaty of Stolbova 1617, but both of which had again belonged to Russia since the Peace Treaty of Nyhamn of 1721.[4] Remarkably, even these territories had, during the period of Russian rule, been governed in principle by Swedish laws. The Finnish Parliament of the Grand Duchy was composed of noblemen, clergy, farmers and bourgeoisie, but was only convened and able to start legislating as late as in 1863.

Sweden gained its first Maritime Code in 1667, which was therefore also applied in Finland. Its roots were found in German and Dutch regulations. In the 17th century, England was only one of the principal maritime nations, with many Continental countries having advanced maritime laws. Two centuries later, after the publication of the German Handelsgesetzbuch HGB in 1861, Sweden adopted a new Maritime Code in 1864 and this constituted a model for the Finnish Maritime Code of 1873.[5]

Sweden, Norway and Denmark revised their Maritime Codes on a common basis at the start of the 1890s. For Finland, due to the Russian repression and political turmoils following the Finnish independence gained in 1917, it took until 1939 to fully follow the Scandinavian re-

[4] These Carelian territories had to be surrendered to the Soviet Union in the Moscow Peace Treaty after the Winter War 1939–40 and again in the Paris Peace Agreement of 1947.

[5] Rudolf Beckman, Handbok i Sjörätt, Sjätte omarbetade upplagan, Helsingfors 1971, pp. 1–3.

visions.[6] Thereafter, the four countries have in substance had identical Maritime Codes. The latest joint revision took place in 1994. The Nordic Maritime Codes enacted in that year are based on the Hague-Visby Rules of 1968, but contain elements of the Hamburg Rules of 1978.

The economies of the four Nordic states are different. Shipping is generally more important for Denmark and Norway, whereas in Finland and Sweden shipper interests, such as those of forest industries, have greater weight. As a result, Denmark and Norway have been avantgardists in producing preparatory work in order to implement the Rotterdam Rules, while in Finland little has been done. According to common wisdom, the entry into force of the Rotterdam Rules requires the United States, which applies the old Hague Rules of 1924, to move forward and adopt them. The current political atmosphere in the United States is not very encouraging for the adoption of an international convention of a very technical nature. Politicians do not win elections on the basis of maritime laws, and very few, if any, polticians in the US Congress seem to be interested in the Rotterdam Rules.

The Nordic countries have succesfully combined forces in the drafting of standard contracts. The Baltic and International Maritime Conference BIMCO, located in Copenhagen, has published standard form charterparties and bills of lading, which are also used outside the Nordic countries. This year marks the centennial of the General Conditions of the Nordic Association of Freight Forwarders (NSAB), since the first set of those Conditions was published in 1919. Sixty years ago, in 1959, the NSAB became an ”agreed document”, meaning that the representatives of customers using freight forwarding services also became involved in the drafting of the Conditions.[7] The current version is NSAB 2015.[8]

6 Ibid.

7 The idea of an ´agreed document´ is probably not a Nordic one. The York-Antwerp Rules 2016 for general average adopted by the Comité Maritime International (CMI) were drafted by representatives of shipowners, marine insurers and average adjusters, which makes them close to being an ´agreed document´ although shippers representing cargo interests were not included in the drafting.

8 See further Lauri Railas, PSYM 2015-ehdot ja logistiikkapalvelusopimukset (NSAB 2015 and Logistics Service Agreements, available only in Finnish), Kauppakamari 2018.

Despite the success of the FIATA transport documents, such as the FIATA Multimodal Transport Bill of Lading, freight forwarding terms are not harmonized internationallly but are instead usually published by national associations. The use of the Nordic NSAB 2015 is in principle restricted to members of the Nordic freight forwarder organisations. However, the Conditions have been translated into Russian and also have some application in the Baltic States. Furthermore, it should be borne in mind that the Conditions are applied to carriages wherever situated in the world, to the extent that they are organised by operators adhering to the Conditions. We shall look further at NSAB 2015 in section VI.2, *infra*.

The Nordic countries have also created common marine insurance conditions called the Nordic Marine Insurance Plans.[9] Each Nordic country originally created its own sets of marine insurance terms, but these are now only applied to smaller craft (hull & machinery) or import carriages (cargo). Before, marine insurers in each of the Nordic countries had their own national associations cooperating in drafting national marine insurance terms, but since the national organizations have by and large disappeared, there are no longer forums for that work.[10] The Nordic approach has been to esatablish a Pan-Nordic association of marine insurers entitled CEFOR.[11]

Finally, the Nordic countries have a common approach to sales laws. In the 1980s, the four largest Nordic countries all ratified the CISG Convention at the same time. However, the countries entered into the so- called Article 92 reservations when ratifying the Convention, which had the effect of excluding the application of Part II of the CISG, covering

[9] There are various Plans and the current versions are the 2019 ones. The idea of a ´plan´ is to integrate statutory provisions, case law and contractual provisions into the same text.

[10] There were other reasons to maintain cooperation, too. Until 1987, there was a virtual cartel in hull insurance in Finland as the Association of Marine Insurance Companies fixed the tariffs for each vessel insured by its members.

[11] CEFOR´s work is very much behind the title of this article as the organization published last year a website entitled ´The Nordic Way, A comparison of ITHC (The Institute Time Clauses – Hulls) and the Nordic Plan´ at http://cefor.no/Clauses/Comparison.

formation of contracts.[12] In 2004, Professor Jan Ramberg from Sweden, as the Vice-Chair of the ICC Commission of Business Law and Practice (CLP Commission), initiated a request to the governments of the four largest Nordic States to lift the Article 92 reservations in order to apply Part II of the CISG as part of the laws of each of the Nordic states. The idea received support from business and academic circles of the Nordic states, with virtually no opposition. As legislative processes take time, the Nordic states finally began applying Part II CISG in 2012.

However, the Nordic states prefer to apply their domestic sales laws to sales between parties in the Nordic countries. This follows from the so-called Article 94 reservation to the CISG. According to the private international law rules, in the absence of any choice of law by the parties, the law of the seller will normally apply. This brings the pan-Nordic Contracts Acts into application as well.[13]

IV Brexit and contracts

I have already mentioned the difficulties involved in addressing this topic, as we do not know what kind of a Brexit there will eventually be, if any. As a "hard Brexit" still looms around the corner when writing this text at the beginning of April 2019, a few words need to be said about this prospect from a contractual perspective.

[12] The Nordic countries had harmonised their Contracts Acts in the 1920s, and formation of contracts would take place according to the provisions of those Acts.

[13] In fact, the Contract Acts might also find application in sales where Part II of the CISG applies, because the CISG does not cover the question of validity of the contract. In such situations, the question would need to be examined in the light of the applicable law (*lex causae*).
There may be different approaches as to what constitutes validity. In Germany, which has produced the greatest number of CISG precedents, the question of whether standard contract terms form part of a contract and thus derogate from the CISG is often regarded as an interpretation of Article 6 CISG, which allows parties to exclude the application of the Convention or modify its terms. A more natural approach would be to treat the question as a question of validity.

One of the most notable immediate legal effects of a hard Brexit is that the United Kingdom would no longer be bound by the Brussels Regulation on Jurisdiction in Civil and Commercial Matters and the Recognition and Enforcement of Judgments.[14] Even though there would be goodwill in both EU countries and the UK, the absence of a legal framework would mean that the "free movement of judgments" would not exist until some form of arrangements were put in place, such as the UK joining the Lugano Convention, being an extension of the Brussels Regulation (formerly Convention) framework to the EFTA/EEA countries (Norway, Iceland and Liechtenstein) and Switzerland. How would pending court cases or enforcement applications be treated during the interregnum?

The only way to tackle the problem for individual parties is to include an arbitration clause into the contract, since arbitral awards are recognized and enforceable between the UK and most of the rest of the world, in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

When it comes to choice of law, the UK would no longer be bound by the Rome I and Rome II Regulations.[15] Being EU regulations, and therefore no longer applicable in the UK, these would no longer constitute parts of English law. The traditional English conflict of laws requiring the determination of ´the closest and most real connection´ would also become applicable in the EU context, if English courts were seized.[16] Whilst the rules on jurisdiction only apply between the courts of contracting states, the rules of private international law are applied internationally. This means that when a Nordic court applies its choice

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[14] See footnote 3, *ante*.

[15] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I*),* OJ L 177, 4.7.2008*, p. 6–16;* and
Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007*, p. 40–49*
Now that choice-of law rules are no longer independent conventions but parts of *acquis communautaire*, they must also be followed by the EEA countries, including Norway.

[16] See further Dicey, Morris & Collins on the Conflict of Laws, Fourteenth Edition, 2008.

of law rules, being either of the EU Regulations, it must then apply the law designated by the rules, even if the applicable law is a non-EEA law, such as English law.

In the context of the sale of goods, the emergence of a customs barrier would entail customs clearance, as well as the payment of tariffs. As contracts of sale have not presupposed the existence of these, the contracts would have to be renegotiated or amended. Uncertainty about the future does not make the task very easy.

V NOMA challenging maritime arbitration in London

A couple of years ago, Norwegian and Danish maritime circles launched a project entitled the Nordic Offshore and Maritime Arbitation (NOMA). The early stages of this project are not publicly known and so only amount to ´hearsay´ for the author, but it does seem that Brexit has at least partly provoked this project. By now, the national maritime law associations (CMI chapters) of Finland and Sweden have become members of NOMA and have appointed members to its Board.

All Nordic countries have had arbitral institutions, the Arbitration Institute of the Stockholm Chamber of Commerce having been the most successful internationally. There has not been any institutional form of maritime arbitration in the Nordic countries. I suspect one of the reasons for this is the small number of experts in the field, so making redundant the appointment function of arbitral institutions. The tendency has therefore been one of ad hoc arbitration. In addition to London, there are also maritime arbitration institutions in the Far East, in both Singapore and Hong Kong, as well as in the former (or current) socialist countries of Russia and China.[17] Maritime arbitration differs from normal

[17] The Court of Arbitration of the International Chamber of Commerce, which is by far the leading arbitral institution when it comes to the geographical scope of the cases

commercial arbitration in that many arbitrators are not lawyers, but instead experts in the nautical, technical or commercial sides of shipping.

Commercial arbitration is generally divided into institutional arbitration, in which arbitral proceedings are conducted in accordance with the rules of arbitration of the institution in question, and ad hoc arbitration, in which the parties are in principle entitled to designate the rules applicable to the proceedings, but failing which (as is normally the case), the arbitral proceedings are conducted in accordance with the arbitration law of the seat of the arbitration (curial law or *lex arbitri*).[18] It is difficult to place NOMA into one of these two categories, as there are few provisions made for the role of the bodies of NOMA in the management of arbitrations.

NOMA arbitrations are supposed to be conducted in accordance with the Rules of NOMA, but there exists in addition a document entitled ´Best Practice´, which is said to reflect the Nordic manner of conducting arbitration. Moreover, there are rules for taking evidence. The regulatory framework for arbitration is very relevant, because there are no means for a party dissatisfied with the outcome to appeal on the merits, and so the only way to fight the award is to challenge it on procedural grounds. Should this succeed, it is a matter of liability for arbitrators and the institution.

According to the Nordic Marine Insurance Plans 2019, settlement of disputes relating to insurance shall take place through NOMA arbitration, when the lead insurer is non-Nordic. The reason for this is said to be Brexit: should the lead insurer be British, one could not enforce a court judgment against it. However, when the lead insurer is a Nordic company, the traditional average adjuster procedure is followed. In Finland and Sweden, there is no access to state courts in marine insurance matters

and the amounts in dispute. The ICC has not been able to establish a viable maritime arbitration alternative, despite attempts.

18 Arbitration pursuant to the UNCITRAL Arbitration Rules (latest version 2010) is a halfway house between institional and ad hoc arbitration, although generally categorised within the latter group. An arbitral institution may act as an appointing authority for arbitrators, but otherwise arbitral proceedings are conducted in accordance with the UNCITRAL Rules.

until the national Average Adjuster has issued an adjustment. As the parties are able to replace court proceedings by an arbitration clause, by using this route they could also avoid requesting the average adjustment.[19]

VI Some differences between Nordic and English substantive laws

In this Section, we consider certain central issues which distinguish the Nordic laws from English law. Obviously, the system of English law being divided into common law and equity is strange to civil lawyers. I would imagine that these aspects make the Nordic laws more modern and competitive, especially for civil lawyers, if one is compelled or able to choose the applicable law. I have selected these issues subjectively as I consider them particularly striking, especially as far as contracts of sale are concerned.

VI.1 Delay in the Nordic and English practices

"Time is of the essence" is a term more and more often stated in contemporary logistics. These days, consumers already get time commitments for delivery when purchasing online. For businesses, timely delivery is not only a way of obtaining products to be sold in Christmas markets, but is also an essential part of the logistics system to avoid unnecessary storage and thereby an important cost item. A delay in delivery triggers sanctions, usually in liquidated damages. Sometimes the buyers are more stringent and establish ´time windows´ for deliveries, so that a delayed delivery may no longer be admissible. The same approach is reflected in chartering law. The Nordic Maritime Codes address the time element

[19] Insurance companies invariably undertake to cover the costs and fees of the average adjusters, whereas in arbitrations "costs follow the merits", which means that the procedure of the average adjuster is more advantageous for the assured.

elaborately when it comes to time and voyage chartering, by providing the possibility of cancelling the contract in cases where the time limit has been exceeded.[20] A similar solution follows from the application of English law.

Transport conventions expressly address the time factor and liability for delay. As is well known, however, there is no convention in force regulating multimodal transport, and due to this absence, contractual approaches, most notably that of FIATA, are relevant

The previous version of the Nordic freight forwarding conditions NSAB 2000 (as well as the current NSAB 2015) contain a provision for the freight forwarder to issue a time guarantee for the customer. The English set of freight forwarding conditions BIFA 2017 also recognizes this possibility in Clause 25, although it does present it conspicuously.

In cargo insurance, the English Institute Cargo Clauses explicitly exclude loss caused by delay and there are no special standard clauses for that purpose (obviously underwriters can draft their own terms on the spot). On the contrary, The Nordic Marine Insurance Plan for cargo allows for compensation for the physical perishing of the goods due to delay and, moreover, also mentions the possibility of obtaining cover for the economic losses caused by delay.[21]

The CISG does not diffentiate between delay and non-conformity when addressing remedies, whereas the Nordic sales laws do so. Parties usually address delay by inserting liquidated damages or penalty clauses into the contract of sale. The Anglo-Saxon world, including English law, does not view penalty clauses favourably, which makes them less enforceable. The amount of liquidated damages should more or less correspond to the actual damages suffered. Incoterms ® 2010 does not recognize the risk of delay between the seller and the buyer, even though the existence of such a risk and its allocation are obvious.

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20 Sections 28 and 55 Chapter 14 of the Finnish Maritime Code (674/1994).

21 The fact that English marine insurance conditions did not offer any cover for delay was already being criticised by UNCTAD forty years ago, see UNCTAD document ´Legal and documentary aspects of a marine insurance contract´ (tdbc4ISL27Rev.1_en.pdf) at paras. 185–188.

VI.2 The impact of gross negligence

Transport conventions for each mode of transport have their liability systems, which attach significance to the conduct and diligence of the carrier, or to the people or subcontractors working for him. Transport conventions are generally at least partially mandatory by nature. The Nordic States and the UK share the same regulatory framework in this respect.

In situations where mandatory laws do not apply, the Nordic countries generally follow the tradition of the civil law countries, in that gross negligence deprives a party of the right to exonerate or limit his liability. This is a normal provision in standard form contracts, but it applies even without an express mention, by virtue of case law.[22] Most cases, however, deal with situations covered by transport mode specific laws, most commonly road transport laws.[23] In maritime law, the system is more complex. Under the Hague-Visby Rules incorporated into the Nordic Maritime Codes, there is no limitation of liability for the benefit of any person if it is proved that the loss resulted from an act or omission of such person with the intent to cause such loss, or recklessly and with knowledge that loss would probably result.[24] The limitation does not, however, apply if only a sub-carrier is liable for wilful misconduct or gross negligence. However, gross negligence may not necessarily lead to liability if the carrier proves that the loss resulted from fault or neglect by the master

[22] For Finland, see HD 1993:166. The Swedish Supreme Court has in an individual case deviated from the principle by applying the possibility of adjusting the contract pursuant to section 36 of the Swedish Contracts Act, see HD judgment 24.2.2017 in case No. T 3034-15.

[23] For air transport under the Montreal Convention 1999, see Lalli Castrén, Lentorahdinkuljettajan syrjäytymätön vastuunrajoitus, 2012.

[24] HVR Article 4.5 e) and 13:33 Finnish Maritime Code. For the Nordic Maritime Codes, see Hannu Honka, New Carriage of Goods by Sea, The Nordic Approach in Honka (Ed.), New Carriage of Goods by Sea, The Nordic approach including comparisons with some other jurisdictions, Institute of Maritime and Commercial Law, Åbo Akademi Unversity, Åbo 1997, pp. 15–216.

or any member of the crew, the pilot or any person performing work in the vessel´s service in the navigation or in the management of the vessel.[25]

The fact that gross negligence makes it impossible to limit liability is well-known to trial lawyers, who regularly build their statements of claim on the alleged existence of gross negligence. Courts and arbitral tribunals are, however, reluctant to admit the existence of gross negligence.

The Nordic approach to gross negligence was strengthened by bringing it into the NSAB 2015 freight forwarding conditions. According to § 6 second paragraph of the said conditions: "the freight forwarder may not invoke the rules…which exonerate him from or limit his liability, or alter the burden of proof, if it is proven that the freight forwarder´s subcontractor has wilfully, or the freight forwarder himself or his own employees have wilfully or grossly negligent, caused the damage, delay or other loss…". As we can see, freight forwarders still refuse to assume responsibility for a grossly negligent subcontractor. This follows the approach of the Nordic Maritime Codes, although with the difference in NSAB 2015 that freight forwarders lose their right to limit liability when there is wilful misconduct on the part of the subcontractor.

Under English law, ít is, however, possible to contract out of or limit liability for gross negligence. Since standard form contracts, such as the BIFA 2017 freight forwarding conditions, may not mention this matter, invoking gross negligence is not of avail.

VI.3 The doctrine of good faith and fair dealing

Continental civil codes require the parties to observe good faith.[26] The doctrine of good faith and fair dealing ultimately found its way to the

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[25] 13:26.1 of the Finnish Maritime Code. Furthermore, in HD 1993:66, the carrier had not, according to the Supreme Court, exercised due diligence in making the vessel seaworthy at the commencement of the voyage and had lost its right to exonerate itself from liability for cargo carried on deck. However, it was found that the carrier did not have knowledge that the damage would probably result, and so the carrier could invoke limitations of liability.

[26] See e.g. § 242 BGB (*Leistung Nach Treu und Glauben*): "*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte*

CISG, although in a rather obscure way.[27] This apparently reflects the fact that there was no unanimity on including it in the Convention. Commentators of the CISG have had varying views on the significance of the reference to the doctrine in the Convention.[28]

The Nordic countries do not have comprehensive civil codes and therefore many principles are created by case law and then elaborated by the doctrine.[29] Sometimes this may take place the other way round, as scholars introduce new ideas in their writings. This has probably happened with the doctrine of good faith.

In the Nordic countries, jurisprudence has, over the last several decades, identified a duty applicable in contractual relationships, which has little by little been crystallised into a legal principle, according to most legal scholars and other legal writers. Although not the originator of this principle, Justice Gustaf Möller has shaped the essential content of the principle in the following way:

"The underlying idea is to conceive a contractual relationship as a cooperative project for the parties instead of an arrangement which entitles a party to a contract to pursue only his or her own interests."[30]

The principle has been popular among writers in Nordic countries, especially in Sweden and Norway, but increasingly also in Finland. In

es erfordern."; as well as Article 1104 of the French Code Civil: "*Les contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d'ordre public*."

27 Article 7(1) CISG provides that "(i)n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." (Emphasis added)

28 See further Farnsworth, Allan E., Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions, and National Laws, 3 Tulane Journal of International and Comparative Law (1995) pp. 47–63, reproduced at https://www.trans-lex.org/122100/_/farnsworth-allan-duties-of-good-faith-and-fair-dealing-under-the-unidroit-principles-relevant-international-conventions-and-national-laws-tuljintcompl-1995-at-56-et-seq/, visited on 31 March 2019.

29 See, however, section 33 of the Nordic Contracts Acts, which relates mainly to the formation of contracts.

30 Gustaf Möller, The Nordic tradition: application of boilerplate clauses under Finnish law in Giuditta Cordero-Moss (Ed.) Boilerplate Clauses, International Commercial Contracts and the Applicable Law, Cambridge University Press, 2011, p. 254.

Sweden, there are several doctoral dissertations made exactly on this topic.[31]

In Finland, the principle of loyalty was systematically introduced by professor Lars-Erik Taxell in the 1970s.[32]

The principle has been expressly referred to at least in two Finnish Supreme Court cases.[33]

The duty of loyalty is a Nordic elaboration of the doctrine of good faith and fair dealing, which has been recognized by the compilations of ´professor-made-law´. The doctrine thus forms part of the UNIDROIT Principles for International Commercial Contracts (the latest version being from 2010, the Principles of European Contract Law (PECL, published in parts in 1997, 2000 and 2003), the draft Common Frame of Reference (published in 2008) as well as the European Commission´s proposal[34] for a Common European Sales Law.

English law neither has a civil code and nor does English contract law know the concepts of good faith and fair dealing as such.[35] English and other Anglo-Saxon lawyers instead resort to equity, where they find tools such as ´equitable estoppel´. This is a legal principle which prevents someone from taking legal action that conflicts with his previous claims or behaviours. The doctrine of good faith is, however, recognized in many other common law jurisdictions.[36]

It should be noted that the doctrine of good faith and fair dealing has been on the rise over the past decades, not only in civil law countries, but also in international commercial law in general. Although the application of English law would eventually lead to the same result, the application of

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31 See e.g. Jori Munukka, Kontraktuell lojalitetsplikt, Jure förlag AB 2007.

32 See Avtal och rättskydd, Åbo Akademi 1972, pp. 81–82, and Om lojalitet vid avtalsförhållanden, Defensor Legis 1977, pp. 148–155.

33 HD 1993:130 and HD 2007:27.

34 COM (2011) 635 final.

35 The concept is nevertheless mentioned in English law e.g. in section 2 of the 1906 Marine Insurance Act, which states that the contract of insurance is a contract of utmost good faith (*uberrimae fidei*).

36 The laws of Australia and New Zealand recognize the principle and so does American law, see Trond Solvang, Forsinkelse i havn. Risikofordeling ved reisebefraktning, 2009, p. 394 and pp. 98–100.

one of the Nordic national laws or international contract law principles – at least in my own Nordic view – gives more predictability. The failure of the EU to pass the Common European Sales Law, which contained the doctrine of good faith and fair dealing, was obviously a setback in the European scene in this respect.[37]

VII. Conclusions

In my view, Brexit inevitably has a negative impact on the standing of English law in international trade, in maritime law and marine insurance. Much of the legal framework is international, but the United Kingdom would need to join many international agreements or organisations,[38] or enact the provisions of conventions adopted under the auspices of these into its national law, as they would no longer be applicable through EU regulations.

Any demise of the Anglo-Saxon world, however relative, is an opportunity for the rest of the world to challenge its hegemony. The Nordic countries generally have a good reputation globally, as they rank high in various surveys relating to quality of life and happiness, transparency, democracy, health care and education. This could give them added value in promoting the ´Nordic Way´ among the legal cultures of the world. This added value would mean more frequent incorporation of any of

[37] For the business community, the CISG, being an instrument of international, rather than regional nature, generally suffices as the sales law for goods. However, the difference and interaction between the sale of goods and of services, or the sale of services in general, are not addressed in the CISG. The Common European Sales Law would have taken a step forward in this respect.

[38] This depends on the EU competences in the relevant field. Where the EU has exclusive competence such as in trade policy, it is the EU that is a member of international organisations and agreements, whereas in the fields of mixed competence, the membership of organisations and adherence to conventions is regularly parallel, see Piet Eeckhout, EU External Relations Law, Second Edition, Oxford University Press 2012, pp. 212–266.

the Nordic laws, or Nordic insurance or freight forwarding conditions, into the relevant contracts. This would inevitably mean more work for Nordic lawyers. As the Nordic laws would become more relevant, this would attract more foreign students to Nordic universities. In this context, one must acknowledge the significance of the Scandinavian Institute of Maritime Law (Nordisk Institutt før Sjørett) in training Nordic and other maritime lawyers into specialization over many decades. It is hoped that financial support for these studies would be found.

The Nordic countries share a special interest in maintaining unity in their basic approaches to maritime and sales laws. Together, the Nordic countries and their legal cultures are stronger. In this way, they can take care of their own affairs on the basis of their own norms. But there is more to it than just that. Our legal culture and related services could become sales items for the rest of the world more often than they are now, if Nordic lawyers play their cards right.

The seller's right of stoppage when bills of lading are issued

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Contents

1 Introduction

In February 2019, the Norwegian Supreme Court (HR-2019-231-A)[1] issued a decision on important aspects of the seller's right to direct the carrier to retain goods carried under bills of lading, when the purchase price is not been paid in accordance with the contract for sale. The majority in the 4-1 decision[2] held that the right of stoppage existed, and that the carrier who had delivered the cargo to the buyer who had presented a bill of lading, was liable for any loss suffered by the seller arising from the subsequent bankruptcy of the buyer.

The facts are outlined below in section 2, to the extent necessary for discussion of the questions – with an indication of how the central legal issues were dealt with by both the court of first instance and the court of appeal. Section 3 provides a summary of the arguments brought before the Supreme Court, with the reasoning of the Supreme Court majority then discussed in Section 4, and the dissenting opinion in Section 5. Finally, Section 6 offers some conclusions and reflections by the author.

2 The background

From 2011 onwards, the Norwegian company Portland had a distribution agreement in place with the Canadian company Genfoot regarding shoes, which made reference to "the laws of Quebec". At first, the shoes were bought by Portland on a cash basis, but gradually credit terms were agreed.

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1 There is no authorized translation of the judgment. The translations below are by the present author.

2 The opinion of the first voting judge was adhered to by the following three.

Our case concerns a sale of shoes in 2014 on fob China-terms. The transportation was undertaken by Schenkerocean,[3] Hong Kong, which has a number of agencies in other countries, i.a. in China, Canada and Norway.

Prior to this particular shipment, a framework agreement existed covering transportation between Portland and Schenker Norway on the basis of NSAB 2000 (General Conditions of the Nordic Association of Freight Forwarders of 2000).

For the shoes, loaded in two containers, Schenker China, acting on behalf of Schenkerocean, issued three original bills of lading, with the Chinese producer as shipper and Genfoot as receiver, and with Portland as a party to whom notification of arrival in Oslo should be given. Once paid by Genfoot, the shipper then sent the three original bills of lading to Genfoot, who sent one of them on to Schenker Canada, endorsed in blank.

On 20th August, Genfoot asked Schenker Canada to forward the bill of lading to Portland, and Portland delivered the bill to Schenker Norway.

When the cargo arrived in Oslo, not later than 22nd September, Genfoot had two bills of lading and Schenker Norway had the third.

On 22nd September, Portland's financing bank (DNB), which had a claim against Portland totalling around NOK 50 million, terminated the relationship due to breach of contract; Genfoot was informed of this the same day. The following day Genfoot instructed Schenker Canada that the containers should not be delivered to Portland. This instruction was sent on to Schenker Norway, which replied, however, on 24th September, that this could not be done, as the containers now belonged to Portland. The reply led to some discussion and resulted in an understanding that release to Portland should be delayed, giving Genfoot the opportunity to make further inquiries and substantiate its right to give such directions.

On 25th September, Schenker Norway informed Genfoot and Schenker Canada that the cargo had been released to Portland.

However, Schenker Norway had not received full compensation for services rendered to Portland, and Schenker Norway retained the cargo

[3] The correct name is SCHENKERocean, but for practical purposes I use – as the Supreme Court does – Schenkerocean, and the Norwegian subsidiary – Schenker AS – I call Schenker Norway.

in accordance with NSAB § 14. Finally, on 27th September the cargo was released to Portland against payment of NOK 2 million.

Portland was declared bankrupt on 6th October, and Genfoot has argued that a substantial loss would have been avoided if Schenker Norway had followed the instructions on stoppage. Appearing before the Supreme Court, the parties agreed that if the claim is sound the loss amounts to USD 350,048.

The court of first instance found that Schenker Norway had not followed the instructions given by Genfoot, and that Schenkerocean was therefore liable for the resultant loss. The damages were fixed at USD 400 000. At this stage the litigation also concerned a third container, which was delivered to Portland without presentation of a bill of lading.

For the court of appeal, the central issue was whether the delivery of the bill of lading to Schenker Norway implied that Schenker Norway now held the cargo on behalf of Portland. This was found not to be the case, but Genfoot failed in its claim because Genfoot "had not tried to establish as against the carrier that the exercise of the right of stoppage was justified". Regarding the third container, there was agreement that it should not have been delivered to Portland, and Genfoot was awarded approximately USD 50,000.

3 The case presented to the Supreme Court

The case before the Supreme Court – on appeal by Genfoot – concerned only the two containers for which Portland had received the bill of lading.

Genfoot's main arguments were:

(i) that the right of stoppage followed from CISG (United Nations Convention on Contracts for International Sale of Goods) Art. 71, which is part of the law of Quebec. DNB's termination on 22nd September gave grounds for stoppage. Lack of preceding notice is immaterial;

(ii) Schenkerocean was under a duty to follow the stoppage instructions, even if Genfoot was not party to the contract of carriage; and

(iii) the liability of Schenkerocean was intact: a clause in the bill of lading on waiver of the right of stoppage was deemed immaterial, and so was the fact that the bill of lading had been given to Portland.

Schenkerocean's defence was:

(i) it contested for a number of reasons that CISG Art. 71 gave a right of stoppage in the present circumstances,

(ii) consequently, Schenker Norway was under no obligation to follow the stoppage directive,

(iii) in any case, that a waiver of the right of stoppage in the bill of lading was binding on Genfoot,

(iv) Genfoot had contributed to the delivery to Portland by giving the bill of lading to Portland and by not using the possibility inherent in Genfoot's possession of the two other bills of lading and, finally

(v) the claim was waived in a deal regarding a reconstruction plan – an issue which will not be discussed in detail here.

4 The view of the Supreme Court majority

4.1 Introduction

The Court discussed a number of issues before reaching the conclusion. We will pay special attention to questions of a legal nature, but some of them are closely connected to the concrete factual circumstances.

4.2 CISG Art. 71: Had payment taken place?

The first question dealt with by the majority was whether, according to CISG Art. 71, Genfoot had a right of stoppage that had to be respected by Schenkerocean.

The parties agreed that the sale agreement was governed by the law of Quebec, which made CISG Art. 71 applicable. The Court remarked that this was consistent with Sect. 3 of the Norwegian Act of 3rd April 1964 on choice of law when a sale of chattels has a connection with more than one country.

Art. 71 paragraph 1 and 2 reads:

> *(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform … as a result of … a serious deficiency … in his creditworthiness …*
>
> *(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document, which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller."*

Schenkerocean contended that the purchase price had been paid, but the Court found that the payments referred to concerned previous obligations, not the present one.

4.3 Had there been a material change regarding creditworthiness?

In the alternative, Schenkerocean argued that the financial position of Portland was known before the shoes were shipped from China, and that consequently, Art. 71 was not applicable. To this argument, the Court said that Genfoot had knowledge of the financial difficulties prior to shipment, but that the situation was "substantially aggravated" when DNB terminated its engagement with Portland, and therefore, Schenkerocean's objection was not accepted.

4.4 Were the shoes delivered to Portland prior to the time the stoppage instructions were given?

The containers arrived in Oslo on 22nd September, and the following day the instructions were given regarding stoppage, but several days before Portland had delivered its bill of lading to Schenker Norway. In view of this, Schenkerocean claimed that the instructions came too late: Schenker Norway was by now the representative of Portland.

The Court did not accept this line of reasoning:

> *"In general, one cannot discount the possibility that an agent at a certain point of time becomes a representative of the buyer. But as this will have effect inter alia on the right of stoppage, concerns around notoriety*[4] *strongly indicate that such a transition must be clearly agreed, marked and documented. There is no documentation – or other circumstances – to imply that such representation has been agreed in this case. Thus, there is no basis for distinguishing between the sea carriage and the warehousing in Oslo harbour before delivery from [Schenker Norway] to Portland. I also note that Schenkerocean itself must have meant for Portland not to have received the cargo before Motorcompaniet AS – as the bank's agent – paid outstanding freight and compensation, and the cargo was delivered to Portland's warehouse on 27nd September 2014. Up to this time Schenkerocean exercised the right of stoppage according to NSAB 200 § 14 – which presupposes that Schenkerocean itself had legal possession of the cargo. Thus, it is in my view clear that Schenkerocean's discharge of the cargo in Oslo was not a transfer to Portland's representative, leading to the loss of the right of stoppage" (section 65).*

Thus, the Court accepted that the carrier might be considered as possessor of the goods on behalf of the buyer, but – which is in no way surprising – this is subject to strict conditions. Taken literally, a clear oral agreement is not sufficient, nor is a written agreement: in addition it has

[4] From the Norwegian legal term "notoritet", meaning the fact of being ascertainable.

to be "marked",[5] which, it must be surmised, is required for verification purposes: one needs to be reasonably certain that the agreement is not a post fact invention.

Two things are surprising: the first is that the delivery of the bill of lading by Portland to Schenker Norway is not mentioned: The fact that it was delivered several days before the issue of the stoppage directive is uncontested, and this delivery appears to fulfil at least the requirements regarding "marked and documented". But there is no word or reflection in the judgment on why the bill of lading was given to the carrier – nor, in this context, on the rules in the Maritime Code Section 307.

The second surprising circumstance is the implications which the Court derives from Schenker's use of NSAB § 14. The right of stoppage in order to secure the carrier's claims (or the freight forwarder's claims when he is not a carrier) presupposes, of course, that he has possession of the goods.

We have here two different types of stoppage rights – with different parties (seller-buyer, carrier-buyer) and different claims (purchase price, transportation costs). In both instances it is a prerequisite is that the carrier must have at least physical possession of the goods. For the seller to have a right of stoppage, the crucial issue is whether, in this case, a third party – the carrier – is obliged to follow the seller's directive (see further below). For the carrier, the question may be whether his right can be exercised against someone who has succeeded the original counterparty – typically: does he have the relevant right against the CIF-buyer, who has received the bill of lading on paying the purchase price to the seller? The answer is clearly yes. In other words: The carrier's right of stoppage may be exercised as against the owner of the goods, and it is difficult to see that this possibility has any bearing on the question of whether the carrier is "the representative" of Portland.

[5] The Norwegian word is «markert», and the verb «markere» is defined as "clearly state (with sign, trace or mark") (Det Norske Akademis ordbok: "tydelig angi, vise (med tegn, spor eller merke)").

4.5 The importance of CISG Art. 71 paragraph three

CISG Art. 71 paragraph three reads:

> *"A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance."*

No written notice was given, and Schenkerocean claimed that the effect was that the right of stoppage was lost.

The Supreme Court did not agree:

> *"The purpose of the notice requirement is that the buyer is given the opportunity to adjust his position in relation to the stoppage, for instance by posting security in order to obtain delivery, alternatively cancelling further transport and inform the next link in the sales chain of the delay. If notice is not given, possible damage may be remedied by holding the seller liable for the consequent loss suffered by the buyer, see e.g. the Norwegian Sales Act Section 61 paragraph three. According to Norwegian law it is clear that lack of notice is not a prerequisite for the exercise of the right of stoppage,*[6] *cf. Ot.prp. nr. 80 (1986–1987) page 112" (section 69).*

In addition to this general statement the Court mentioned that

> *"the situation here is that a possible liability for the carrier Schenkerocean arose because the company delivered the goods, despite the instructions given by Genfoot. Schenkerocean's view was that stoppage was not possible as Portland had already delivered the bill of lading. When the cargo was nevertheless retained some days later, this was due to Schenkerocean's own claim. Once Schenkerocean had received payment, the cargo was delivered to Portland. In these circumstances, the lack of any notice of stoppage from the seller Genfoot is irrelevant to the issue of the carrier's liability" (section 72).*

[6] Here there appears to be a printing error by the Supreme Court. The intention is obviously to state that lack of notice does not preclude the right of stoppage.

4.6 Was Schenkerocean obliged to follow directions given by Genfoot?

The most important part of the decision concerns the clarification of Schenkerocean's obligation to follow stoppage orders given by Genfoot.

It was agreed, and the Court approved, that neither CISG Art. 71, nor the Norwegian Sales Act Section 61, were applicable. There was no contract of a traditional character between Genfoot and Schenkerocean. Whether Schenkerocean was liable for not having followed such directives was therefore "a question of duties and liability outside contract", and "since the damage occurred in Norway", this was a question of Norwegian law (section 74).

The Court started with some remarks of a general nature:

> *"The parties have … agreed that an independent carrier, depending on the circumstances, may have a duty to comply with stoppage instructions from a seller who is not a party to the transportation agreement. This is a contractual-like duty; the carrier has a duty of loyalty as against both parties in the underlying sales contract. The transport spans a period of time and unforeseen situations may occur during this period. This may be of relevance for the relationship between seller and buyer. In turn, this may imply that an independent carrier, on request, has to respect the underlying legal relationship, without regard to which of the parties is party to the transport contract. The right of stoppage in a sale on credit terms is a typical example of this. However, the parties in the present case are not in agreement on the further requirements for deciding whether the carrier has a duty to follow such an instruction of stoppage" (section 75).*

To what extent do the rules on bills of lading interfere with this duty?

The Maritime Code Section 302 says that presenting a bill of lading gives a prima facie right, as against the carrier, to obtain possession of the goods.[7] There is, however, an exception in Section 307 paragraph one in favour of a seller who has a right of stoppage:

[7] The full text is: «The person who presents a bill of lading and, through its wording or, in the case of an order bill, through a continuous chain of endorsements or through

> *"The right of a seller in the event of breach of contract to prevent delivery of the goods to the buyer or the estate of the buyer or to demand their return, applies even if the bill of lading has been passed on to the buyer."*

These rules may present difficulties for the carrier. In the words of the Court:

> *"When a carrier receives instruction on stoppage from the seller, a duty to act arises: The carrier has to decide whether or not there are grounds for following the instruction. It is not sufficient to refer to the fact that the buyer has presented a bill of lading, cf. the Maritime Code Section 307 paragraph one" (section 80).*

The knowledge available to the carrier is relevant, says the Court, regardless of whether it comes from the seller or from other sources (section 82). If the carrier does not have sufficient knowledge to decide whether the instruction is justified, he should notify the seller, allowing him the possibility of documenting his right (section 81).

The starting point is this: was it justifiable – based upon the available information – to retain or deliver the cargo? Relevant factors here are: the time element and, in particular, the carrier's need to get rid of the cargo, and, further: the potential damage arising from either stoppage or delivery. The Court also notes that the existence of a bill of lading has the effect that the carrier must have more definite knowledge than in other instances, to be obliged to comply with the stoppage instruction (sections 83–85).

After these more general remarks, the Court discusses the specific issues in the case.

First, Schenkerocean asserted that the right of stoppage was waived: the bill of lading had a clause to that effect, and by receiving and later on transferring the bill of lading this restriction should be considered as accepted by Genfoot.

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an endorsement in blank, appears as rightful holder, is prima facie regarded as entitled to take delivery of the goods."

The Court disagreed: Genfoot had not demanded stoppage of the cargo based on a bill of lading – in which case it would have had to accept the terms of the bill of lading. The claim followed from the carrier's duty of loyalty to follow the seller's instruction on stoppage (section 91–92).

The Court expressed some sympathy for the carrier's obvious interest in getting rid of the cargo on arrival, but this was not decisive. With Schenker Norway's knowledge of the financial difficulties of the buyer, Schenkerocean (identified with Schenker Norway) could not – without liability – deliver the goods with reference to a received bill of lading (sections 93 and 94).

Schenkerocean also argued that Genfoot had not at any time documented its right of stoppage, but the Court said that Schenkerocean

> *"had not asked for documentation when Genfoot repeatedly gave instructions on stoppage. Schenkerocean, however, held the view that Portland had delivered the bill of lading and was consequently the owner – with the implication that the underlying relationship between Genfoot and Portland was immaterial. Correcting Schenkerocean's misconception of the legal situation is not a question of documentation of the right of stoppage. As a professional party Schenkerocean clearly runs the risk arising from lack of knowledge on the Maritime Code section 307" (section 95).*[8]

The next point dealt with by the Court was the arguments on exclusion or limitation of liability, because Genfoot had (i) given Portland a bill of lading endorsed in blank, (ii) had not presented their own bill of lading, and (iii) had not documented the right of stoppage. The Court's rejection of these issues is to some extent a repetition of what has been referred above, and it is sufficient to quote:

> *" … there is nothing illegitimate about Genfoot's use of the right of stoppage, instead of demanding that the goods be delivered or warehoused, by using the bill of lading.*[9] *Once Genfoot had given instruc-*

[8] Somewhat surprisingly, the same theme is dealt with also in sections 97 and 98.

[9] The Court does not at this stage refer to the complications with the waiver clause in the bill of lading, see above.

> *tions on stoppage and Schenkerocean's maintained the view that the goods were already delivered, because Portland had presented a bill of lading, it would not have been reasonable*[10] *to expect Genfoot to reverse the asserted delivery by presenting a bill of lading" (section 98).*

Finally, there was a question of whether the claim was waived in connection with a Portland reconstruction arrangement. The Court found it sufficient to remark that there was no documentation to show that Genfoot had directed or waived any claim as against Portland's successor.

5 The dissenting opinion – in particular on the Maritime Code Section 292 third paragraph

The dissenting judge was in agreement with the majority on most points, but voted for no-liability for Schenkerocean because Schenkerocean, in his view, was not obliged to follow Genfoot's directions on stoppage.

First, he quoted this clause in the bill of lading:

> *"Once the Goods have been received by the Carrier for Carriage, the Merchant shall not be entitled either to impede, delay, suspend or stop or otherwise interfere with the Carrier's intended manner of performance of the Carriage or exercise of the liberties conferred by this Bill of Lading … for any reason whatsoever including but not limited to the exercise of any right of stoppage in transit conferred by the Merchant's contract of sale or otherwise."*

He remarked that the term "Merchant" is defined in the bill of lading and includes Genfoot.

[10] Norwegian: "ikkje ha vore nærliggande".

As mentioned above, the majority held the view that Genfoot had not accepted this clause, and the dissenting judge agreed (section 110). Instead, he found – "as opposed to the first voting judge"[11] – grounds for rejecting Genfoot's claim in the Maritime Code Section 292 third paragraph:

> *"A bill of lading governs the conditions for carriage and delivery of the goods in the relationship between the carrier and a holder of the bill of lading other than the sender. Provisions in the contract of carriage which are not included in the bill of lading cannot be invoked against such a holder unless the bill of lading includes a reference to them."*

This means, he argued, that Schenkerocean "is not obligated to follow the instructions given by Genfoot" (section 110).

The essential part of his argument appears to be that

> *"when the clause is included in the bill of lading and does not conflict with mandatory law, is must also be respected by the holder of a bill of lading, as if he had been party to the transport agreement" (section 115).*

And:

> *"I cannot see that – as argued by the first voting judge – it is of relevance whether the holder of the bill of lading bases his claim on the bill of lading. According to the wording [in Section 292] it is the bill of lading that regulates the relationship between – in our case – Genfoot and Schenkerocean as regards the carriage and delivery of the cargo. This is, according to my view, applicable without regard to whether the right pleaded by Genfoot derives from the bill of lading or otherwise; the decisive point is that the clause concerns the carriage and delivery of the goods. When Genfoot receives the bill of lading, the clause on waiver of the right of stoppage becomes part of the legal relationship between Genfoot and Schenkerocean" (section 117).*

[11] The first voting judge did not specifically discuss or mention this paragraph.

What is somewhat surprising is that the dissenting judge neither discusses nor mentions the Maritime Code Section 307, on which the majority relied. He softens, however, his understanding of the rights of the buyer by saying that even though Genfoot "as a starting point" does not have the right to instruct Schenkerocean on stoppage,

> *"nevertheless, I assume*[12] *that the carrier, in spite of the waiver of the right of stoppage, will, in very special circumstances, be obliged to abide by such an instruction to retain the cargo. What I have in mind is first of all cases where the carrier* knows *that the requirements for stoppage are fulfilled. Even though the wording of the clause also encompasses such cases, fundamental principles of loyalty and general considerations regarding the scope of exception clauses imply such a limitation of the scope of the clause. The natural purpose of the clause is to protect the carrier against a duty to make investigations in order to evaluate the legitimacy of the right of stoppage where it is not immediately apparent that the seller has such a right" (section 119, emphasis on "knows" by the judge).*

6 Some reflections

Finding the facts is often difficult, and the difficulty is increased when the legal consequences are dependent upon fine distinctions. This is apparent from the opinions presented by the first voting judge and that of the dissenting one:

The carrier who receives instructions from a *third* party may be placed in a very difficult position.

The starting point is that the carrier has a contractual relationship with the sender who is, according to the Maritime Code Section 251, "the person who enters into a contract with a carrier for the carriage of general cargo by sea". Such a sender may be a seller under a CIF-sale – and

[12] The Norwegian text: «Jeg antar nok …».

then, of course, a waiver clause regarding stoppage is binding.[13] And the carrier is entitled to deliver the goods to the person presenting the bill of lading at the place of destination.

In e.g. a FOB-sale, the buyer is the sender, and the seller may be the shipper, i.e. "the person who delivers the cargo for carriage" (the Maritime Code Section 251). In either case, the shipper is the one who is entitled to have a bill of lading issued by the carrier (the Maritime Code Section 294). The carrier may presume that there is an underlying sales transaction, but in most instances, he will have no information as to who the parties are. And then – perhaps as late as when a bill of lading holder has presented his delivery claim – the carrier receives an instruction to retain the goods, because, it is said, the purchase price has not been paid. The instruction may come from

(i) the shipper, or – as in our case – the person to whom the bill of lading has been transferred, or from

(ii) a person with whom the carrier has no (direct or indirect) relationship.

The question is whether there is a legal basis for stating that the carrier has to pay regard to such instructions.

The Supreme Court has clearly stated that CISG Art. 71 – and the corresponding regulation in the Norwegian Sales Act – do not impose duties on the carrier.

Does the Maritime Code Section 307 provide an answer?

This regulation concerns the scope of the seller's right of stoppage: The buyer's possession of a bill of lading does not preclude the seller's having the right of stoppage (paragraph one). But if the buyer has transferred the bill of lading to a third party who had no knowledge of the seller's claim (he was acting "in good faith"), the seller then has no right of stoppage (paragraph two). In our context, the important observation is that Section 307 does not provide a basis for the right of stoppage; it clarifies to some

[13] In our case, the waiver clause was in in the bill of lading. If the bill in this respect does not conform to the previous carriage agreement, we may encounter delicate questions on whether the clause would be considered accepted when the sender, without objections or comments, receives the bill.

extent the relation between a right of stoppage and rules on bills of lading. However, neither this section nor other rules in the Maritime Code give more detailed guidance on the obligations of the carrier when presented with two conflicting claims, as follows.

One claim is solidly anchored in contractual rules: on presentation of the bill of lading the holder is, generally speaking, entitled to get the cargo from the carrier, and deviation from this rule may lead to heavy liability for the carrier.

The other claim is based upon rules that the Court characterised as "of a contractual nature" (section 75): The carrier is not party to the sale, but the reasoning appears to be that by having knowledge of the sale, the carrier has to some extent a duty to pay attention to the interest of the seller. There is no formal basis for this, but the principle derives, one must surmise, from "general principles of private law". This is called "a duty of loyalty towards the parties in the underlying sales relationship" (section 92).

Before dealing with the problem of balancing the two obligations, it makes sense to insert a few lines on some distinctions regarding loyalty in contractual relations.

Such obligations are of particular importance in the traditional two parties relationship: to what extent are the seller, the carrier etc. obliged to act in such a manner that the interests of the other party are taken care of? An extensive analysis of this part of the law is given by Nazarian, Lojalitetsplikt i kontraktsforhold (2007).

Loyalty obligations may also exist out of consideration for a third party. A much discussed example is the Supreme Court decision in Rt. 1994 p. 775 (Yousuf): Bank B was, according to its contract with A, entitled to extend credit against security in A's house, but such security would be contrary to A's obligations towards bank C. The Court found that bank B was not entitled to obtain security to the detriment of bank C. Of general interest is the fact that the Court said that B had no duty to make investigations before utilising its contractual right, and that knowledge of the A-C relationship was required before B had to step

aside. For the details, see e.g. Falkanger & Falkanger, Tingsrett (8th ed. 2016) pp. 831 et seq.

The Schenker case is one further step away from the basic idea of loyalty towards the contractual counterparty: The duty is placed on a person who has the position of a judge: He shall decide which one of two conflicting interests is to be preferred. The final result is of no importance for him – as long as he is not held liable!

It is somewhat surprising that the different types of loyalty are not mentioned, in particular as the Court in the Yousuf case decreed that knowledge was a precondition for establishing loyalty obligations.

Now, reverting to the Schenker case, I remind the reader of the interests at play and also that the standard of care placed on the carrier is a question of Norwegian law.

If the cargo has been delivered to the buyer, the total purchase price may be lost for the seller. Stoppage is, however, not a final solution. On the other hand, stoppage may cause considerable loss on the part of the buyer of the goods: his factory runs short of material, he is unable to fulfil resale contracts etc., with a corresponding risk of liability on the part of the carrier. In addition, we have specific problems for the carrier: He wishes to get rid of the cargo so that the vessel becomes available for further carriages. This may be achieved by warehousing the cargo, but perhaps there is no facility for this. If there is, it implies further contractual arrangements for the carrier: arranging and paying for warehousing, with the prospect of compensation from the proceeds from a forced sale.

In its decision, the Court has placed a heavy burden on the carrier, without clearly defining when the carrier is obliged to follow the instructions given by a non-contractual party, regardless of the apparent contractual obligations he has as carrier.

A minimum, one might think, is that the party giving the instructions of stoppage must document (make clear) (i) that he is the seller and still has the creditor position regarding the purchase price, (ii) that the purchase price has not been paid, (iii) that the basis for the originally granted credit has disappeared. In particular, this would seem neces-

sary when the carrier asks for further information on the receipt of the instructions.

To my mind, a very important additional aspect is the following:

Intervention in a contractual relationship, that is to a great extent is regulated by rules on bills of lading aiming at effective transactions, requires strong justification. If stoppage were the only means of protecting the interests of the seller, intervention might be justified, but this is not the situation. The seller has a remedy, by use of the bill of lading rules, which appears to be adequate to protect his interest when he has granted the buyer credit: he may (i) retain the bill of lading until the purchase price has been paid, or (ii) let the buyer have one of several bills of lading and use the others in case of need. If he chooses to disregard these possibilities, it is then not obvious that he has the right of intervention, thereby causing serious problems for the carrier.

Finally, some practical reflections:

When there is a conflict between the seller and the receiver, a temporary solution is often found. The parties agree that the goods shall be delivered to the receiver against an adequate guarantee, coupled with stipulations as to how the underlying conflict shall be solved. One may also have the situation that the carrier accepts the stoppage order against a guarantee that he will be held harmless if, at the end of the day, the receiver's claim is found to be justified.

If no such practical solutions are found, the question is whether the carrier has the possibility of warehousing the cargo, leaving it to the seller and the receiver to fight out the conflict. Such an action presupposes that there are suitable warehouse facilities, and we meet the problems of payment or security for the expenses in moving the cargo, as well as the actual warehouse costs. Supposing that such matters are resolved, we have the fundamental question of the carrier's right.

Regarding monetary claims, we have well established rules on depositing: When A and B do not agree on who is entitled to the sum owed by C, C may deposit the sum, and in this way avoid the risk of paying it to the wrong person. For goods, we do not have similar rules of a general nature, but the Maritime Code Section 303 does state:

> *"If several persons claim delivery, each demonstrating authority through separate originals of the bill of lading, the carrier shall warehouse the goods in safe custody for the account of the rightful receiver. This shall immediately be made known to the claimants."*

We note that this does not cover a conflict between a claim based on the contract of sale and a claim arising from the bill of lading. I would add, there is no other enacted rule that gives the carrier the possibility of escaping from the choice between Scylla and Charybdis, nor are there – as far as I can see – grounds for saying that we have customary law to that effect.

Loss of hire insurance when the damaged vessel is substituted

What does loss of hire insurance cover?

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Contents

1 Introduction and overview

The topic of this article is loss of hire insurance in cases where the vessel that is off hire is substituted by another vessel. The main Nordic loss of hire insurance contract is the Nordic Marine Insurance Plan of 2013 (NP)[1] ch. 16. Loss of hire insurance covers the assured's loss when the insured vessel is deprived of income due to damage. However, if the insured vessel is sailing on a charterparty, the assured charters a substitute vessel to take over the charterparty and thereby manages to keep the income from the charterparty, but incurs costs in relation to the substitute vessel, the question then is whether the insurer is liable for the vessel being deprived of income, or whether the insurer shall instead provide cover for the costs incurred in chartering the substitute vessel.

This issue was previously neither regulated nor commented upon in NP ch. 16. However, the question came up recently in a dispute between the assured company Hamburg Cruise SA and three insurance companies with Gard as the claims leader.[2] The assured[3] claimed loss of hire cover for a vessel that was under repair for ca. three months and was thus off hire under the charterparty. For two of those months, the assured had chartered a substitute vessel to perform under the same charterparty. The insurer[4] therefore denied that the assured had sustained a loss, but accepted that the costs in connection with chartering the substitute vessel should be covered as extra expenses according to NP Cl. 16-11.

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1 The Nordic Marine Insurance Plan of 2013 was revised in 2016 and in 2019. The version used today is The Nordic Marine Insurance Plan of 2013 – Version 2019 (2019), http://www.nordicplan.org/The-Plan. Reference here to NP is to this version.
Reference to the Commentary to the Nordic Marine Insurance Plan of 2013 – Version 2019 (2019), http://www.nordicplan.org/Commentary/, is to the pdf version, http://www.nordicplan.org/Documents/Nordic%20Plan%202013/Commentary%20to%20the%20Nordic%20Marine%20Insurance%20Plan%20of%202013%20-%20Version%202019.pdf.

2 See NP (2019) ch. 9.

3 The party who is entitled under the insurance contract to compensation or the sum insured, see NP (2019) Cl. 1-1 (c).

4 The party who under the terms of the contract has undertaken to grant insurance, see NP (2019) Cl. 1-1 (a).

The dispute was referred to court proceedings. The assured lost his case in the City Court, but won in the Appeal Court.[5]

Parallel to these proceedings, the 2016 NP was revised. Several amendments were made in relation to ch. 16, including revising the Commentary to Cl. 16-1 Main rules regarding the liability of the insurer and Cl. 16-11 Extra costs incurred in order to save time. The purpose was to clarify that if a substitute vessel was chartered, the assured sustained no loss of income to be covered by Cl. 16-1, and that costs relating to substitute vessels should be covered as an extra cost to avoid loss of income. These amendments were part of a more general and principle-related discussion as to whether loss of hire insurance is tied to the income from the insured vessel or to the assured's income in general, and also if loss of hire insurance is insurance for loss of time or for loss of income. These issues are not sufficiently clarified in the conditions. However, it was agreed that clarifying these questions would require a thorough investigation into the consequences of different alternatives and could not be done within the time framework for the 2019 revision. Such investigation was therefore postponed to a future revision.

The purpose here is not to solve these issues, but to give a presentation of the *Hamburg* case (item 3) and the Plan amendments (item 4) in order to provide some considerations for the future discussion (item 5). First, however, a general presentation is necessary of the regulation in question (item 2).

2 Cover for loss of hire and extra expenses

According to Cl. 16-1 sub-clause 1 first sentence, loss of hire insurance "covers loss due to the vessel being wholly or partially deprived of income

[5] LA-2018-35513. The case was appealed, but was not accepted to be tried for the Supreme Court, cf. HR-2019-187-U.

as a consequence of damage to the vessel which is recoverable under the conditions of the Plan". This means that the insured event under the loss of hire insurance is damage covered by hull insurance. Loss of hire insurance is therefore closely tied to hull insurance and is rather limited in scope when one considers all the other events that may result in loss of income for the vessel.[6] The definition of the insured event is however somewhat broadened by the extension for cover in Cl. 16-1 sub-clause 2, covering i.a. loss of income due to stranding (a), because it is prevented from leaving a port or a similar limited area (b), due to salvage or removal of damaged cargo (c), or due to a general average event (d).

The link between loss of hire and damage also means that loss of hire insurance is not triggered by total loss of the vessel covered by chapter 11 of the Plan, cf. Cl. 16-2. In case of total loss, the assured is entitled to the whole sum insured,[7] but not in excess of the insurable value, cf. Cl. 4-1. The insurable value is defined as "the full value of the interest at the inception of the insurance".[8] The main rule for ocean going vessels is that the insurable value is agreed by the parties to the contract when the contract is entered into,[9] and the sum insured is set as being equal to the insurable value.

Since the insurable value is the "full market value of the vessel", one might think that this value represented the full economic interest in the vessel, including the value of future freight income. However, by tradition, the economic interest in the vessel is split between ordinary hull insurance and so-called hull interest and freight interest insurance. Hull interest and freight interest insurance are also called separate insurances against total loss as they must be viewed as an extension of the total loss cover under the hull insurance, and are as a main rule triggered only in the

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6 See further Stang Lund, Haakon. *Handbook on Loss of Hire Insurance, 2*nd ed., Oslo: Gyldendal akademisk, 2008, ch. 1.3.2, pp. 23–24.

7 The maximum amount of the insurer's liability as agreed by the parties when entering the contract, cf. Wilhelmsen, Trine-Lise and Hans Jacob Bull. *Handbook on Hull Insurance, 2*nd ed., Oslo: Gyldendal Juridisk, 2017, pp. 69–70.

8 NP (2019) Cl. 2-2 sub-clause 1 first sentence.

9 NP (2019) Cl. 2-2 sub-clause 1 second sentence, cf. Cl. 2-3 sub-clause 1.

event of total loss.[10] The assured cannot however freely decide how to divide his interest between ordinary insurance and interest insurances. The assured is allowed to insure 25 % of the agreed insurable value for ordinary hull insurance as hull interest insurance and 25 % as freight interest insurance.[11] Any freight loss that is not covered by the hull and hull interest insurance is thus covered by the freight interest insurance. In case of total loss, there is therefore no freight loss to be covered by loss of hire insurance.

> The system with hull-interest insurance is based on the fact that the insurable value for hull insurance is assessed and, consequently, does not necessarily correspond to the ship's «full value … at the inception of the insurance», cf. Cl. 2-2. There may therefore be a "rest value" that can be covered as hull interest. In practice insurers have also been willing to provide hull-interest insurance in situations where the agreed insurable value under the hull policy corresponded to – or is even higher than – the full value of the ship at the time of inception of the insurance.[12]
>
> A freight interest insurance is supposed to cover loss arising from expiry of a pre-determined, long-term contract of affreightment which the owner has entered into or to a pre-determined form of employment for the ship which is not reflected in the insurable values for hull.[13]

The compensation in case of loss of income due to a casualty is regulated by Cl. 16-3 to Cl. 16-6:[14]

> Cl. 16-3. Main rule for calculating compensation
>
> Compensation shall be determined on the basis of the time during which the vessel has been deprived of income (loss of time)

[10] See NP (2019) ch. 14. Hull interest insurance also provides cover liability according to ch. 13 that exceeds the sum insured for ch. 13, cf. Cl. 14-1 (b).

[11] NP (2019) Cl. 14-4, see further Wilhelmsen (2017) pp. 381–382.

[12] Wilhelmsen (2017) p. 379.

[13] Wilhelmsen (2017) p. 379.

[14] The regulation is similar to the previous Plans except that Cl. 16-4 sub-clause 2 is moved to Cl. 16-1 sub-clause 3.

> and the loss of income per day (the daily amount). Loss of time that occurred prior to the events described in Cl. 16-1 shall not be recoverable.
>
> Cl. 16-4. Calculation of the loss of time
> Loss of time shall be stipulated in days, hours and minutes. A period of time during which the vessel has only partially been deprived of income shall be converted into a corresponding period of total loss of income.
>
> Cl. 16-5. The daily amount
> The assured's loss of income per day (the daily amount) shall be fixed at the equivalent of the amount of freight per day under the current contract of affreightment less such expenses as the assured saves or ought to have saved due to the vessel being out of regular employment.
>
> …
>
> Cl. 16-6. Agreed daily amount
> If it is stated in the insurance contract that loss of time shall be compensated for by a fixed amount per day, this amount shall be regarded as an agreed daily amount unless the circumstances clearly indicate otherwise.

It follows from these clauses that the main principle applied for calculation of the compensation is the loss of income as defined by the daily amount (the sum insured) times the number of days the assured is without income (Cl. 16-3). If the vessel is deprived of income for less than a day, it shall be adjusted down to hours and minutes (Cl. 16-4). The daily amount is normally agreed to a fixed sum and not calculated on the basis of the actual freight for the vessel when the casualty occurs (Cl. 16-5 and 16-6).

It may be that the assured can avoid a loss of hire situation or reduce the time the vessel is off hire. In such cases, he is in actual fact acting for the benefit of the insurer who would otherwise be liable for the loss of

income. It is therefore natural that the assured has the right to cover for such costs. This is regulated in Cl. 16-11:

> Cl. 16-11. Extra costs incurred in order to save time
>
> The insurer shall be liable for extra costs incurred in connection with temporary repairs and in connection with extraordinary measures taken in order to avert or minimise loss of time covered by the insurance, insofar as such extra costs are not recoverable from the hull insurer. ….
>
> The insurer shall not, however, be liable for such costs in excess of the amount he would have had to pay if such measures had not been taken.
>
> …

If the costs to employ a substitute vessel are regarded as "Extra costs incurred in order to save time", the result is that time "saved" generates no loss, but the insured is reimbursed for the costs involved.

3 The Hamburg case[15]

MV *Hamburg* was bareboat chartered by Hamburg Cruise S.A (Hamburg Cruise), who in turn had time chartered the vessel to Plantours & Partner GmbH (Plantours) for 6 years from 2012–2018 and for a daily hire amounting to Euro 33,450. MV Hamburg grounded on 11 May 2015. The period of repair caused by the grounding was from 11 May 2015 until 10 August 2015, a total of 91 days. During this period the vessel was off-hire according to the charterparty. From 10 June to 10 August 2015 the bareboat charterer Hamburg Cruise replaced MV Hamburg with MV Deutchland and was thereby able to continue the service for Plantours. The daily hire received from Plantour was the same as agreed

[15] LA-2018-35513.

for MV Hamburg, i.e. Euro 33,450. Hamburg Cruise incurred various costs in connection with hiring MV Deutchland.[16]

MV *Hamburg* was insured for loss of hire under a policy incorporating the conditions of the Nordic Marine Insurance Plan of 2013. The insured "Interest" was defined as "Loss of earnings and/or expenses and/or hire".[17] The "Agreed Daily Amount" was set as Euro 50,000. The "Total Sum Insured" was set to Euro 4,500,000 and the "Basis" as 14/90/90,[18] which meant a deductible of 14 days and 90 days insured for each casualty and in total.

MV *Hamburg* was off hire from 11 May to 10 August 2015. The first 14 days was the deductible period and not covered. Thereafter, the insurer paid the agreed daily amount for 14 days until 8 June 2015. From 9 June to 9 August 2015 – 61 days – the insurer claimed that the obligation to pay compensation under the loss of hire policy should be limited to an amount equal to additional costs incurred by hiring the MV Deutschland and those associated costs, which is based on another principle of calculation than the agreed daily amount for loss of hire.[19]

Hamburg Cruise claimed that the indemnity should be based on the agreed daily amount of Euro 50,000. The reason why the agreed daily amount was higher than the daily rate under the charterparty was that the insurance covered "expenses" in addition to "earnings" and thus covered losses and costs that were not captured by the hull insurance.[20]

The Court of Appeal started with two general aspects of the interpretation. First, it emphasised that the Plan was an agreed document and that the rule on interpretation against the insurer that is established for standard agreements could not be applied. Even so, the court found that lack of clarity – depending on the circumstances – was the risk of the insurer. The explanation for this appears to be that the disputed issue was not touched upon in the Commentary and was not solved in court

16 LA-2018-35513 p. 2.
17 LA-2018-35513 p. 2.
18 LA-2018-35513 p. 3.
19 LA-2018-35513 p. 3.
20 LA-2018-35513 pp. 5–6.

practice.[21] The court stated that "When this is the situation, it cannot be doubtful that Gard et al. must carry a greater part of the uncertainty than the assured owner".[22] Second, the court denied that the amendment in 2019 had any bearing whatsoever on the interpretation issue.[23]

Gard had referred to the provisions for calculation of loss of hire for fishing vessels in NP (2013) ch. 17, section 7, Cl. 17-59, where the Commentary stated that if the assured had chartered a substitute vessel to fish the quota, he sustained no loss. The court found the reference to be irrelevant. According to Cl. 17-56, the provisions in ch. 16 applied with the amendmends that followed i.a. from Cl. 17-59. The court argued that the existence of the regulation in ch. 17 was an argument against the insurer's interpretation. If the Plan Committee had meant for the same rules to apply to ch. 16, it must be presumed that they would have said so expressly.

The insurer claimed that payment of the agreed daily amount when the assured had sustained no loss of income would result in a gain for the assured and be contrary to fundamental insurance principles. The Court referred to Gard's witness statement, where it was explained that the amount decided upon as the agreed daily amount mainly reflected the wishes of the assured. It was not uncommon for the amount to be much higher than the daily rate under the charterparty, as the situation was here. The assured's reason for this approach was to establish an economic buffer in case of a casualty. Based on this the Court found that the system with agreed insurable value was established by agreement and thus accepted by the parties, and that any unwarranted gain would be offset by the higher premium the insurer claimed for agreed insurable value, as compared with open insurable value. Thus, the argument that the insurance should not result in an unwarranted gain had "almost no relevance".[24]

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21 LA-2018-35513 pp. 9–10.

22 LA-2018-35513 p. 10. My translation.

23 LA-2018-35513 p. 10.

24 LA-2018-35513 p. 11. My translation.

Gard further claimed that the agreed insurable value was not suitable for the settlement when there was no direct loss of income. The Court disagreed and stated that according to Cl. 16-3 and 16-4, the loss of hire was tied to the time the vessel was out of activity, and not to a sum of money. The court further found that by refusing to compensate the agreed insurable value, the insurer in actual fact converted the agreed insurable daily amount according to Cl. 16-6 to an open policy according to Cl. 16-5. There was no legal basis for this conversion. The object of the insurance was the vessel's ability to earn income, and not the charter party.[25] The purpose of the system with agreed insurable values was to avoid difficulties when calculating an open daily amount,[26] and by refusing to pay the amount the result was the opposite: namely, a long and complicated settlement.[27]

The insurer further claimed that the costs involved in putting a substitute vessel into activity were covered under Cl. 16-11 as Extra costs incurred in order to save time. The court found that chartering a substitute vessel could not be seen as "extraordinary measures taken in order to avert or minimise loss of time covered by the insurance"[28]. The natural understanding of the wording was that this referred to measures to get the damaged vessel back into activity to earn income and the measures would normally be tied to the repair situation.[29] This interpretation was also supported by the Commentary.[30]

The court also discussed the significance of Cl. 3-30 in the General Part of the NP (2013), which states that the assured where a casualty has occurred "shall do what may reasonably be expected of him in order to avert or minimise the loss". The insurer had argued in the City Court that chartering *Deutchland* as a substitute vessel was a part of the assured's duty to minimise loss according to Cl. 3-30, and the City Court accepted

25 LA-2018-35513 p. 12.
26 LA-2018-35513 p. 11.
27 LA-2018-35513 p. 12.
28 NP (2013) Cl. 16-11.
29 LA-2018-35513 p. 12.
30 LA-2018-35513 p. 13.

that this charter constituted such a measure and that the insurer could take this into consideration when the loss was calculated. The Appeal Court disagreed and stated that the parties had agreed that Cl. 3-30 did not provide a duty for the assured in the case to charter a substitute vessel, at least not in the situation as it was at the time of the casualty.[31]

4 The revision of NP chapter 16 in 2019

Under the 2019 revision of the NP the insurers wanted to amend the Plan to reflect their attitude toward substitute vessels. Normally, Plan amendments are made through revision of the clauses. However, the Plan Committee has also made amendments in the Commentary in cases where they have found the former commentaries "impractical, misleading or could be misunderstood".[32] This method was used in relation to the amendments concerning substitute vessels in relation to Cl. 16-1 and Cl. 16-11. In regard to Cl. 16-1 the new text is as follows:[33]

> The loss covered by loss-of-hire insurance is referred to as "loss of time". This does not mean that the time lost is covered; loss-of-hire insurance is an insurance against loss of income (loss of freight), hence "loss-of-hire" or "loss of earning" insurance in English. The characteristic aspect of loss-of-hire insurance is that income is usually lost as a direct consequence of loss of time, i.e. as a result of the fact that the vessel is temporarily unable to operate. **However, in certain circumstances the assured may be able to maintain the earnings even if the insured vessel as such is out of operation. For example, certain charterparties allows for hire to be paid for a number of "maintenance days" even if the vessel e.g. is out of**

[31] LA-2018-35513 p. 13.

[32] See the Norwegian Marine Insurance Plan of 1996 – Version 2010 (2010), Preface p. 3V, the Nordic Marine Insurance Plan of 2013 – Version 2016 (2016), Preface pp. XI-XII and NP (2019), Preface p. XI.

[33] Commentary (2019) pp. 359–360. The marking of the text is original and signals that the text is new.

> **operation for repairs (see e.g. Cl. 13 (c) of "Supplytime 2017"). Another example could be a situation where the assured employs a substitute vessel during repairs of a damaged vessel in order to maintain earnings under the charterparty of the damaged vessel. In these situations there is no claim for the agreed daily amount for the period during which the assured maintains the earnings, even if the insured vessel as such is unable to operate. On the other hand, if the assured incurs extraordinary expenses by employing a substitute vessel in order to maintain earnings, such extraordinary expenses may be allowable under Cl. 16-11.**

The expression "loss of time" is not used in Cl. 16-1 sub-clause 1, to which the explanation refers, but it is used in the new sub-clause 2 and in other clauses, see for instance Cl. 16-2 and Cl. 16-4. It appears that "loss of time" and "loss of income" have been used more or less synonymously throughout chapter 16. This demonstrates the general uncertainty about what constitutes the economic interest to be covered by the loss of hire insurance. The explanation may be that the Norwegian translation for loss of hire insurance is "tidstap forsikring" or insurance for "loss of time". It appears that the paragraph in the Commentary is taken from the Commentary to the Norwegian loss of hire insurance from 1972.[34] However, the Norwegian expression "tidstap" or "loss of time" is not accurate because lost "time" can never be paid back.[35] The decisive point is therefore that loss of time generates loss of income.

The new Commentary text for Cl. 16-11 reads as follows:[36]

> The wording "extraordinary measures" will also cover the increase in costs related to the use of overtime in connection with the damage repairs, an agreed bonus to be paid in the event the ship is returned to service earlier than stipulated in the repair contract, and the higher costs of replacement rather than repairs that entail a lengthy repair period. **There has been some uncertainty related**

[34] Commentary to the Norwegian Loss of Hire Insurance of 1972 in Forsikringsaktieselskapet Vesta et al. *Almindelige vilkår for tidstapforsikring av 1972 med motiver*, Bergen: Forsikringsaktieselskapet Vesta mfl, 1973, p. 17.

[35] Commentary (1973) p. 17.

[36] Commentary (2019) p. 385.

> **to situations where an assured is able to engage a substitute vessel during repairs of a damaged vessel, in order to maintain earnings under the damaged vessel's trade/charterparty. A characteristic aspect of such a situation is however that the assured receives hire and is thus not "deprived of income" which is a requirement for cover in Cl 16-1. On the other hand, the extra costs incurred in connection with employing the substitute vessel are recoverable subject to the terms of Cl. 16-11. This is already clearly the solution adopted for fishing vessels, cf. Commentary to Cl. 17-59, and there is no reason why other vessel segments should be treated differently.**

This comment is a reflection of the comment to Cl. 16-1; as the use of a substitute vessel means that the "assured" is not "deprived of income" and there is no loss under Cl. 16-1, the starting point is that the loss of hire insurance is not triggered. However, this result is obtained by hiring a substitute vessel, and the costs involved in this operation are incurred for the benefit of the insurer. It is therefore in line with general rules for measures to reduce losses that the insurer should cover these costs.

5 Some considerations

5.1 Overview

The regulation of loss of hire in ch. 16, the *Hamburg* case and the amendment in 2019 of the Commentary to Cl. 16-1 and Cl. 16-11 lead to reflections on different issues. One issue relates to the interpretation of the Plan, the Commentary as an argument in the interpretation and the method of the Plan Committee to make amendments through the Commentary, cf. item 5.2 below. Another issue is the defining of the economic interest under the loss of hire insurance, cf. item 5.3. Based on this, the concept of loss according to Cl. 16-1, the relationship between "loss" and costs to employ a substitute vessel and coverage for costs to

employ a substitute vessel are discussed in items 5.4 to 5.6. The last issue is some reflections on the argument in the Hamburg case that the insurers in fact opened up the issue of the insurable value when they refused cover, cf. item 5.7.

5.2 Issues of interpretation

The Court of Appeal states that the insurers must carry more risk than the assured for the uncertainty created by the wording in cases where no guidance can be found in the Commentary or practice. This view is not explained and is contrary to the Norwegian/Nordic text books on marine insurance.[37] Considering the method of construction of the Plan it is also highly surprising. As both parties have been involved in the construction they must share the liability for any uncertainty in the interpretation. This is true even if the insurer is the direct author of the actual clause. The assured has the opportunity to suggest a different wording and if they do not do so, this must be interpreted to mean that they have accepted the wording as it stands.

On the other hand, the Court of Appeal seems to acknowledge the weight of the Commentary.[38] This is in line with the following remark in the Commentary itself:[39]

> The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. … Nevertheless the Commentary shall still carry more weight as a legal source than is normally the case with the Traveau Preparatoire of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Nordic Revision Committee, and it must therefore be regarded as an integral component of the standard contract which the Plan constitutes.

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37 Brækhus, Sjur and Alex Rein. *Håndbok i kaskoforsikring*, Oslo: Bergens Skibsassuranseforening et al., 1993, p. 8 and Wilhelmsen (2017) p. 27.

38 LA-2018-35513.

39 Commentary (2019) p. 25 to Cl. 1-4A.

This attitude in the Commentary has been accepted by the Supreme Court in a series of cases.[40] The Committee's approach to amending clauses by adding explanations in the Commentary is also in line with previous practice, cf. above. In ND 2000 p. 442 NA (Sitakathrine) it was accepted that such explanation extended the cover compared to previous interpretation of the relevant provision:

> In this case, the question was whether *Sitakathrine's* liability for damage to the towage vessel *Bayan* was covered by *Sitakathrine*'s hull- or P&I-insurance. The hull insurer is according to NP (1997) Cl. 13-1 sub-clause 1[41] liable for "loss which is a result of liability imposed on the assured due to collision or striking by the ship, its accessories, equipment or cargo, or by a tug used by the ship." The damage was sustained when *Sitakathrine* pulled *Bayan* so that *Bayan* was jammed between the towage and a port installation where a beam punctuated *Bayan's* side. The wording of Cl.13-1 was identical to the previous NMIP 1964[42], but the Commentary was different. The hull insurer argued that the NMIP 1964 made a distinction between "striking" and "pulling" and that the hull insurer was not liable for damage caused by "pulling". Even if the Commentary stated that "To simplify matters between the hull insurer and the P&I insurer, however, the hull insurer should cover all liability for collision damage which the tow may incur under a towage contract on ordinary terms"[43], this statement was too unclear and unscrutinised to be given any weight. The court however concluded that the 1996 Plan Cl. 13-1 according to comments in the Commentary extended the scope of cover for the hull insurance compared to the 1964 Plan to include damage to a towage vessel due to collision with a third party even if this did not follow clearly from the wording of the clause.

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40 ND 1998 p. 216 NSC (Ocean Blessing), ND 1990 p. 194 NSC (Brødrenes Prøve), ND 1969 p. 126 NSC (Grethe Solheim), ND 1956 p. 920 NSC (Bandeirante), ND 1956 p. 937 NSC (Pan), cf. Wilhelmsen (2017) p. 27.

41 The Norwegian Marine Insurance Plan of 1996 – Version 1997 (1997).

42 The Norwegian Marine Insurance Plan of 1964 (1964).

43 Commentary to The Norwegian Marine Insurance Plan of 1996 – Version 1997 (1997), p. 204.

In relation to Cl. 16-1 and Cl. 16-11 on the other hand, the amendments result in a more restricted cover than the interpretation given by the Court of Appeal. However, no changes in the existing Plan or Commentary can be made unless the parties agree to the amendment, which means that the representatives of the assureds have also accepted this amendment. Further, one amendment cannot be seen in isolation. Both parties start the revision with a long list of wishes, and the result must be seen as part of a compromise where the total result is fair even if some amendments are unfavourable. To illustrate, it can be noted that the Commentary to Cl. 16-11 was also amended in favour of the assured in regard to costs of using extra tugboats:[44]

> The extent to which the costs of a charter aircraft are to be regarded as an extraordinary measure must be assessed in each individual case, having particular regard to what is recoverable under the hull insurance according to the doctrine of "impossibility of repair". **In previous versions of the Plan, the Commentary established that the costs of using extra tugboats for port calls and canal transits due to, for instance, reduced engine capacity or damage to thrusters and the like did not qualify for allowance under this clause. Part of the rationale for not covering such costs has been related to burden of proof issues. Factors such as weather, wind and sea current may also influence the necessity of employing tugs, and if extra tugs are necessary in any event due to such factors, there is no cover under this clause. However, in many cases it is clear that such tug costs are indeed extra for the assured due to the damage. If the assured can prove that the costs are extra due to the damage, it is now established that allowance can be made also for extra tug costs under the terms of this clause.** Costs that are not deemed to be extraordinary in this connection are primarily those that can be described as increased voyage expenses, i.e. the extra voyage costs incurred in order to keep the vessel gainfully employed. These increased voyage expenses have to be paid by the assured according to his duty to minimise the loss. If the assured chooses to keep the vessel idle waiting for repair, the insurer shall

[44] Commentary (2019) pp. 385–386.

not be liable for greater loss than that for which he would have been liable if the duty of the assured had been fulfilled.

5.3 The economic interest in loss of hire insurance

According to NP Cl. 2-1, a contract concerning insurance which does not relate to any interest is void. The provision "establishes the traditional precondition for a valid insurance contract, i.e. that the assured must have an economic interest in the subject-matter insured".[45] It also reflects the general insurance law terminology that the insurance is not tied to "an object", but to the economic interest in this object.[46]

Generally speaking, a distinction must be made between casualty insurance covering loss of damage to a physical object ("tingsforsikring") and insurance that covers loss of income. Insurance covering loss of or damage to an object covers the objective value of this object,[47] and such insurance will always be tied to one specific object or a group of objects as defined. In principle, an economic value can be attributed to each object, which may then be used as the insurable value for this object. Thus, hull insurance for vessels is always tied to each individual vessel and each vessel is given a value. The insurable value for the vessel is the full market value of the vessel at the inception of the insurance period, cf. NP Cl. 2-2 and above in item 2.

Loss of income, on the other hand, is a much less specific concept. Loss of income can be tied to an individual object, a specific contract, a specific person or company, a consortium of companies or some other defined "profit centre". Insurance for loss of income is often tied to damage to one or more physical objects.[48] As loss of hire insurance is tied to damage to the vessel, the starting point is that this insurance is tied to the income

45 Commentary (2019) p. 30.

46 Commentary (2019) p. 30. See in general Selmer, Knut. *Forsikringsrett,* 2nd ed., Oslo: Universitetsforl., 1982, p. 74 ff., Bull, Hans Jacob. *Forsikringsrett*, Oslo: Universitetsforl., 2008, pp. 433–434 and NOU 1987: 24, Lov om avtaler om skadeforsikring (skadeforsikringsloven), ch. 6.2.1.

47 Bull (2008) p. 28.

48 Bull (2008) p. 29.

of the vessel. This follows clearly from the wording in Cl. 16-1, ("loss due to the vessel being wholly or partly deprived of income"), Cl. 16-3 ("Compensation shall be determined on the basis of the time during which the vessel has been deprived of income") and also from references to the vessel in Cl. 16-4 and Cl. 16-5.

However, the provisions also refer to the "assured's loss of income", cf. Cl. 16-5:

> The assured's loss of income per day (the daily amount) shall be fixed at the equivalent of the amount of freight per day under the current contract of affreightment less such expenses as the assured saves or ought to have saved due to the ship being out of regular employment.

This expression is also used in the Commentary:

> In relation to Cl. 16-3:[49] ""The daily amount" is the insurable value of the assured's loss of income per day".
>
> In relation to Cl. 16-5:[50] "As mentioned in the Commentary on Cl. 16-3, the "daily amount" is the insurable value of the assured's loss of income per day."

This difference can however be explained from a language point of view most clearly by looking at the Norwegian wording in Cl. 16-1, stating that the insurance covers "tap som skyldes at skipet helt eller delvis har vært ute av inntektsgivende virksomhet". The vessel may be "out of employment that generates income", but the vessel cannot sustain a "loss". The loss is sustained by the assured, i.e. what the loss of hire insurance covers is the assured's loss of income[51] due to the vessel being deprived of income. With this interpretation the economic interest that is covered by the loss of hire insurance is not a general loss for the assured, but instead loss for the assured tied to the insured vessel.

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49 Commentary (2019) p. 367.

50 Commentary (2019) p. 369.

51 Commentary (1973) p. 17.

The calculation of loss of hire insurance is based on daily income loss multiplied by the number of days the vessel is out of hire. There is therefore clearly a time element in this insurance. The Court of Appeal argues that the loss of time is clearly defined as a period and not a sum of money. But as already mentioned, loss of time cannot in itself be compensated and neither is loss of time an economic interest. Loss of time is only interesting as an object of insurance because it results in loss of earnings.

In conclusion, it appears that the economic interest covered under loss of hire insurance is the assured's loss of income because the insured vessel is damaged and thus deprived from earning income under the contract of affreightment under which it operated when it was damaged. It is not sufficient that the vessel is deprived of earning income; this must in fact result in an economic loss for the assured. Stated in other words; the economic interest covered under loss of hire insurance belongs to the assured, and not to the vessel.

In the *Hamburg* case the assured argued that the insured "interest", in addition to loss of earnings also included "expenses", and it appears that the court accepted that this was a valid loss under Cl. 16-1. It may be argued that the inclusion of expenses similar to "earnings" is tied to the insured vessel so that the interest includes any expenses the assured sustains due to the casualty presuming the costs must be attributed to the vessel. Expenses from hiring a substitute vessel are outside this scope.

5.4 The concept of loss according to Cl. 16-1

The distinction between the assured's loss of income and the vessel being deprived of income ("skipet helt eller delvis har vært ute av inntektsgivende virksomhet") is also relevant in relation to the concept of loss according to Cl. 16-1. The provision states that the insurance covers "loss due to the vessel being wholly or partially deprived of income". The Court of Appeal interpreted this to mean that the insurance covers loss due to the vessel being deprived of income regardless of any performance under the charter party, i.e. the daily amount attributed to the vessel. This is

then the economic interest under the insurance, and the concept of loss is tied to each individual vessel. However, as mentioned above, the vessel cannot sustain a loss, so the loss must be attributed to the assured. It may therefore be argued that the provision actually contains two conditions for cover: the first being that the vessel is being deprived of income and the second being that this results in a loss for the assured. This means that if the income is not lost, there is no loss under the loss of hire insurance.

As a general principle, this requirement for loss also seems to follow from the Commentary to Cl. 16-3:

> A basic condition for compensation under the loss-of-hire insurance is that the ship has been deprived of income as a result of the damage. If the ship would have been unable to obtain employment even if it had not been damaged and would consequently have been laid up, there is no loss of time that entitles the assured to claim compensation, cf. *Cepheus Shipping Corporation v. Guardian Royal Exchange Assurance PLC,* The Capricorn, [1995] 1 Q.B. 622.[52]

Even if the Capricorn case[53] does not concern substitute vessels, it illustrates the relationship between the vessel being deprived of income and the assured's loss:

> In the *Capricorn* the plaintiffs claimed 60 days' loss of time under the loss of hire policy. The policy was subject to the Norwegian "General Conditions for Loss of Charter Hire Insurance (1972)" with 1977 amendments and with the incorporation of a reference to the Institute Time Clauses (Hull) dated Oct. 1, 1983. The plaintiffs argued that it was irrelevant to consider what, if any, use they might have made of the vessel after the end of the peak season but for the damage. They submitted that the policy wording compensated them for loss of earning capacity without proof that such capacity would have been deployed by them in the market.[54] The defendants argued that the policy was not to be read as covering loss

[52] Commentary (2019) p. 367.

[53] Cepheus Shipping Corporation v. Guardian Royal Exchange Assurance PLC (The Capricorn), [1995] 1 Q.B., p. 622.

[54] The Capricorn (1995) p. 622.

> which the vessel would have sustained, damage or no damage, because she would in any event have been out of the market. They submitted that the vessel was due to be and would have been laid up throughout the low season and thus that the plaintiffs had no insurable interest.[55]
>
> The judge held that the plaintiff's insurable interest in the subject matter insured (i.e. freight and income from trading) must have existed at the time of loss. The judge found that it was clear that the insured would not have exercised their off-season option to trade the vessel, and that their intention throughout was and would (irrespective of the damage repairs) have been that the vessel should remain in lay-up. In other words, any loss of earnings was not due to the damage, but due to the fact that the vessel would have been out of the market anyway.[56]

In the *Capricorn* case it was not the use of a substitute vessel that prevented the loss, but the fact that the vessel would be unemployed regardless of the damage, i.e. there was no economic interest for the assured at the time of the loss. It is therefore correct when the Court of Appeal states that the case concerns another situation. The situations also differ in that the failure to establish an economic interest for the assured concerned the insured vessel, whereas when a substitute vessel is used, the loss is prevented by the use of another vessel. But the case supports the general principle that it is not sufficient that the vessel is prevented from earning hire; this situation must in fact lead to a loss. As the damage to *Hamburg* did not result in economic loss for the assured, it may be argued that the result should be the same.

The Plan Committee has now decided that this interpretation is correct. It must however be admitted that this interpretation is not easily accessible. In order to clarify this issue it should therefore be considered whether there is also a need to revise the wording or at least provide a better explanation for the relationship between the vessel being deprived of income and loss of income from the charterparty.

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55 The Capricorn (1995) p. 622.

56 The Capricorn (1995) p. 623.

5.5 The relationship between "loss" and costs to employ a substitute vessel

Chapter 16 previously had no references to substitute vessels. Curiously enough, such a reference was however provided in chapter 17 for fishing vessels in relation to Cl. 17-38.[57] This provision reads as follows:

> If it is stated in the insurance contract that a certain amount per day shall be paid in compensation for loss of income, the said amount is the maximum compensation that may be paid out per day under Cl. 17-37 unless it is clearly evident from the contract that the amount is an agreed daily amount.

The starting point in Cl. 16-6 is that an amount fixed in the policy "shall be regarded as an agreed daily amount". The starting point in Cl. 17-38 is the opposite; the daily amount is open unless it is "clearly evident" that the amount is agreed. But even if the amount is agreed, the Commentary states in regard to this provision that "the limitations on compensation prescribed in Cl. 17-36 will apply".[58] Clause 17-36 sub-clause 1 has the following wording:[59]

> The insurance does not cover loss that is due to the vessel being deprived of income from fishing as a result of regulatory measures introduced by the authorities or the fact that the authorities have stopped fishing activities.

In regard to this provision the Commentary states that "If the assured leases another vessel to fish his full quota while the insured vessel is deprived of income, the costs of such leasing must be recoverable under Cl. 16-11".[60] The remark must be seen in the context of the provision. The main point according to the Commentary is that:[61]

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57 NP (2016) Cl. 17-61, NP (2019) Cl. 17-38.
58 Commentary (2019) p. 431.
59 NP (2016) Cl. 17-59, NP (2019) Cl. 17-36.
60 Commentary (2019) p. 429.
61 Commentary (2019) pp. 427–428.

> Cl. 17-36, *sub-clause 1*, therefore provides very generally that the insurance does not cover losses resulting from the vessel being deprived of income due to regulatory measures introduced by the authorities or from the authorities having stopped fishing operations. … This provision is a logical consequence of the principle expressed in the Commentary on Cl. 16-3 with reference to the English judgment "CAPRICORN", which determined that loss of time that occurred during a period when the vessel would have been deprived of income regardless of the damage is not recoverable.
>
> Therefore, the question of whether there is a recoverable loss cannot be considered solely on the basis of whether the vessel has been unable to operate regularly due to damage. Consideration must also be given to whether the vessel has been prevented from fishing its full allocated quota of a specific species of fish. If, once the vessel is back in operation after an interruption due to damage, it is able to fish its full allocated quota, the assured has suffered no loss and is thus not entitled to compensation.

Loss of hire insurance for fishing vessels, according to Cl. 17-34, covers loss due to the vessel being wholly or partially deprived of income. This is similar to ch. 16, and means that damage to the vessel must be a necessary cause for the loss. If the loss is caused by regulatory measures and not by damage, there is no loss of hire insurance. The meaning of the exclusion in Cl. 17-36 is therefore that even if the vessel is damaged and therefore deprived from earning income, there is no insurance if such income would anyway be deprived because of regulatory measures. From the Commentary it appears that the issue is not a question of combination of causes (the damage and the regulatory measures are both necessary but not sufficient causes),[62] but instead one of concurrent causes or hypothetically concurrent causes where both causes have caused or would have caused the same loss.[63]

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[62] NP (2019) Cl. 2-13, Wilhelmsen, Trine-Lise. «Årsaksprinsipper og tolkningsprinsipper i forsikringsretten», *Tidsskrift for erstatningsrett, forsikringsrett og velferdsrett* no. 4 (2011), p. 233 and Bull (2008) p. 245.

[63] Wilhelmsen (2011) p. 233, Bull (2008) p. 244 and Brækhus (1993) pp. 286–288.

The starting point in insurance law in such situations is that one looks at which cause did in fact cause the loss and one does not take the hypothetical concurrent cause into consideration.[64] However, this starting point is given for insurance of objects where you can decide which of the two causes did in fact cause the casualty, and it is clear that the hypothetical concurrent cause has no influence on the actual damage. The situation is more complicated in loss of hire insurance where the casualty is only the starting point for calculating loss of earnings during a certain period and where other causes than the damage may interfere, that by themselves could cause the same loss. According to NP Cl. 17-36, the insurer is not liable if income loss would occur regardless of the damage because of regulatory measures.

This is however a different situation from that where the assured hires another vessel to do the fishing. In the case of regulatory measures, the income would have been lost regardless of the damage. In the case of substitute vessels, the income loss is avoided by the substitute vessel. The sentence in the Commentary on this issue therefore seems out of place and cannot be explained by the reference to the *Capricorn* case. A reference to this judgment is also provided in the Commentary to Cl. 16-3[65] emphasising that if the vessel would have been unable to earn any freight regardless of the damage, there should be no recovery under the loss of hire insurance, cf. above. The point in the *Capricorn* case was that the interest did not exist when the casualty occurred. In the *Hamburg* case, the interest clearly existed at this point in time. In the *Capricorn* case, the damage occurred whilst the vessel was on hire, but the loss of income would have been caused by another cause (intention to remain in lay-up). The damage was therefore no longer a necessary condition for the loss of income. In the *Hamburg* case, the damage is a necessary cause for MV *Hamburg* to be off hire, but the income is "rescued" by using a substitute vessel. This is therefore a different situation.

Seen in this context, it appears that the point with the reference to substitute vessel is not to decide on whether or not there has been a

64 Brækhus (1993) p. 288 and Selmer (1982) pp. 310–311.

65 Commentary (2019) p. 367.

loss; this is decided by the reference to the regulatory measures, but to emphasise that the costs of hiring a substitute vessel is covered by Cl. 16-11.

5.6 Cover for costs to employ a substitute vessel

If there is no loss according to Cl. 16-1, the next issue is whether the assured may claim costs in regard to a substitute vessel covered according to Cl. 16-11 Extra costs incurred in order to save time:

> The insurer shall be liable for extra costs incurred in connection with temporary repairs and in connection with extraordinary measures taken in order to avert or minimise loss of time covered by the insurance, insofar as such extra costs are not recoverable from the hull insurer. ….
>
> The insurer shall not, however, be liable for such costs in excess of the amount he would have had to pay if such measures had not been taken.

Cl. 16-11 regulates extra costs to "minimize loss of time covered by the insurance". The insurance was tied to MV *Hamburg*. A natural starting point would therefore be that the loss of time that is "covered by the insurance" is loss of time attributed to MV Hamburg even if this does not follow directly from the wording of the provision. This is also supported by the first part of the clause on "extra costs incurred in connection with temporary repairs", which are obviously tied to the insured ship. The types of costs that are covered are further described in the Commentary as follows:[66]

> The costs encompassed by sub-clause 1 are costs related to "temporary repairs and in connection with extraordinary measures". This wording includes those measures which in accordance with Cl. 12-7, sub-clause 2, and Cl. 12-8 activate the hull insurer's limited liability for loss of time, but also embraces a wider range of measu-

[66] Commentary (2019) p. 384.

> res. The provision in Cl. 16-11 therefore encompasses any temporary repair; i.e. all measures taken to enable the ship to be removed to a repair yard, but which are not intended as permanent repairs. This includes the replacement of parts of the ship or its equipment, if relevant also the hire of such parts or equipment, e.g. a mobile generator. The fact that the ship is supplied with parts that will later be replaced is of no significance. Nor is it required, contrary to Cl. 12-7, sub-clause 1, that the temporary repairs are "necessary".

It therefore seems to be presumed that the costs to which the provision applies are connected to the repair of the vessel and not to commercial measures like hiring a substitute vessel to take over the charterparty. This is in line with the reasoning by the Appeal Court.

On the other hand, the expression "in connection with extraordinary measures taken in order to avert or minimise loss of time covered by the insurance" is wide enough to include measures not tied directly to the damaged vessel, and the Commentary now states that "the extra costs incurred in connection with employing the substitute vessel are recoverable subject to the terms of Cl. 16-11"[67]. This may seem somewhat surprising in the context of Cl. 16-11, but can be explained if Cl. 16-11 is seen in conjunction with NP Cl. 3-30 and Cl. 4-7, cf. also that the Commentary states that the "wording "taken in order to avert or minimise" loss of time is in accordance with Cl. 4-7".[68]

NP Cl. 3-30 states as follows:

> If a casualty threatens to occur or has occurred, the assured shall do what may reasonably be expected of him in order to avert or minimise the loss. If possible, he shall consult the insurer before taking any action.

In the *Hamburg* case a casualty had occurred, and it is clear that the assured had a duty to minimize the resultant time loss within the framework of what could reasonably be expected of him. The duty is

[67] Commentary (2019) p. 385.

[68] Commentary (2019) p. 383.

unspecified and not tied directly to the insured ship or to any specific acts. The main point is that there is a risk for a loss that is covered under the policy, and that the therefore measure is aimed at averting or minimizing this loss. From the wording the measure may consist of hiring a substitute vessel. Whether or not such act may in fact be invoked as a duty will depend on the situation and the costs involved for the assured measured against the benefits for the insurer. In the offshore market it is not uncommon that the assured charges a substitute vessel to secure against cancellation of the charterparty in case of a casualty. In such cases, it has been accepted that no loss of hire is sustained, but that the assured may claim coverage for the costs. It may therefore be argued that the Appeal Court's rejection of this duty is too easy.

If the assured undertakes measures to reduce the time loss, the insurer is liable for mitigation costs according to the rules in Cl. 4-7 ff. According to Cl. 4-7, the insurer is liable for "the costs of measures taken on account of a peril insured against, provided that the measures were of an extraordinary nature and must be regarded as reasonable". Cl. 4-8 to Cl. 4-11 regulate general average situations, whereas Cl. 4-12 regulates particular measures:

> If measures to avert or minimise loss under Cl. 4-7 have been taken without the rules in Cl. 4-8 to 4-11 being applicable, the insurer is liable for loss of or damage to the assured's property, and for liability and costs incurred by the assured. Loss referred to in Cl. 4-2 is nevertheless not recoverable under this provision.

According to the provision, the insurer is liable for the "costs incurred by the assured". Similar to the measures in NP Cl. 3-30, the "costs" are unspecified and may relate to any kind of measure as long as the purpose is to reduce a loss. Therefore, all costs in connection with hiring a substitute vessel will be covered under this provision, whether or not the costs would otherwise be covered under the insurance.[69] Further, it must be assumed that the measure of indemnity is calculated according

[69] Commentary (2019) p. 161.

to tort law rules, and not according to the insurance contract.[70] This means that the assured may require full indemnity for all costs but less any revenue earned. The maximum amount for this cover is given in Cl. 4-18 as "an equivalent amount" to the sum insured.

The provisions on measures to reduce loss in the general part of the Plan thus appear to have a wider approach than Cl. 16-11, which seems more directed at the damaged vessel. Insurance cover for costs to reduce liability for the insurer is also a strong principle in Nordic marine insurance. The relationship between Cl. 16-11 and the general provisions are however not explored further in the Commentaries and the step from measures to get the damaged vessel back into employment to commercial measures to rescue the income for the assured by using a substitute vessel could be better explained. The problem however is not that the costs of a substitute vessel are covered by Cl. 16-11, but that the relationship between the assured's loss of income due to the insured vessel being deprived of income and the condition that the assured must in fact sustain a loss is not explained properly.

5.7 The requirement of "loss" and the use of agreed insurable values

If the conclusion is that the assured in the *Hamburg* case sustained no loss, there is no cover according to Cl. 16-1 and no question of payment of the agreed insurable value. However, it was argued in the *Hamburg* case that the insurers in fact "opened" the agreed insurable value when they refused cover. This calls for a discussion of the use of agreed insurable values in loss of hire insurance and to what extent a "loss" is required.

It is a fundamental principle in Nordic insurance law that insurance should cover an economic interest or loss and not lead to a gain.[71] In marine insurance, it has for a long time been accepted that this principle is crossed by the assured's need for foreseeability in relation to the valuation of the vessel and the compensation in case of total loss where he will have

[70] Bull (2008) pp. 491–492.

[71] Wilhelmsen (2017) p. 65 ff.

to re-pay the loan on the lost vessel. The system with agreed insurable value provides such security. It is well known that prices on vessels may fluctuate, and mortgages will normally have clauses in the loan agreement that the owner has a duty to insure the full value of the loan.[72] Any gain that the assured makes on such arrangement will be set off by the premiums charged by the insurers, as stated by the Court of Appeal in the *Hamburg* case. Further, by using agreed insurable values the risk of under-insurance, where the sum insured is lower than the insurable value and the insurer is only liable for the proportion between the two values,[73] is avoided.

It is more surprising that the system with agreed insurable value is used in loss of hire insurance. The Commentary does not tie this to the need for foreseeability in relation to loan commitments and rebuilding programs. According to the Commentary to Cl. 16-6, "the daily amount is usually agreed; the reason for doing so is to avoid difficulties in calculating the daily amount under an open loss-of-hire insurance contract".[74] The Commentary further comments upon this approach as follows:[75]

> The system of agreed insurable values is well established in hull insurance. Ship values change constantly, and it can often be difficult to establish what a ship is really worth at a particular point in time – there is clearly a need to fix the value in advance. In freight insurance, the situation appears to be slightly different; in this case the exact amount of freight of which the assured is deprived will often be known, and an assessment that exceeds the freight amount is likely to be perceived as excessive compensation for the assured's actual loss. Nevertheless, the system of agreement has been maintained without exception. If it is evident that a loss of time has occurred, cf. Cl. 16-3, and the daily amount has been agreed, the assured must be paid the amount agreed for the number of (full) days during which the ship is out of operation.

72 Wilhelmsen (2017) p. 68.
73 NP (2019) Cl. 2-4, see further Wilhelmsen (2017) pp. 75–76.
74 Commentary (2019) p. 370.
75 Commentary (2019) p. 371.

There appears to be some discrepancy between the statement that the goal "is to avoid difficulties in calculating the daily amount under an open loss-of-hire contract" and the sentence that in loss of hire insurance "the exact amount of freight of which the assured is deprived will often be known". This may indicate that the problem is not to decide the freight amount, but rather the costs that shall be added or deducted. This may be illustrated by the *Hamburg* case, where expenses were included in the interest and constituted part of the agreed daily amount. However, it follows from the Commentary to the original 1972 Conditions that the calculation of off-hire under a time charter party will often cause difficulties.[76] It may also be that the vessel sails on a charterparty at the inception of the insurance period, but the assured plans to operate in the spot market later during the period. In this case, calculation of the daily amount is difficult. In a general perspective, it is not unusual that agreed insurable values are used for interests that are difficult to assess correctly.[77]

Further, even if there is no reference to this in the Commentary, a shipowner will usually assign the earnings and payments under a loss of hire insurance to the institution financing the vessel or the financiers may be co-insured pursuant to NP ch. 7 and 8.[78] This is reflected in Cl. 7-4 stating that "Compensation for loss of time may not be paid without the consent of the mortgagee who has [a] mortgage on the vessel's freight income". In such cases the agreed insurable value will have the same function as in hull insurance. There are therefore good reasons for the practice with agreed insurable values in loss of hire insurance and the principle is firmly established. Even so, it is important to see the use of agreed insurable value as an exemption from the main principle in insurance law that insurance shall cover a loss, and not lead to gain. If it is uncertain how far the agreed insurable value reaches, one must therefore fall back on the main rule. Seen from this perspective, it is surprising

[76] Commentary (1973) p. 31, cf. pp. 28–31. See also Lund (2008) pp. 71–73.
[77] Bull (2008) p. 456.
[78] Lund (2008) p. 73.

that the Court of Appeal states that the argument to avoid unwarranted gain has little if any relevance at all.

Based on the argument in the *Hamburg* case that the insurers in fact "opened" the agreed insurable value, it is interesting to discuss how far the principle of agreed insurable value should reach in cases where the income from the damaged vessel is "rescued" by a substitute vessel. The use of agreed insurable value to predict income to pay loan facilities is not relevant when the income is obtained by the substitute vessel. Neither will the use of substitute vessel cause problems in relation to defining the daily amount because this amount is not disputed. What is left, are the problems of deciding the costs involved. Whether such problems alone should be a decisive argument for the assured to obtain a gain on the insurance, can be discussed.

Natural damage insurance: the Norwegian model and current efforts to improve it

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Contents

1 Introduction

This article examines the natural damage insurance scheme that was established in Norway in 1979, as well as the changes made to this scheme over the years.[1] Together with the State-financed compensation scheme for natural damage, the insurance scheme form the centrepiece of the cover for natural damage in Norway. In order to understand the current situation and the relationship between the two schemes, it is necessary to give a short historical overview (see 2 below). The natural damage insurance scheme is presented under two headings: the cover (see 3 below) and the organization (see 4 below). Criticism has been voiced of elements of the scheme; a partial answer to this criticism, presented in a newly published report from an appointed law committee (NOU 2019: 4), is considered at the end of the article (see 5 below).

2 Natural damage insurance: The history

Damage caused by natural perils ("natural damage") is today covered under two main schemes in Norway,[2] a private insurance scheme and a State-financed compensation scheme. Originally, up until 1979, the State took responsibility, both for measures to avoid natural damage, and also

1 The present article is an enlarged and updated version of the article Natural damage insurance: the Norwegian model, published in Insurance Law, Scandinavian Studies in Law Volume 64 pp. 45–55, Stockholm 2018. Reference should also be made to Hans Jacob Bull and Anne-Karin Nesdam, *Naturskader og naturskadeforsikring: fortid, nåtid, fremtid,* TfEFT 2017 s. 169–203.

2 In addition, some «all risks» insurances include natural damage as part of their ordinary cover, see, as examples insurances for ships, airplanes, cars and cargo under transport. Mention should also be made of the financial assistance offered on a case by case basis by the Norwegian State to municipalities that have had their infrastructure damaged or destroyed due to natural perils, see Prop. 88 S (2017–2018) (Kommuneproposisjonen 2019) p. 77.

for economic compensation to those who had suffered loss as a result of a natural damage event.[3]

In 1979, the previous State scheme for compensation was partly "privatized" through the introduction of an insurance scheme for natural damages. The purpose of the new scheme was twofold: (1) to secure a more extensive economic cover for those who had suffered loss due to a natural peril; and (2) to relieve the State of substantial parts of its commitment to cover the economic consequences of natural damage. Demand for State support to compensate those who had suffered natural damage had shown a steady increase over the years. Simultaneously, the need for greater investment in preventive measures was seen as being necessary and important, in order to avoid the effects of natural perils. By establishing a private insurance scheme, financed by premiums paid by the public, to cover a significant part of the costs of compensating those affected by a natural damage, the State's financial contribution could be concentrated on efforts to avoid the damaging effects of natural perils.[4]

The natural damage insurance scheme was established in the Insurance Contract Act of 6 June 1930 no. 20.[5] Although the State compensation scheme for natural damage was retained, it was thoroughly revised and adjusted to work together with the insurance scheme, such that natural damage covered by the insurance scheme would not be eligible for coverage under the State scheme.[6] Later legislation maintained this approach,[7] most recently in Act 15 August 2014 no. 59 on compensation for natural damage (henceforth abbreviated "NDDA").

The Insurance Contract Act 1930 was repealed in 1989 through the passing of a new Insurance Contract Act.[8] The provisions found in the

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3 See Act 9 June 1961 no. 24 on protection against and compensation for natural damage.

4 See NOU 1974: 9 Erstatning for naturskader p. 10.

5 See sections 81a – 81d, added by Act 8 June 1979 no. 46.

6 See alterations made by Act 8 June 1979 no. 46 to Act 9 June 1961 no. 24 section 1 no. 1 and section 7. As for measures to prevent natural damage, the regulation in the Act of 1961 was retained.

7 See Act 25 March 1994 no. 7, particularly sections 1, 3, 4, 5 and 6 as regards compensation to be paid.

8 See Act 16 June 1989 no. 69.

Insurance Contract Act 1930 on natural damage insurance were repeated almost verbatim in a new Act 16 June 1989 no. 70 on natural damage insurance (henceforth "NDIA"). Since 1989, this Act has been altered several times. Most of these changes are of a formal nature. The material significant changes will be commented on below.

Of the Decrees authorized by NDIA, special mention should be made of the Decree 21 December 1979 no. 3420 on instructions for the Norwegian Natural Perils Pool, last amended 24 November 2017 no. 1821. The decree is henceforth abbreviated to "Decree on instructions".

From the beginnings in 1979 of the natural damage insurance scheme, a total amount of NOK 16.5 billion has been paid out in compensation. 1992 and 2011 were the years with the largest total amount paid, NOK 1.3 billion and NOK 2.5 billion respectively. Of the total amount paid out, storms accounted for NOK 9 billion and floods for NOK 5.2 billion. The highest amount ever paid out in a single year for storm damage was in 2011 (NOK 1.5 billion), and for flood damage in 1995 (NOK 0.9 billion).[9]

3 Natural damage insurance: The cover

3.1 Introduction

Natural damage insurance in Norway is organized as a compulsory cover, linked to an insurance against fire. In principle, all property which is covered against the risk of fire under an insurance, will also be automatically covered against natural perils. Although persons or companies are under no duty to take out fire insurance and thereby natural damage insurance, experience shows that owners of most buildings and relevant chattels will, in fact, insure against fire. The premium charged for natural damage cover is based on the same rate being applied to any person or

[9] The numbers are gathered from statistics provided by Finans Norge Forsikringsdrift, see https://www.naturskade.no/statistikk.

company insured, regardless of the risk of being struck by a natural peril.[10] This *solidarity principle* forms an important element in the current structure of the scheme.

3.2 Property covered under the scheme

NDIA section 1 first paragraph first sentence states that "property in Norway that is insured against damage caused by fire, is also insured against damage caused by natural perils …" The concept of "property" covers both real property (buildings) and chattels. It is irrelevant whether the chattels are covered as part of a real property insurance or under a separate and independent insurance. "In Norway" would encompass both mainland Norway and Svalbard.[11] The insurance against fire could be a separate insurance; however, most often the cover against fire constitutes an element in a combined insurance, including several different perils.

Since the introduction of the scheme in 1979, there have been two extensions in terms of property covered. Both extensions relate to the situation where the property insured is a residential or recreational house. The first extension, from 2004,[12] incorporated natural damage to gardens, yards and access roads of such houses into the insurance scheme.[13] The second extension, from 2017, gave owners of such houses the right to claim the value of the site in addition to the house itself, where the owner is prohibited by the municipality from rebuilding or repairing the house at the former location, due to the risk of future natural damage.[14]

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10 See Decree on instructions section 11 second paragraph first sentence.

11 The concept "Svalbard" is defined in Act 17 July 1925 no. 11 on Svalbard section 1 second paragraph, and includes more than just the Spitsbergen islands.

12 See Act 17 December 2004 no. 98, which added a new third sentence to NDIA section 1 first paragraph. The area covered by this extension is limited to five dekar (about a quarter acre).

13 Such natural damage was previously covered by the State compensation scheme.

14 See Act 21 April 2017 no. 17, which added a new third paragraph to NDIA section 1.

3.3 Property not covered under the scheme

There are important limitations regarding property included in the cover. First and foremost, the scheme will not be called upon to cover natural damage which is already covered by another insurance.[15] In addition, certain specific types of property are excluded, whether or not the property is in fact covered under another insurance.[16]

3.4 Natural perils covered

NDIA section 1 first paragraph second sentence defines natural damage as being damage "directly caused by a natural peril, such as landslide, storm, flooding, storm surge, earthquake and volcanic eruptions". The concept "landslide" (Norw.: "skred") would also cover the collapse of part of a mountain and an avalanche.

Given the way the text is formulated, with the words "such as" placed in front of the listing, a pertinent question is whether the list of perils should be seen as being exhaustive. The alternative would be to consider them as relevant examples, enabling the inclusion under the insurance scheme of damage caused by other natural perils as well. The preparatory works make it clear, however, that the listing should be regarded as exhaustive.[17] Consequently, damage due to heavy rain is not covered by the scheme,[18] unless it results in the flooding of rivers, etc., which again causes damage to property.

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15 See NDIA section 1 first paragraph first sentence (last part of the sentence). "All risks" insurances as mentioned in note 2 above are examples of relevant insurances.

16 See NDIA section 1 second paragraph. As examples of property falling under this exclusion, mention is made of goods under transport, cars, airplanes and ships. For such excluded property, "all risks" insurances are often available in the insurance markets, see note 15.

17 Ot.prp. no. 46 (1978–79) p. 33. It is interesting to note that the State compensation scheme, which uses exactly the same wording, is supposed to be understood differently, see NDDA section 4 first paragraph and the comments made in Prop. 80 L (2013–2014) p. 33.

18 As a general rule, damage to property caused by water overflowing into a building due to heavy rain ("urban flooding") will be covered by the insurance companies' ordinary

In order to be covered, the damage suffered has to be "directly caused" by the natural peril. This is the same term as that found in the State compensation scheme, but it is not as strictly construed as under that scheme.[19]

3.5 Who is protected under the scheme?

The rules do not impose any limitations on ownership of the relevant property under the natural damage insurance scheme, provided the property is covered by fire insurance. As a consequence, both private persons, companies, municipalities, etc. will be eligible for cover under the scheme.[20]

3.6 The assessment of claim

The assessment of the assured's claim in the event of natural damage will be based on the insurance conditions of the insurer who has provided the assured's fire insurance. Differences in cover may consequently occur between the insurance companies. However, this is not seen as a practical problem. The rules of the Norwegian Natural Perils Pool, see 4.4 below, establish to what extent a claim incurred by an insurance company may be accepted for distribution under the pool arrangement. If the insurer has given the assured better conditions than those decided by the pool rules, the insurer will have to bear the extra costs himself.

combined insurance policy on buildings, see, as an example, If's insurance conditions for buildings (2015) section A.1.4 no. 3.

19 See, as an example of the strict interpretation under the State compensation scheme, the Court of Appeal case LF-2014-49538, where damage to a fence caused by trees falling on it during a heavy storm was not considered a natural damage, since the damage was not directly caused by the storm. Under the insurance scheme, such a damage would have been covered, see the Handbook on handling of damage, issued by the Norwegian Natural Perils Pool (under the heading Treffskader).

20 Municipalities and companies owned by them are excluded from the State compensation scheme, with the effect that their infrastructure (roads, bridges etc.) will not be covered under either of the two established schemes. Cover for such natural damage may be sought by a municipality under the State arrangement mentioned in note 2.

In addition, relevant provisions of the Insurance Contract Act and the NDIA may come into play. As for the NDIA, reference should be made to section 1 sixth paragraph, whereby the assured's compensation for natural damage may be reduced in the event of inadequate construction or maintenance of the property being involved.[21] Expenses incurred for preventive and safeguarding measures will not be covered, even if they may contribute to reducing the risk of future natural damage to the property.[22]

The assured will have to bear a deductible for each natural damage occurrence.[23] Today, the deductible amounts to NOK 8000.

The natural damage insurance scheme operates with an absolute limit for all claims made after a single natural catastrophe.[24] The relevant amount today is NOK 16 billion.

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21 Both the assured and the insurer may ask the Appeals Board of the State Natural Damage Compensation Scheme to decide whether the criteria are met for reduction or refusal of the compensation, see NDIA section 2 first paragraph first sentence. Under the same provision, the Appeals Board may also decide whether the criteria are met for natural damage under NDIA section 1 first paragraph. The decision of the Appeals Board is final in both instances.

22 See Decree on instructions section 3 second paragraph.

23 See NDIA § 3 first paragraph, which gives the King (in reality the Ministry of Justice and Public Security, see Decree 15 December 1989 no. 1241) the right to stipulate the amount in a decree, see Decree 15 December 1989 no. 1335 section 1, last amended 11 February 2005 no. 125.

24 See NDIA section 3 second paragraph, with authorization for the King (in reality the Ministry of Justice and Public Security, see note 23) to stipulate the amount. This has been done in Decree 15 December 1989 no. 1335 section 2, last amended 23 November 2017 no. 1828. It follows from NDIA section 3 fourth paragraph that the Appeals Board (see note 21) has the authority to make the final determination on whether one or several natural catastrophes have occurred. If the stipulated amount is exceeded, the assureds will have to accept a proportional reduction in their claims, se NDIA section 3 fifth paragraph.

4 Natural damage insurance: The organization

4.1 The Norwegian Natural Perils Pool

The Norwegian Natural Perils Pool (Norw.: Norsk naturskadepool) was set up in 1980 as a consequence of the enactment of the private insurance scheme.[25] The pool is an equalization mechanism, whereby claims and costs incurred are distributed between the member companies in proportion to their market share.[26]

4.2 Members of the pool

NDIA section 4 first paragraph first sentence requires that "[a]ll non-life insurance companies that indemnify natural damage according to section 1 shall be members of a common claims pool."[27] All insurers providing cover against fire in Norway are obliged to be members of the pool, regardless of where they have their head office, see second sentence. Both Norwegian and non-Norwegian insurance companies will consequently be members of the pool. Today the pool has around 100 members. Membership will automatically begin when the insurance company starts signing contracts for fire insurance in Norway and will end when the company is no longer liable for the claims and costs incurred under the natural damage cover.[28]

The legislator has considered it important to ensure that a fire insurance contract can only be established with a (foreign) insurance

[25] In December 2017, the Ministry of Justice and Public Security appointed a Law committee to look into certain aspects of the natural damage insurance scheme, inter alia the Norwegian Natural Perils Pool. The committee presented its report (NOU 2019: 4 Organisering av norsk naturskadeforsikring – Om Norsk Naturskadepool, henceforth abbreviated NOU 2019: 4) in February 2019.

[26] See NDIA section 4 second paragraph second sentence.

[27] See also Decree on instructions section 1.

[28] See NOU 2019: 4 section 11.2.2 for further details.

company where it is a member of the pool, thereby making certain that the premium stipulated by the pool for the natural damage cover has in fact been paid. NDIA section 4a first paragraph prescribes that if an insured party enters an insurance contract with an insurance company that is not a member of the pool, he "shall pay a fee to the pool", which "is determined on the basis of the sum on the fire insurance coverage".[29] The fee shall be distributed to the member companies in accordance with the distribution formula, see 4.5 below.[30] Payment of the fee to the pool does not give the assured a right to claim compensation from the pool in the event of natural damage occurring. The provisions on fees do not seem to have played a central role in practice.

4.3 Premium

An important point in the natural damage insurance scheme is that the premium rate charged for the cover is the same for all insurance companies offering fire insurance and for all relevant assureds, regardless of the individual risk.[31] The rate is stipulated by the board of the pool, "taking into account that the total premiums shall over time correspond to the NPs and the individual company's amount of loss and damage and administrative expenses".[32] Today's rate is 0.07 promille (per thousand) of the sum of insurance for the relevant property under its fire insurance. Over the years, the rate has varied, from 0,25 promille to 0,07 promille.[33]

The premium payable by each separate assured is collected and retained by the individual insurance company.

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29 The provision was added to NDIA by Act 24 June 1994 no. 40. The provision is supplemented by Decree 25 November 1994 no. 1026.

30 See Decree on instructions section 11 a.

31 See Decree on instructions section 11 second paragraph first sentence.

32 See Decree on instructions section 11 first paragraph.

33 The rate 0,07 promille was set in 2012 and has been constant since.

4.4 Reinsurance

Reinsurance is arranged through the pool. The board makes the necessary reinsurance arrangements in accordance with the reinsurance principles approved by the annual meeting.[34] The reinsurance program has been expanded over the years. As from 1 January 2018, the program offers coverage for NOK 16 billion in two layers, with a retention of NOK 1.5 billion. The first layer gives cover between NOK 1.5 billion and NOK 3.5 billion, and the second between NOK 3.5 billion and NOK 16 billion. The total reinsurance premium paid in 2018 under these two layers amounted to NOK 87 million and NOK 151 million respectively, with 100 per cent reinstatement premium.[35] The reinsurance program must be placed with reputable companies with an acceptable rating, with the board stipulating the minimum rating requirements.[36] As from 1996, member companies of the pool have had the opportunity to act as reinsurers under the program, with a share equal to their share in the pool, provided they satisfy the rating requirements.

4.5 Settlement of claims

As already mentioned in 3.6 above, each insurance company regulates and settles the natural damage claims reported by their policy holders.[37] The settlement will be based on the terms and conditions agreed in the individual insurance contract.

Having settled the claims with the assured parties, the insurance company reports the claims to the pool on a monthly basis.[38] The pool has a separate set of standard conditions for use between the member companies and the pool.[39] These conditions will decide to what extent

[34] See Decree on instructions section 12.

[35] See NOU 2019: 4 section 10.1.1.

[36] See NOU 2019: 4 section 10.2.1.

[37] See Decree on instructions section 4 first paragraph.

[38] See Decree on instructions section 5.

[39] Terms for settlement through the Natural Perils Pool, to apply from January 1 2019, revising the terms that applied from 1 January 2016, as revised 1 January 2018.

claims settled between the member company and the insured party will be allowed to be equalized in the pool.[40] The pool will also cover and equalize the costs which a member company incurs in settling the insured party's claim.[41]

The pool will make a separate settlement and distribution for all loss and damage that has occurred during a single calendar year (the claim year).[42] When all claims pertaining to the claim year have been settled, final settlement and distribution is made.

For the claim equalization, the relevant amount to be equalized is the total allowable compensation paid by all the member companies for natural damage claims under a claim year, including interest and settlement costs, together with the administrative costs of the pool itself. The costs of the reinsurance program administered by the pool, see 4.4 above, and possible reinsurance settlements received from the reinsurers, are also taken into consideration when assessing the relevant amount for claim equalization.[43]

The basis used for the settlement between the member companies (the distribution formula) is the aggregated sum insured for fire insurance across all the member companies as of 1 July of the relevant claim year.[44] The claim settlement for each separate claim year is made on a quarterly basis, based on the payment statements received from the member companies.[45] Because it will take time before the distribution formula for each claim year is ready, the amounts as of 1 July of the previous year are used for these quarterly settlements. When calculating the annual settlement in January, the amounts already paid in the quarterly settlements will be adjusted, according to the distribution formula for the relevant claim year.

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40 The previous terms from 1 January 2012, named the Common terms and conditions for all insurance cover against natural damage, applied as an independent set of insurance terms and served as a minimum cover for the insured party.

41 See Decree on instructions section 10, with detailed provisions on the types of settlement costs covered.

42 See Decree on instructions section 6.

43 See Decree on instructions section 7.

44 See Decree on instructions section 8.

45 See Decree on instructions section 9.

4.6 Allocations

The rules regulating the insurance companies' allocations in their accounts regarding possible future claims for natural damage fall into two categories. *First*, each insurance company is required to allocate "in the normal manner" its proportionate share of the overall claims reserve for unsettled claims to be regulated through the pool, as well as an ordinary premium reserve based on the natural damage insurance premium.[46] *Second*, if the accrued premium exceeds the company's share of the compensation payments to be made through the pool and the claims reserve for unsettled claims, the difference must be allocated to a special natural damage account within the member company.[47] The natural damage account belongs to such company[48] and may only be used to cover future natural damage claims.[49]

4.7 The internal organization

The pool's highest authority is the annual meeting.[50] At the annual meeting, each member company of the pool has voting rights cor-

[46] See Decree on instructions section 11 third paragraph. During the period 2010–2017 these allocations varied considerably, from NOK 5 million in 2010 to NOK 400 million in 2017, see NOU 2019: 4 p. 78 note 2. The large allocation amount in 2017 was due to extensive flooding with several claims made late in the year, which had not been settled by the end of the year.

[47] See Decree on instructions section 11 fourth paragraph. The natural damage account was previously called the "natural damage fund", see NOU 2019: 4 p. 31 note 23. The terminology was changed by Decree 19 February 2016 no. 163, as the previous wording might leave the impression that a central "fund" existed, separated from the insurance companies' ordinary equity.

[48] The Decree on instructions section 11 fourth paragraph had a new last sentence added to it by Decree 19 February 2016 no. 163, which expressly stated that the natural damage account belonged to the member company.

[49] The Decree on instructions § 11 fifth and sixth paragraphs provide rules for the situations where a member company either transfers its fire insurance business to another company or else ceases operations. Whereas, in the first instance, the accumulated natural damage account will be transferred to the other company, in the second instance the account will be transferred to the pool without compensation being paid, for onward distribution among the other member companies.

[50] See Decree on instructions section 14.

responding to the distribution formula explained in 4.5 above. The four biggest non-life insurance companies operating in Norway have accounted for between 65 and 75% of the aggregated sums insured for fire insurance of all the relevant member companies during the last ten years.[51] Consequently, they have a dominating position in the annual meeting, provided they advocate a shared view. The annual meeting adopts the pool's annual report and accounts, elects the board and its chairman and deputy chairman, as well as the auditor, and deals with other matters on the agenda.

The board[52] consists of eight members with personal deputies. Members serve for a period of two years. The four largest member companies of the pool are always represented on the board. The companies' policy holders or the public at large will not have representatives on the board. It is for the board to stipulate the premium rate to be charged to the insured parties and to enter into reinsurance treaties. As for claims settlement, the board has a supervisory function.

The claims committee[53] is appointed by the board and has five members, each serving for a period of three years. The committee shall perform the necessary review of the claims submitted by the member companies for distribution. It shall also take necessary initiatives to coordinate the treatment of large claims, where more than one company and/or the State natural damage compensation scheme are involved.

The claims committee is responsible for the ongoing contact between the pool and the State natural damage compensation scheme.[54] A special liaison committee has been established between the two entities, which is responsible for dealing with matters where the two parties have a common

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51 See NOU 2019: 4 section 3.7 tables 3.1 (2009) and 3.3 (2017). Of the four, two (Gjensidige Forsikring ASA and SpareBank 1 Skadeforsikring AS) are Norwegian-owned and two (If Skadeforsikring NUF and Tryg Forsikring) are foreign-owned. SpareBank 1 Skadeforsikring AS and DNB Forsikring AS have recently (2019) merged their activities in non-life insurance into a new company called Fremtind.

52 See Decree on instructions section 15.

53 See Decree on instructions section 17.

54 See Decree on instructions section 18.

interest. The committee, consisting of three members from each party, is required to meet at least every four months.

The general manager of the pool is Finans Norge,[55] the Norwegian financial services association. The general manager has responsibility for the day-to-day settlement of claims.

5 Criticism and challenges

5.1 Lack of inducement to take preventive measures

Over recent years, criticism has been voiced of the natural damage insurance scheme. One set of criticism has focused on the lack of elements in the scheme to induce the assureds and the insurers to take measures to prevent natural damage or to reduce the economic losses suffered after a natural peril has struck.[56] Various steps have been suggested to overcome the problem. One would be to use the insurance to secure a higher quality and standard when repairing or replacing buildings, after natural damage has occurred. Another would be to differentiate the deductible dependent on the risk for natural damage, or else to earmark a part of the premium paid by the insured for use in preventive measures.

[55] Se Decree on instructions section 16.

[56] See as examples of such criticism NOU 2010: 10 Tilpasning til et klima i endring, p. 153, NOU 2015: 16 Overvann i byer og tettsteder, p. 226 and NOU 2018: 17 Klimarisiko og norsk økonomi, pp. 130–131.

5.2 The Norwegian Natural Perils Pool: Activities and organization

5.2.1 NOU 2019: 4: Background and mandate

Another set of criticism targets the organization of the Norwegian Natural Perils Pool and its activities. The insurance scheme, as a semi-compulsory arrangement with a fixed premium rate for all properties, regardless of the risks involved, is seen as hampering competition. Due to the way the premium rate is set, by the insurance companies through their membership in the pool, the policyholders and their organizations are left with no influence or insight. It has been argued that this arrangement has led to higher premiums than necessary to cover the cost of natural damage.

In December 2017, The Ministry of Justice and Public Security appointed a Law committee[57] to look into certain aspects of the natural damage insurance scheme. The committee submitted its report (NOU 2019: 4 Organisering av norsk naturskadeforsikring. Om Norsk Naturskadepool) in February 2019.

The mandate for the committee expressly stated that the committee should not evaluate or propose changes to the basic principles of the scheme. Consequently, both the solidarity principle,[58] as well as the present regulations regarding the compensation to be claimed by the insured party under the scheme, were left outside the committee's remit for consideration.[59] This limitation in the committee's mandate had the effect that the criticism voiced regarding the lack of prevention in the present scheme[60] has not been addressed by the committee.[61]

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[57] The committee had six members. Three represented the insurance industry (Finans Norge), the larger companies insured (Næringslivets Hovedorganisasjon) and the financial supervisory authority (Finanstilsynet) respectively, and three, including the chairperson (the author of this article), were appointed in their own capacity.

[58] See section 3.1 above.

[59] See NOU 2019: 4 section 1.1.

[60] See the references cited in note 56.

[61] The reason for the ministry's reluctance to start such a full review is perhaps a fear that such a review might bring up questions that could have detrimental effects on the

The committee's mandate was accordingly limited to looking into the activities and organization of the Norwegian Natural Perils Pool.[62] As for the *activities* of the pool, the mandate specified five distinct matters to be examined and evaluated:

(1) The way in which premiums are set today;

(2) The mechanism for distributing the payment of claims between the participating insurance companies;

(3) The companies' duty to allocate the difference between accrued premiums and claims paid or accrued to a separate natural damage account in the company;

(4) The rules to apply in determining how the yield from such an account may be used;

(5) The way reinsurance is organized.

As for the *organization and management* of the pool, special mention was made of the need to examine and evaluate the pool's relationship with the public as regards openness, insight and control.

Based on its findings and evaluations, the committee was asked to present proposals for possible changes to the natural damage insurance scheme, together with proposals for changes to both the Act on natural damage insurance and the related Decrees.

5.2.2 The committee's main findings

The majority of the committee (the only dissenter being the member representing Finans Norge) accepted two central elements in the criticism raised against the pool arrangement.[63] *First,* the majority emphasized that the way in which the premium rate has been set over the years, does not conform with the standard laid down in the Decree on instructions section 11 first paragraph ("the total premiums shall *over time* correspond to the NP's and the individual company's amount of loss and damage

very basis of the scheme. For a discussion on the need for a review of certain elements of the scheme, based on the underlying principles in the present Act, see the article referred to in note 1 by Bull and Nesdam, at pp. 195–203.

62 See NOU 2019: 4 section 1.1.

63 See NOU 2019: 4 section 4.3.4.

and administrative expenses", my italics). The financial accounts for the member companies of the scheme reveal that during the period 1980–2017 the premium rate has been administered so as to give the companies as a group a "surplus", totalling approximately NOK 8.5 billion. The yearly surplus has been allocated across the individual members' natural damage accounts, depending on each member's market share for that year.

Second, the majority agreed with the group of some of the later established and smaller insurance companies[64] that the distribution of the natural damage accounts among the companies had put them at a disadvantage. Statistics showed that the surplus and building-up of natural damage accounts in the member companies was particularly prevalent in the first thirty years of the scheme. Since 2005, and even more profoundly since 2012, the results of the Norwegian natural damage insurance business have been negative for many of these years. In these situations, newcomers to the fire insurance market have had to eat into their equity in order to cover the deficit. In contrast, the well-established companies have been able to draw on their natural damage accounts in such years of deficit.[65]

The dissenting member of the committee did not accept the criticism.[66] According to her, the reported surplus of NOK 8.5 billion did not amount to a real surplus, once the administrative and capital costs related to the companies' natural damage insurance business were taken into consideration.[67] Accordingly, in her opinion the insured parties had not paid more for their natural damage cover than was to be expected, and the newcomers of the fire insurance business had not been placed in an unjust position in their competition with the well-established companies.

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64 The group has been referred to as the Fairfond group, and consists of companies representing about 10 % of the pool's membership.

65 In addition, these companies had the advantage of being free to use the return on their natural damage accounts as they deem fit, see NOU 2019: 4 section 3.7.

66 See NOU 2019: 4 section 15.12.

67 See the calculations made in NOU 2019: 4 section 15.12.6, where "real natural damage capital" is calculated as being NOK 130 million, by contrast to the reported number of NOK 8.5 billion.

Over the years, proposals have been made to try to overcome the criticism put forward. A central element in these proposals has been to establish whether and to what extent the natural damage accounts with (some of) the insurance companies may be used to cover other companies' share in the deficits suffered in the natural damage insurance business.[68] Following an amendment in 2016,[69] the Decree on instructions section 11 fourth paragraph now states explicitly that the natural damage account in each separate company belongs to that company. Although voices have been raised to the effect that the status of the accounts has not been finally settled through this provision,[70] the committee chose unanimously to base its discussions and proposals on the assumption that the provision validly decided the status of the accounts.[71] This assumption had the effect that the capital on these accounts could only be used to cover the share of possible deficits falling on the respective company itself, and not the share of the deficits suffered by other companies.

5.2.3 A central natural damage fund

The committee's majority (all members except the one representing Finans Norge) tried to accommodate the criticism raised by proposing a compromise solution, consisting of a permanent and an interim arrangement. The aim of the compromise was to provide a fair and equitable solution for all interests involved, through the imposition of a robust and lasting regime. It was important to ensure that the insurance companies would not be in a position to continue the build-up of large natural damage accounts. Accordingly, the premiums should be stipulated in a better way than previously, see 5.2.5 below. In addition, any future surplus on the natural damage insurance business should be allocated to a new joint (central) fund to be administered by the Norwegian Natural Perils Pool,

68 See NOU 2019: 4 section 5.2.

69 See 4.6 above at note 48.

70 Or through statements made by the Ministry of Justice and Public Security over the years, see NOU 2019: 4 section 5.2.

71 See NOU 2019: 4 section 5.3.

instead of being allocated proportionately to each member company's natural damage account. The fund may then be used to stabilize the future premium rate.[72] In addition to the accumulated future surplus, such a fund would include the return on the fund's capital.[73] The fund should aim for a total size of NOK 4 billion.[74] In years where there is a deficit on the natural damage insurance business, all the insurance companies would be able to draw on the fund to cover their part of the deficit.[75]

The majority accepted that it would take time for the central fund to reach a magnitude of NOK 4 billion.[76] Consequently, the majority introduced an interim solution for the period until the fund reached the intended size.[77] In years with a surplus on the natural damage insurance, the surplus would be allocated to the central fund, in the same way as under the permanent solution.[78] In years with a deficit, companies

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72 See proposed Decree section 3-1 second paragraph subparagraph 2b).

73 See NOU 2019: 4 section 7.1, cf. section 6.2 and proposed Decree section 7-3. The dissenting member did not support the proposal of a joint fund, operated by the Norwegian Natural Perils Pool. She suggested that for the future, surplus on a company's natural damage insurance business should be treated in the same way as any other surplus on the company's insurance business, and no longer be allocated to a special natural damage account in the company (see 4.6 above), see NOU 2019: 4 section 15.12.4 and other places in section 15.

74 See NOU 2019: 4 section 7.3, where the discussions and the calculations made to establish the correct size of the fund are found in section 7.3.1 and the proposal in section 7.3.2.

75 See NOU 2019: 4 section 7.4, particularly section 7.4.2.5 first sentence and proposed Decree section 7-4.

76 In NOU 2019: 4 section 9.2.3, two scenarios are presented to illustrate how and with what speed the fund may be expected to grow. From the illustrations it would seem unrealistic to expect the fund to reach NOK 4 billion in less than fifteen years.

77 See proposed Decree section 7-5. If the fund drops below NOK 3 billion during its first ten years of existence, once having reached the size of NOK 4 billion, section 7-5 provides for the interim rules to be reintroduced until the fund has once again reached the size of NOK 4 billion. This "reserve solution" is not expected to have any great significance in view of the relatively short period where it will apply. It should be noted that one member of the majority, representing Næringslivets Hovedorganisasjon (see note 57 above), did not support the inclusion of the "reserve solution" in section 7-5, see NOU 2019: 4 section 7.4.2.5. In her opinion, this solution would have the effect of meaning that very little of the natural damage accounts in the established companies would in fact be used to cover future deficits in the natural damage insurance business.

78 See NOU 2019: 4 section 7.4.2.1 first sentence.

would be treated differently, depending on whether or not there is a natural damage account on their books. Companies with such an account would have to cover their part of the deficit by drawing on the account,[79] whereas companies without such an account would be allowed to draw on the central fund for their share of the deficit.[80] The effect of this arrangement for the interim period is threefold. First, it will support the effort to increase the size of central fund as fast as possible. In years with a surplus on the natural damage insurance business, the relevant surplus from all the companies will be allocated to the fund, whereas in years with a deficit, only the share of the deficit from the (smaller newcomer) companies without an account will be charged to the fund. Second, it will help companies with no natural damage account from having to exploit their equity in years where there is a deficit. Third, it will serve to ensure that (larger well-established) companies with a natural damage account will continue to use this account in line with the prescription in the present Decree on instructions section 11 fourth paragraph second sentence: "This fund … shall be used exclusively to cover future natural insurance damage claims".

In reaching its compromise solution, the committee's majority were careful to ascertain that the solution did not conflict with the principles laid down in the Norwegian Constitution section 97[81] or in the European Convention on Human Rights, first Protocol article 1.[82] The majority also concluded that the solution prescribed for the interim period, being that only companies with no natural damage account could draw on the central fund in case of a deficit on their natural damage insurance

[79] See proposed Decree section 7-5 first and second paragraph and NOU 2019: 4 section 7.4.2.1.

[80] See proposed Decree section 7-5 first and third paragraph. If the central fund is not large enough to cover such deficits, these companies will have to cover the deficits themselves by drawing on their equity, see fourth paragraph.

[81] No law must be given retroactive effect, see the discussion in NOU 2019: 4 section 7.4.2.2.

[82] The right to peaceful enjoyment of one's possessions, see the discussion in NOU 2019: 4 section 7.4.2.3.

business, did not conflict with the EEA agreement article 61(1) on state aid.[83]

5.2.4 Stipulation of premium

The committee was in full agreement on several points regarding how the premium rate for the natural damage insurance should be stipulated in the future. To overcome the challenges seen in the previous history of the pool, where the premium charged did not correspond with the goal set by the Decree on instructions section 11 first paragraph, see 4.3 above, the committee suggested that more exact criteria should form the basis for the stipulation of the premium rate.

The starting point was taken as being what was described as a "risk-correct" premium, according to an actuarial calculation.[84] This calculation, based on well-established methods and principles, should take into consideration the amounts made out for natural damage over the years, including costs incurred in establishing the damage, as well as costs for reinsurance.[85]

In addition, the committee agreed that two other items should be included in the stipulation of the premium rate. The first item comprises the administrative costs of the pool and the insurance companies' payment for settling the natural damage claims of the insured parties.[86] The second item covers four different elements, where anticipated future risk increases, such as climate changes, would probably be the most important.[87]

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83 See the discussion in NOU 2019: 4 section 7.4.2.4.

84 In Norwegian, «en risikorett premie ut fra en aktuariell beregning», see proposed Decree section 3-1 first paragraph.

85 Since at least 2012, this method has been used as the starting point for the stipulation of premium. The actuarial calculation for 2018 resulted in a risk-correct premium of 0,0578 promille (per thousand).

86 See proposed Decree section 3-1 second paragraph subparagraph 1, where such costs have been set to 0,003 promille (per thousand) of the member insurance companies' total fire insurance sums as per July 1.

87 See proposed Decree section 3-1 second paragraph subparagraph 2. The four elements could form the basis for an increase or a decrease in the premium stipulated, but a

The member of the committee representing Finans Norge proposed that the administrative costs and the capital costs of the insurance companies should also be taken into consideration when stipulating the premium.[88] The majority of the committee disagreed.[89] Under the present system, the companies are not compensated for such costs, and there was little reason to make changes on this point for the future. Companies with a natural damage account would be compensated for such costs through the yield on capital placed on this account. Although the solution would continue to put companies with no natural damage account at a disadvantage in the future, this disadvantage was at least partly compensated for by the advantages these companies were given in the interim period.[90]

5.2.5 Reinsurance

The insurance companies and Finans Norge had argued that it would be a better solution to let the participating companies arrange their own reinsurance. Each separate company would thereby be given the possibility of connecting its natural damage risk with the company's total risk exposure and its risk appetite as an insurance company.

The majority of the committee (all except for the member from Finans Norge) thought differently. They proposed to continue the current solution with a joint reinsurance arranged by the pool.[91] Such an arrangement would suit the solution advocated by the majority, where the pool had its own natural damage fund. This fund would first and foremost be at risk in the event of a large natural damage event, and, consequently, would be in need of protection through reinsurance.

possible increase has been expressly limited to 0,01 promille (per thousand) of the member companies' total fire insurance sums as per July 1.

88 See NOU 2019: 4 section 15.19 and 15.20.

89 See NOU 2019: 4 section 8.4, with conclusion in section 8.4.5 and proposal in section 8.6.

90 See proposed Decree section 7-5 third and fourth paragraph and above 5.2.3.

91 See NOU 2019: 4 section 10.1 and the dissenting opinion in section 15.22.

Detailed rules as regards the establishment of a reinsurance program for the pool and the conclusion of the relevant reinsurance contracts are laid down in the proposed Decree.[92]

5.2.6 The internal organization

The committee did not propose any changes to the basic set-up of the pool. All insurance companies providing fire insurance on relevant property in Norway will still need to be members of the pool.[93]

As for the annual meeting, an important change has been suggested.[94] Although it is expressly stated that the annual meeting is the "highest authority" in the pool, the possibility for the meeting to instruct the board or overturn its decisions has been precluded in respect of three important areas:

1) Stipulation of the premium rates;
2) Reinsurance principles and reinsurance program;
3) Principles for management of the pool's natural damage fund.

The background for this proposal is to protect the interests of the insured community. Although policy holders are represented on the pool's board, where they have been given a decisive role regarding the three above-mentioned subjects,[95] they are not represented in the annual meeting.

In the proposed Decree, the board has been reduced to six members, and specific rules have been provided as to representation on the board. Two seats are reserved for members representing policy holders and one seat for a member representing companies with a small member share in the pool, leaving three seats for the other (larger) companies. The members of the board representing the policy holders have been

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92 See first and foremost section 3-3, named Reinsurance. Rules on the tasks and composition of the reinsurance committee are to be found in section 2-6 first paragraph.

93 Proposed Decree section 2-1.

94 Proposed Decree section 2-2 first paragraph.

95 See proposed Decree section 2-3 fifth paragraph and the text below.

equipped with a veto in the three areas mentioned above. At least one of representatives must be present in the board meeting for the board to have a quorum, and to reach a valid decision, one of them must vote in favor.[96]

The proposed Decree also secures membership for a representative of the policy holders of all the committees of the pool, whereas the companies with a small membership share in the pool are given representation on the most important committees, i.e. the claims committee and the reinsurance committee.[97]

The committee agreed with the criticism being voiced that the pool was too much of a closed shop, with little possibility for public insight. The proposed Decree requires the pool to have "the utmost possible degree" of openness regarding its activities, in order to secure insight and control.[98]

5.2.8 The way forward

NOU 2019: 4 is presently undergoing a public consultation procedure, with the deadline for comments set as 2nd September 2019. For practical reasons, potential new rules will need to come into operation from the commencement of a new year. Since the interval between 2nd September and 1st January 2020 is short, it is not expected that the Ministry of Justice and Public Security will be in a position to act on the proposal in 2019, with the effect that the possible new rules will enter into force on 1st January 2021, at the earliest.

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96 On both the last two points, the committee member from Finans Norge dissented, see NOU 2019: 4 section 15.23. The majority felt that a new, general rule on abuse of power, see proposed Decree section 2-7, would prevent unwarranted misuse of power given to the representatives of the policy holders.

97 Proposed Decree sections 2-5 and 2-6.

98 Proposed Decree section 2-9.

Marine insurance for intervention by State power – The Nordic perspective

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Contents

1 Introduction and overview

The topic of this article is marine insurance cover for intervention by a State power in a Nordic perspective. As a starting point, marine insurance includes insurance both for vessels and for cargo under transport. However, this article only concerns insurance for vessels. Since intervention by State power mainly concerns hull insurance and loss of hire insurance, the article will also be limited to these two branches of vessel insurance.

Interventions by State power refer to measures taken by a state against the vessel. The most serious measure is when the State power takes over ownership of the vessel by means of expropriation or requisition. Less serious measures have a more temporary character; i.e. capture at sea, seizure, arrest, restraint or detainment. As a vessel is always flagged in a certain State, a distinction must also be made between "own" state power and "foreign" state power. In general terms, interventions by own state power have traditionally not been insurable in the marine insurance market, whereas certain interventions by a foreign state power have been covered as a war risk.

The traditional distinction between intervention by own State as a non-insurable risk and more war-related interventions by a foreign State power, has however been challenged in recent years. We have seen several cases where vessels are captured at sea and/or detained in port, with the action being officially justified through breach of trade- or customs regulations, but where the vessel has then not been released even if there apparently has been no breach or the investigations take an abnormally long time. From a Nordic perspective, the intervention in such cases has the character of corruption, abuse of power or even extortion. The question has thus arisen as to whether such cases are covered under the existent regime, and if not; whether they should be covered. This issue was discussed under the revision of the Nordic Marine Insurance Plan 2013 Version 2016, and a new regulation has been agreed upon for Version 2019 of the Nordic Plan. The amendment cannot, however, be

properly understood without a presentation of the current regulation. The current Nordic regulation and the agreed revision is therefore the main topic of this article. However, taking a broader perspective, it is also interesting to compare this regulation to the UK regulation of cover for state intervention. The Nordic Plan is widely used internationally, and it is therefore appropriate to see how this regulation departs from the UK regulation, which is often seen as the natural alternative.

In what follows, the UK regulation is presented in chapter 4 and the Nordic regulation in chapter 5. Prior to considering these, Chapter 2 provides an overview of the legal sources and Chapter 3 presents the two systems, as a necessary background for the more detailed discussion in Chapters 4 and 5.

2 Overview of the legal sources

2.1 The Nordic sources

Each of the Nordic countries has its own legislation on insurance contracts.[1] However, none of the Nordic insurance contracts acts contain any regulation of the scope of cover for marine insurance. They will therefore not be addressed further in this article.

Until 2013, each of the Nordic countries also had its own marine insurance conditions. However, in 2013 a common Nordic Marine Insurance Plan (the NP) was introduced, based on the Norwegian Marine Insurance Plan 1996 Version 2010 (the NMIP 2010). According to the Nordic Association of Marine Insurers (Cefor), the NP 2013 received «massive support» upon its introduction in 2013. Today it constitutes the most commonly used insurance conditions for the Cefor ocean fleet,

[1] For Norway; the Insurance Contracts Act (ICA) of 16 June 1989 (no 69). For Denmark; The Insurance Contract Act 2015 (Lovbekendtgørelse 2015-11-09 nr. 1237). For Sweden: Försäkringsavtalslag (2005: 104). For Finland: Insurance Contracts Act 28 June 1994.

with a share of 35 %. Other Nordic insurance conditions are used for a further 9.2 % of the fleet.[2] It is therefore fair to say that the regulation in the NP constitutes the "Nordic perspective" of the issues addressed in this article.

As the NP is based on the NMIP 2010, it is appropriate to outline the historical development of the Norwegian Marine Insurance Plan, in order to establish the characteristic features of the current Nordic Plan.

The first Norwegian Marine Insurance Plan was published in 1871, and was later followed by several Plans,[3] the most recent being the 1996 Plan. The 1996 Plan was published in several versions, up until 2010.[4] In 2010, Cefor, who is responsible for the maintenance and publishing of standard marine insurance conditions in the Nordic market, decided that instead of operating with one set of standard conditions in each of the Nordic countries, the maintenance effort should be concentrated on one common set of conditions. As the basis for a set of unified Nordic conditions, Cefor chose the Norwegian Marine Insurance Plan 1996 Version 2010. An agreement was entered into between Cefor and the Norwegian, Danish, Swedish and Finnish Ship-owner Associations on 3 November 2010 to construct the Nordic Marine Insurance Plan of 2013, which then came into force in January 2013. It was amended in 2016 and again in 2019.[5]

Several characteristic features of the Plan are important when considering its legal status. First, the Plan is an agreed document constructed by a committee consisting of participants from all interested parties, i.e. the ship-owners, the insurers, and the average adjusters. Up until 2003, Det Norske Veritas (DNV), acting as a neutral party, hosted the amendments and was also responsible for the publishing and distribution of the Plan. From 2003 onwards, Cefor has taken over this task.[6]

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2 Trine-Lise Wilhelmsen and Hans Jacob Bull, Handbook on hull insurance, 2nd edition, Oslo 2017 (Wilhelmsen/Bull) p. 23.

3 The Plans of 1881, 1894, 1907, 1930 and 1964.

4 Version 1997, Version 1999, Version 2000, Version 2002, version 2003, Version 2007 and Version 2010.

5 Wilhelmsen/Bull p. 26.

6 Wilhelmsen/Bull p. 26.

Secondly, widespread participation in the construction of the Plan has secured its neutrality and balance. This stands in contrast to many other standard conditions in the marine insurance market constructed by the insurers with no participation from the assureds.[7]

A third characteristic feature of the Plan is that it contains a fully comprehensive regulation of all aspects of marine insurance. Both the structure of the Plan and the construction of the individual clauses are more similar to legislation than to ordinary standard contracts.[8]

Fourth, the Plan is supplemented by extensive and published commentaries (the Commentary). Until 2007 the Commentary was published in hard copy and on the web site. From 2007 onward the Commentary has only been published on Cefor's web site.[9] The reference to the 2016 Commentary and 2019 Commentary in this article are to the pdf download placed on this web site for these versions of the Plan.

The characteristic features of the Plan also have bearing on the interpretation of the clauses. As the Plan is an agreed document, one cannot rely on the ordinary Nordic rule that a standard agreement shall be interpreted against the party drafting the clause. The similarity to legislation rather than to contract law implies that it would be more correct to interpret the Plan according to legislative principles rather than those applicable to contracts.[10] This is supported by the following remark in the Commentary:[11]

> "The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. … Nevertheless the Commentary shall still carry more weight as a legal source than is normally the case with the Traveau Preparatoire of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Nordic Revision Committee, and it must

7 Wilhelmsen/Bull p. 26.
8 Wilhelmsen/Bull p. 26.
9 http://www.nordicplan.org/Commentary/
10 Wilhelmsen/Bull p. 27.
11 Commentary 2016 p. 25 to Cl. 1-4.

> therefore be regarded as an integral component of the standard contract which the Plan constitutes."

This attitude in the Commentary that the Commentary is a relevant factor for the interpretation of the Plan has been accepted by the Supreme Court[12] and in arbitration cases.[13] The weight of the Commentary will, however, depend on the relationship between the Plan text and that of the Commentary. If the wording does not directly solve the disputed issue, the Commentary is given much weight.[14] In arbitration practice, the court has also accepted that the interpretation of the Plan has been amended through the Commentary when the Plan text could be interpreted in different ways and therefore did not hinder the amendment.[15] On the other hand, if there is obvious conflict between the Plan text and the Commentary, the text shall prevail as the primary legal source over the Commentary.[16]

2.2 The UK regulation

In international hull insurance, the English conditions have traditionally dominated. These conditions are also used in the Nordic market.

In the UK, marine insurance is regulated by the UK Marine Insurance Act of 1906 (the "MIA 1906").[17] In addition, the Insurance Act 2015 regulates some issues which are also relevant for marine insurance. However, similarly to the Nordic Insurance Contract Act, these pieces of legislation are not relevant for the questions addressed in this article. However, the MIA 1906 contains a schedule with "Rules For Construction Of Policy", which were adopted for the SG Form of Policy traditionally incorporated in the MIA. Even if this policy form is no longer used,

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12 ND 1998.216 NSC *Ocean Blessing,* ND 1969.126 NSC *Grethe Solheim,* ND 1956.937 NSC *Pan,* ND 1956.920 NSC *Bandeirante.*

13 ND 2000.442 NA *Sitakathrine.*

14 ND 1998.216 NSC *Ocean Blessing.*

15 ND 2000.442 NA *Sitakathrine.*

16 Cf. the Commentary 2016 p. 25 to Cl. 1-4.

17 https://www.jus.uio.no/lm/england.marine.insurance.act.1906/doc.html#377

the construction rules are still applied whenever the clauses used today contain the same wording as those of the SG Form of Policy. In relation to the issues discussed here, Rule no. 10 is relevant.

The English market is divided between Lloyd's and the corporates which effect insurance on identical conditions. Marine risk insurance for ocean-going ships is regulated by several sets of clauses.[18] A common feature for these clauses is that they are based on the named perils principle, whereby the perils insured against are specifically listed. None of the clauses used contain cover for intervention by State power, which means that this peril is not covered under an insurance against marine perils. However, some coverage for this peril is provided by the Institute War and Strike Clauses (Hulls-Time) 1/10/83 as amended 1/11/95 (IWSCH) (Cl. 281).[19] IWSCH are therefore the relevant set of clauses for this article.

3 The distinction between marine risk and war risk insurance

3.1 The Nordic system

The historical starting point was that marine insurance against marine perils covered all perils to which the insured interest was exposed.[20] Except for P&I insurance, however, marine insurance with this wide scope of cover was not, in practices, used. Instead, the scope of cover was divided between insurance against marine perils and insurance against war perils. In formal terms, this distinction was made in two steps. The insurance against marine perils was based on the all risks principle, which stated that the insurance covered all perils to which the interest was

[18] Institute Times Clauses (Hulls) of 1983 and 1995, International Hull Clauses of 2002 and 2003.

[19] https://www.garex.fr/documents/IWSC_HULL_CL281_1995.pdf

[20] NMIP 1930 § 4 subparagraph 1, see also Nordic ICA 1930 § 60.

exposed, unless the peril was especially excluded. Perils covered under the war risk insurance were then excluded from the marine risk cover.[21] Interventions by a war-faring State were regulated as a war risk and were thus excluded from the marine risk cover.[22] The war risk insurance did not cover interventions from not war-faring countries, and neither were such interventions excluded from the marine insurance cover in NMIP 1930. Such exclusion was, however, inserted in NMIP 1964 for Norwegian or allied State power, in order to avoid these interventions being covered through the all risks principle,[23] and this was extended in the 1996 revision of the NMIP to apply to all State interventions. The central concept is thus that the cover for marine risks is based on the all risks principle, with exclusions for war risks and for interventions from state power that are not covered under the war risk insurance. The relevant provisions in the NP 2013 Version 2016 read as follows:

> **Clause 2-8. Perils covered by an insurance against marine perils**
>
> An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of:
>
> (a) the perils covered by an insurance against war perils in accordance with Cl. 2-9,
>
> (b) intervention by a State power. A State power is understood to mean individuals or organisations exercising public or supranational authority. Measures taken by a State power for the purpose of averting or limiting damage shall not be regarded as an intervention, provided that the risk of such damage is caused by a peril covered by the insurance against marine perils,
>
> …….
>
> **Clause 2-9. Perils covered by an insurance against war perils**
>
> An insurance against war perils covers:

[21] Commentary 1964 p. 11.

[22] NMIP 1930 § 42 no. 2

[23] NMIP 1964 15 (b), Commentary NMIP 1964 p. 15.

> (a) war or war-like conditions, including civil war or the use of arms or other implements of war in the course of military exercises in peacetime or in guarding against infringements of neutrality,
>
> (b) capture at sea, confiscation and other similar interventions by a foreign State power. Foreign State power is understood to mean any State power other than the State power in the ship's State of registration or in the State where the major ownership interests are located, as well as organisations and individuals who unlawfully purport to exercise public or supranational authority. Requisition for ownership or use by a State power shall not be regarded as an intervention,
>
> …
>
> (e) measures taken by a State power to avert or limit damage, provided that the risk of such damage is caused by a peril referred to in sub-clause 1 (a)–(d).

It follows from this regulation that some interventions are covered as war risk perils and are thus excluded from the insurance against marine perils through Cl. 2-8 (a), some interventions are excluded from coverage altogether according to Cl. 2-8 (b), and that those interventions (if any) that are not directly regulated by either Cl. 2-8 or Cl. 2-9 are covered under the all risks principle in Cl. 2-8. The distinction between cover and no cover is obviously very important. However, the distinction between marine risk and war risk cover is also important because the war risk cover is extended in several different directions. An insurance against marine perils covers damage according to the NP ch. 12, total loss according to NP ch. 11, and loss of hire according to NP ch. 16. The characteristic features of these rules are that total loss requires the vessel to be in fact lost to the assured,[24] and that cover for loss of hire is triggered by damage to the vessel.[25]

[24] NP Cl. 11-1.

[25] NP Cl. 16-1 sub-clause 1. Sub-clause 2 provides cover for a limited number of other circumstances but they are less relevant here.

In addition to this "normal" cover for marine perils, the war risk insurance provides cover for total loss if "the assured has been deprived of the vessel by an intervention by a foreign State power, for which the insurer is liable under Cl. 2-9," and the ship is not "released within twelve months from the day the intervention took place."[26] In such cases it is "irrelevant for the assured's claim that the vessel is released at a later time".[27] Further, if "the vessel is prevented from leaving a port or a similar limited area due to blocking, the assured may claim for a total loss, if the relevant obstruction has not ceased within twelve months after the day it occurred".[28] This means that if an intervention by a foreign State, that is covered by Cl. 2-9 sub-clause 1 letter b, results either in the assured being deprived of the vessel or in the vessel being prevented from leaving a port for a period of 12 months, the assured may require compensation for total loss.

There is also extra cover for loss of hire under the war risk insurance. First, the insurer "is liable for loss due to the vessel being wholly or partly deprived of income because it is prevented from leaving a port or a similar limited area", regardless of any damage to the vessel.[29] Second, the insurer is also liable for loss of time if the vessel is brought into a port by a foreign State power for the purpose of visitation and search of cargo, etc. together with capture and temporary detention.[30]

Under the 2019 revision of the NP, several amendments were made, both for the marine risk cover and to the war risk cover. The new provisions in the 2019 Version where new text is marked, read as follows:

> **Clause 2-8**
>
> An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of:
>
> (a) perils covered by an insurance against war perils in accordance with Cl. 2-9,

[26] NP Cl. 15-11 sub-clause 1.
[27] NP Cl. 15-11 sub-clause 4.
[28] NP Cl. 15-12 sub-clause 2.
[29] NP Cl. 15-16 sub-clause 2.
[30] NP Cl. 15-17 sub-clause 1.

(b) **capture at sea, confiscation, expropriation and other similar interventions by own State power provided any such intervention is made for the furtherance of an overriding national political objective. Own State power is understood to mean the State power in the vessel's State of registration or in the State where the major ownership interests are located. Own State power does not include individuals or organisations exercising supranational authority,**

(c) **requisition by State power,**

(d) insolvency **or lack of liquidity of the assured or the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance,**

Clause 2-9. Perils covered by an insurance against war perils

An insurance against war perils covers:

…

(b) **capture at sea, confiscation, expropriation and other similar interventions by a foreign State power, provided any such intervention is made for the furtherance of an overriding national or supranational political objective. Foreign State power is understood to mean any State power other than own State power as defined in Cl. 2-8 (b), second sentence, as well as organisations and individuals exercising supranational authority or who unlawfully purport to exercise public or supranational authority,**

…

The insurance does not cover:

(a) **insolvency or lack of liquidity of the assured or the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance,**

,

….

(c) **requisition by State power.**

The result of the amendment is that the war risk cover for interventions by a foreign state power is somewhat narrowed, whereas the marine risk cover for state interventions is made significantly broader, cf. further details on this in 5.3 below. It should be noted, however, that the distinction between marine and war risk cover is maintained with regard to the losses covered.

3.2 The UK system

As the ITCH/IHC are based on the named perils principle and do not mention intervention by State power, the implication should be that such interventions are not covered by the insurance against marine perils. Even so, the clauses contain the following paramount war exclusion:[31]

> In no case shall this insurance cover loss damage liability or expense caused by
>
> ….
>
> 24.2 capture seizure arrest restraint detainment (barratry and piracy excepted), and the consequences thereof or any attempt thereat

The IWSCH 1995 however, cover the following perils:

> 1.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat
>
> …
>
> 1.6 confiscation or expropriation

[31] ITCH 1983/1995 clause 24, cf. IHC 2001/2003 clause 29.2.

but with the following exclusions:

> 5.1.2 requisition or pre-emption
>
> 5.1.3 capture seizure arrest restraint detainment confiscation or expropriation by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered
>
> 5.1.4 arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations
>
> 5.1.5 the operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause

The UK regulation is thus simpler than the Nordic regulation, since interventions are either covered by the war risk clauses or else not covered at all. There is no question of there being different levels of cover. This makes it appropriate for this article to start by providing an outline of the UK regulation as background for the presentation of the regulation in NP, with a focus both on differences between the UK and the Nordic system and on what is changed in NP 2013 Version 2019.

4 The UK war risk insurance

4.1 The covered perils

The perils that are covered in IWSCH Cl. 1.2 and 1.6 are "capture", "seizure", "arrest" "restraint", "detainment", "confiscation" and "expro-

priation". The terms are not mutually exclusive, and they overlap to a certain extent.[32]

The cover applies to the actions that are described, regardless of any war or war-like situation, who is performing the actions and the legal basis for the actions. The cover thus also applies in times of peace,[33] and there is no explicit requirement for State involvement or legal justification for the intervention. However, this may follow from other legal sources, as discussed further below. It should also be noted that where such interventions are made by the country in which the vessel is owned or registered, they are excluded in IWSCH Cl. 5.1.3, cf. 4.2 below.

"Capture" is a taking by the enemy as prize, in time of war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken.[34] "Capture" seems to presume a belligerent act.[35] Capture is deemed lawful when made by a declared and lawfully commissioned enemy, and according to the laws of war, but is unlawful when it is made otherwise. Both lawful and unlawful capture are covered.[36] Capture is prima facie a case of total loss, which gives the assured an immediate right to notice of abandonment.[37] However, the loss cannot as a rule be said to be irretrievable at the moment of capture, so as to entitle the assured to treat it as an actual total loss, since there is no immediate loss of title. The loss of title occurs when there is an official sentence of condemnation pronounced by a prize court of the government of the captor.[38] The concept of "capture" thus seems to imply a State intervention or intervention by persons purporting to act on behalf of a State.

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32 Arnould, Law of Marine Insurance and Average, p. 1225 and 1229, Hudson, Madge, Sturges, Marine Insurance Clauses, p. 342 and p. 360.

33 Hudson et al p. 359, Keith Michel, War, terror and carriage by sea, p. 204–205.

34 Arnould p. 1223.

35 Arnould p. 1223, Hudson et al p. 342.

36 Arnould p. 1223 note 165.

37 Arnould p. 1225.

38 Arnould p. 1225–1226.

"Seizure" is a broader concept than capture and includes other forms of taking, such as taking by revenue or sanitary officers of a foreign State.[39] It includes seizure by a State due to smuggling by the ship's master.[40] Nor is "seizure" confined to acts of state. It includes seizure by pirates, passengers or by natives whose object is to plunder the vessel.[41] It embraces every act of taking forcible possession, either by lawful authority or by overpowering force.[42] The seizure need not be belligerent.[43] However, it does not include misappropriation by those already in possession of the ship.[44] This means that "seizure" may be a state intervention, but the concept is broader and includes taking the vessel by forcible means from other groups.

The perils "arrests, restraints, and detainments" are also listed, without reference to involvement of a State. In the previous SG form of policy the wording was instead "arrests, restraints, and detainments of all kings, princes and people of what nation, condition or quality soever". According to rule 10 of the "Rules of Construction of Policy" in Sch. 1 to the Marine Insurance Act 1906, these words are declared to refer to "political or executive acts", and do not include a loss caused by riot or by ordinary judicial process.[45] The reference to "kings, princes and people" no longer appears in the current perils clauses. But although the new policy forms are not a policy of like form, such as would make mandatory the Rules for Construction scheduled to the 1906 Act, it is nonetheless clear that the meaning of these perils has not been altered and that the principles laid down by rule 10 continue to apply. The word "people" did not mean mobs or multitudes of men, but instead referred to the ruling power of the country.[46] These interventions are thus more narrowly interpreted than the interpretation of "seizure". However, in the current clauses,

39 Arnould p. 1223.
40 Michel pp. 203–204.
41 Arnould p. 1223, Hudson et al p. 342, Michel p. 204.
42 Arnould p. 1224, Hudson et al p. 342, Michel p. 205.
43 Michel p. 205–207.
44 Arnould p. 1224.
45 Arnould p. 1226, Hudson et al p.342.
46 Arnould p. 1226–1227.

there is also a general exclusion for "the operation of ordinary judicial process" in Cl. 5.1.5.

There is no clear distinction between the terms "arrest", "detainment" and "restraint", nor is there a clear distinction between arrest and capture, because there may be an arrest when the authorities intend to permanently confiscate the insured property.[47]

The expression "restraint of princes" refers to an act either actually or purportedly carried out on behalf of the ruling power in its capacity as such.[48] The ruling power refers to both the government and also to the authority that is authorised to use forcible means that have the same consequences, for instance the army.[49] "Forcible means" refers to either physical enforcement or else the authority to punish resistance of those restrained.[50] It includes actions or orders that interfere with the voyage of the ship, even if there is no specific act of force, seizure or hostility displayed towards the insured ship, provided the state has the power to use force.[51] However, the actual use of forcible means is not required here; a direct order from the State by general law or otherwise by decree, which it has power to enforce, is sufficient. Thus, restraint arising under a sanitary law may be "restraint",[52] but restraint under "quarantine regulation" is excluded by 5.1.4, cf. below.

A declaration of war constitutes "a political or executive act",[53] and prohibitions on sailing in war times by the States involved in war will normally constitute "restraint". This is also true if the State imposing the order is the ship's State of registration,[54] but this situation is expressly excluded in 5.1.3, see below under 4.2. It may also be that a detention of the vessel by directions imposed for the safety of shipping in times of war, may not constitute a "restraint" if the directions are made primarily for

47 Arnold p. 1229.
48 Arnould p. 1227.
49 Arnould p. 1232.
50 Arnould p. 1231–1234, p. 1237.
51 Michel p. 218, Arnould p. 1232–1233, p 1236.
52 Arnould p. 1233.
53 Michel p. 225.
54 Arnould p. 1233–1234, 1237.

commercial purposes and are more in the nature of encouraging, rather than preventing navigation.[55] Furthermore, it is argued that in order to constitute an operation of these perils, the detention or interference with the vessel must be fortuitous from the perspective of the assured, in the sense that it is not simply the ordinary consequence of voluntary conduct of the assured arising out of ordinary incidents of trading. A detention of the vessel merely because of failure to pay port dues is outside the cover.[56]

The words "ordinary judicial process" in rule 10 relate to the administration of justice in civil proceedings.[57] This does not include the detention of a vessel by judicial process for the purpose of enforcing the public or criminal law of the country. Thus the fact that a judicial process is in operation does not deprive the restraint of its character of being a political or executive act. The cover includes a situation where a vessel is seized for a smuggling offence and in subsequent legal proceedings an order for her confiscation was issued, under which the vessel continued to be detained.[58] Furthermore, only "ordinary" judicial process is outside the scope of the cover. If an order for restraint is issued by a court not acting "bona fide" as an independent judicial body and the situation is effectively an attempt at extortion, there is no "ordinary judicial" process.[59]

It appears from this that the concept of restraint includes a situation where the assured is deprived by a superior authority of possession of his property or where, although he retains possession the property is forcibly detained, for instance by an embargo.[60] There is no requirement that the restraint be obtained through forcible means.[61] Direct intervention by the authorities with regard to the conduct of the voyage, based either on general law or by decree or otherwise, is sufficient.[62]

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55 Arnould p. 1227.
56 Arnould p. 1227.
57 Arnould p. 1228.
58 Arnould p. 1228.
59 Arnould p. 1228.
60 Arnould p. 1231.
61 Hudson et al p.342–343, Arnould p. 1232–1233.
62 Arnould p. 1232–1233.

Confiscation and expropriation refer to acts done by governmental authorities or by persons professing to represent those in power.[63] There is no judicial determination on these concepts in relation this particular clause.[64] Such acts will normally also be included in the term "restraint". Both expressions are probably confined to circumstances where the appropriation of the vessel to public use is intended either to be permanent or to be reversible only on payment of some fine, penalty or other exaction.[65] It is argued that these expressions are confined to circumstances where no compensation is paid,[66] and that the clause is designed to "deal with the regrettable propensity of certain states to seize ships and other insured objects, often under the flimsiest of pretexts and sometimes by the most dubious means".[67]

4.2 The exclusions

Cl. 5.1.2 excludes "requisition or pre-emption". "Requisition" refers to a formal act, rather than to the temporary occupation of a vessel and must usually import the compulsory taking-over of a vessel on the part of a government acting in a formal manner, which may involve either a transfer of property or title or hiring of the vessel to the government.[68] As a general but not invariable rule, compensation must be paid for the time that it is used and for any damage it may suffer.[69] It is suggested that requisition is normally made by the vessel's flag State, as a State normally does not have authority to requisite a foreign vessel, but this is not clear.[70] However, requisition implies that at the end of the service required of the vessel it must be handed back to the owners with compensation for

63 Arnould p. 1229.
64 Michael D. Miller, Marine War Risks, 3 ed. 2005, p. 224.
65 Arnould p. 1229.
66 Arnould p. 1229.
67 Miller p. 225.
68 Arnould p. 1247–1248, see also Hudson et. Al p. 364–365, Miller p. 225.
69 Miller p. 225.
70 Miller p. 230–231.

any damage suffered during the period of requisition.[71] "Pre-emption" is taken from the US and refers to the practice of paying a government subsidy in return for agreement to allow the vessel to be taken over in the event of national emergencies.[72]

Cl. 5.1.3 excludes "capture seizure arrest restraint detainment confiscation or expropriation by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered". It was a supposed rule of English law that a marine insurance policy subject to that law would not cover the risk of British capture, on the grounds of public policy. However, once the House of Lords had decided that such cover was afforded if recovery could not be denied due to illegality or war-related public policy,[73] a specific exclusion was included to secure this result. It appears that instead of applying the supplementary rule 10 of construction, it is expressly stated that the intervention must be by "the order of the government or any public or local authority ".

Cl. 5.1.4 excludes "arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations". This exclusion applies to both own and foreign state but is limited to interventions based on certain regulations. The link between the regulation and the interventions is worded differently, cf. "under" as opposed to "by reason of infringement". A loss by detention under quarantine regulations would therefore be denied, even if no infringement of the regulation has actually taken place.[74] In relation to customs or trading regulations there is a requirement for a breach to have occurred, but it is an open question as to whether a potential infringement is sufficient for this.[75]

The term "customs regulation" refers to laws in force in the country concerned, whatever their form, which deal with smuggling or other

71 Miller p. 231–232.

72 Arnould p. 1248.

73 British and Foreign Marine Insrance Co v. Sanday, (1916) 21 Com Cas 154, cf. Hudson et al p. 365 and Arnould p. 1194.

74 Arnould p. 1251.

75 Arnould p. 1251, Hudson et al. p. 365.

offences in the field of customs.[76] It includes smuggling of narcotics, even if beyond the scope of UK customs legislation.[77] Where a court purported to condemn a vessel on account of smuggling activities by the crew, the assured would have the burden of displacing the prima facie application of the exception by establishing a break in the chain of causation, which he could only do by showing either that the court which ordered the confiscation of the vessel for smuggling had knowingly acted outside its jurisdiction, or else that the court had acted in response to some political intervention unconnected by the offence.[78] It does not matter whether or not the owner is acting in good faith.[79]

The concept of "trading" refers to regulations forbidding, controlling or otherwise regulating the sale or importation of goods into a country and the carriage of goods for that purpose, but does not include regulations prohibiting or controlling fishing for the purposes of conservation.[80]

Cl. 5.1.5 excludes the "operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause". As already mentioned, it was the established interpretation of the perils of arrest, detainment and restraint that they did not apply to these measures if they were part of an ordinary judicial process. The exclusion thus confirms the previous interpretation, but according to the wording it also applies to seizure. As also mentioned, the words "ordinary judicial process" relate to the administration of justice in civil proceedings and do not include judicial process for the purpose of enforcing the public or criminal law of a country. This is also true if the enforcing public or criminal laws take place within the ordinary judicial system.[81] As a result, for intervention based on public or criminal law, one must therefore rely either on the exclusion for interventions by own State, on the exclusion for quarantine regulation or else on breach of custom- and trade regulation.

[76] Panamanian Oriental SS Corp v Wright (The Anita), Arnould p. 1249.

[77] Sunport Shipping Ltd V Tryg-Baltica International (The Kleouvoulos of Rhodes) (2003), 1 Lloyd's Rep 138 (CA), Hudson et al. p. 365–366, Arnould p. 1249.

[78] Panamanian Oriental SS Corp v Wright (The Anita), Arnould p.1249.

[79] Hudson et al. p. 366, Arnould p. 1250.

[80] Arnould p. 1250.

[81] Arnould p. 1252.

By contrast, the expression "failure to provide security or to pay any fine or penalty" extends to the areas of public and criminal law. There is no reference to the owner being liable for the failure and it appears that this is irrelevant.[82] The exclusion applies both to situations where an initial seizure or detention results from a failure to provide security, and also to situations where such failure takes place after the vessel's seizure.[83] There is however, a requirement that the providing of security be reasonable, compared to the value of the ship.[84]

The expression "any financial cause" is interpreted widely and there is no requirement that the owner be responsible for the financial cause or that there must be a financial default on the part of the owners.[85]

5 The Nordic regulation

5.1 The regulation before Version 2019

5.1.1 War risk cover for state interventions

5.1.1.1 Some starting points

NP 2013 Version 2016 Cl. 2-9 sub-clause 1 (b) covers "capture at sea, confiscation and other similar interventions by a foreign State power". Contrary to NP Cl. 2-9 sub-clause 1 (a), there is no requirement for the intervention to take place under "war or war-like conditions", and it follows from the Commentary that the provision deals both with measures that are related to a war in progress or an impending war, as well as with measures that have no direct connection to war or war-like conditions.[86] The cover is, however, limited to "foreign State power". There

[82] Arnould p. 1252.
[83] Arnould p. 1253.
[84] Arnould p. 1253.
[85] Arnould p. 1254, Hudson et.al. p. 366.
[86] Commentary 2016 p. 48.

is no cover for interventions taken by own State power. This is similar to the cover in IWSCH Cl. 1.2 and 1.6 cf. 5.1.4.

The provision was first inserted in NMIP 1964 and the main content is the same.[87] The reasons for including such interventions under the war risk insurance, even when there is no war, are discussed in the 1964 Commentary. It is pointed out in that Commentary that these perils, contrary to the ordinary war risk, do not constitute a "catastrophic" risk and that, from a technical insurance point of view, they could be included in the insurance against marine perils.[88] Not all assureds wish to contract war risk insurance, and it was not reasonable to deny them cover for interventions in peace time.[89] On the other hand, war risk insurance was also needed in peace time to secure a state of readiness, and it would also be very difficult to draw the borderline between acts of war and war-motivated interventions from the authorities, and acts of violence and interventions of a "civil" nature. In cases of revolutions and local conflicts, it may be difficult to establish whether the situation may be characterized as "war". The conclusion was therefore that it was most appropriate to place the described interventions by foreign State power under the war risk insurance.[90]

The concept "foreign State power" is closely linked to the concept of "a State power", as defined in Cl. 2-8 letter (b) second sentence: "A State power is understood to mean individuals or organizations exercising public or supranational authority". The definition covers States recognized under international law and their local entities (provinces, communes, etc.), as well as supranational organizations such as the UN, the EU and NATO, to the extent that such organizations exercise the same type of power as can a State.[91]

According to the definition of "foreign State power" in Cl. 2-9 sub-clause 1 letter (b) second sentence, the concept "is understood to

87 NMIP 1964 § 16 sub-clause 1 (b), NMIP 1996 § 2-9 subparagraph 1 (b).

88 Commentary 1964 p. 18.

89 Commentary 1964 p. 18–19.

90 Commentary 1964 p. 19.

91 Commentary 1964 p. 20, Commentary 2016 p 50, Wilhelmsen/Bull p. 93.

mean any State power other than the State power in the ship's State of registration or in the State where the major ownership interests are located, as well as organizations and individuals who unlawfully purport to exercise public or supranational authority".

On the one hand, the concept is thus structured so that it covers all States, subject to two exceptions: State powers both in the ship's State of registration and also in the State where the major ownership interests in the ship are located, are excluded. In the event of so-called double registration in both the owner State and the bareboat-charterer State, both States must be regarded as "the State of registration" for the purpose of this provision. As regards the term "major ownership interests", the vital question will normally be to ask in which country the largest proportion of the ownership interests are located, but other elements may nonetheless lead to the conclusion that another country should be chosen, e.g. the country where the controlling interests in the ship are located.[92]

On the other hand, the concept also covers all persons and organizations which unlawfully pass themselves off as being authorized to exercise public or supranational authority. In the case of interventions by groups of rebels and usurpers, it may at times be unclear as to whether the situation is covered by the wording or whether it is a case of pure piracy. However, in practice this will not normally create difficulties, since Cl. 2-9 sub-clause 1 letter (d) also refers to piracy as being within the war-risk insurer's scope of cover.[93]

The IWSCH do not make a similar distinction between "State power", "foreign State power" and "own State power". The starting point for the cover is the interventions, regardless of who makes them, but with interventions from "the country in which the Vessel is owned or registered" being excluded in cl. 5.1.3. The main result appears however to be the same, i.e. that war insurance only covers interventions by a foreign State.

[92] Commentary 2016 p 50, Wilhelmsen/Bull p. 93.

[93] Commentary 1964 p. 20, Commentary 2016 p. 51, Wilhelmsen/Bull p. 93.

5.1.1.2 The interventions "capture at sea" and confiscation

The term "capture at sea" means that the ship is intercepted, seized or arrested by a foreign State power at sea. The definition in the Commentary is that "the insured ship is stopped at sea by a battleship or some other representative of the relevant State power using power or threatening to do so, and taken into port for further control".[94] Such capture is most practical as a wartime measure, but capture in times of peace is also covered. Furthermore, neither the wording nor the Commentary expressly require there to be a political motive behind the arrest. The same is true for the previous NMIP of 1996 § 2-9 first sub paragraph letter (b) and 1964 § 16 first sub paragraph letter (b), as well as the 1964 Commentary. On the contrary, the Commentary to Cl. 15-17 regulating the war risk cover in connection with a call at a visitation port states that:[95]

> "Calls at a port for visitation (sub-clause 1 (a)) are usually only relevant in wartime or war-like conditions, cf. Cl. 2-9, sub-clause 1 (a), but are also possible in other circumstances, for example, when a State power intervenes, cf. Cl. 2-9, sub-clause 1 (b) in connection with sanctions against a given country.
>
> Capture and temporary detention (sub-clause 1 (b)) are also most relevant in wartime or war-like conditions, but may happen in peacetime as well, for example, in connection with customs inspection, embargo, etc. The detention must be by a foreign State power; thus, the provision does not apply if the ship is detained by reason of a strike, etc.: see the arbitration award in GERMA LIONEL ..."

Even though this comment clearly implies that capture in connection with customs inspection and embargo is covered by war risk insurance, it is somewhat confusing. The reference to the *Germa Lionel* case is somewhat misleading, as the issues in this case are better classified as an aggressive intervention by State power than a mere detention for customs purposes.[96]

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94 Commentary 2016 p. 48.

95 Commentary 2016 p. 340.

96 Haakon Stang Lund, Handbook on loss of hire insurance, 2. Ed. p 145.

Further, it is clear that detention in port by a foreign State power for customs inspection is not covered by the war risk insurance, cf. below.

The Norwegian concept "oppbringelse" ("capture at sea") from the 1964 NMIP § 16 (b) is discussed in further detail by Sjur Brækhus and Alex Rein,[97] who claims on the one hand that the motive for the measure is irrelevant, and that arrest due to an alleged or real breach of customs or fishery legislation qualifies as "capture at sea".[98] On the other hand, the authors also refer to the *Wildrake* case, where the concept of capture is interpreted narrowly, to apply only if there is a political motive:[99]

> The diving ship *Wildrake* was working on taking up metals from a wreck of war 17.8 nautical miles outside Tunis, on the Tunisian Continental Shelf but outside the territorial waters, when it was approached by a Tunisian cannon boat and ordered to sail to the naval port in Bizerte. Here, the ship was given a customs fine and the metals were confiscated. The ship stayed in Bizerte for about 14 days. The *average adjuster* that decided the case stated that there was a «capture at sea», but raised the question whether the capture was an intervention to enforce police and customs legislation, in which case it would fall outside the war risk cover. However, based on a concrete and individual assessment of the political situation in Tunis at the time, the average adjuster concluded that the capture could not be seen as an intervention to enforce police and customs regulation, and thus constituted a war peril.

Brækhus has also, as an arbitrator, stated that "a common characteristic feature" for the measures listed in the NMIP 1964 § 16 first sub paragraph letter (b), hereunder "capture at sea", is "that the measures concern interventions for the furtherance of overriding political objectives, typical for war and times of crisis, and contrary to interventions by a State power tied to regulation and control of normal commerce and shipping".[100]

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97 Håndbok i kaskoforsikring, Oslo 1993. Sjur Brækhus was chairman of the committee that drafted the 1964 NMIP.

98 Brækhus/Rein p. 69–70.

99 Brækhus/Rein p. 75.

100 ND 1988.275 NA *Chemical Ruby* p. 283, cf. Wilhelmsen/Bull p. 95.

The concept of "capture" was discussed in an arbitration award from 27 October 2016 concerning the vessel *Sira*, with Hans Jacob Bull as the arbitrator. *Sira* was detained in port by a Nigerian court, and the main question in this case was whether this detainment constituted a war peril as a "similar intervention" according to Cl. 2-9 sub-clause 1 letter (b), cf. further below. However, the award also contains a discussion of the concepts "capture at sea" and "confiscation" in the same provision. The arbitrator acknowledged that the wording of the clause and the Commentary do not make any express requirement concerning motive. However, as the Commentary in regard to "similar interventions" refers to i.a. the *Wildrake* case and ND 1988.275 NA *Chemical Ruby*, cf. further below, as well as to Brækhus/Rein pp. 73–76 concerning this concept, but not to Brækhus/Rein p. 70 concerning "capture", the interpretation in these two cases must be decisive for the understanding of the word capture in Cl. 2-9 letter (b).

This remark in the *Sira* case was not needed in order to decide the dispute in the case, and the relevance of the remark with regard to the interpretation is therefore limited. The remark is also contrary to the arguments for the regulation given in the Commentary 1964, where it is stated as a purpose that the only uncovered perils should be intervention by own State power and insolvency.[101] As Cl. 2-8 letter (b) excludes interventions by State power, the result of a narrow interpretation of "capture at sea" in Cl. 2-9 sub-clause 1 (b) would be that several instances of capture by a foreign State power would not be covered. This issue remains unsolved.

The expression "capture at sea" presumes that the arrest or seizure is enforced by the authorities through the use of physical power or the threat of use of such power. Brækhus/Rein argues that even a "voluntary" call at a port may be deemed as a capture if the alternative was an enforced measure by the authorities, but this argument has not been tested in court.[102]

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[101] Commentary 1964 p. 16.

[102] Brækhus/Rein p. 69, Wilhelmsen/Bull p. 96.

The term "confiscation" is from the latin *confiscare* "to consign to the *fiscus*, i.e. transfer to the treasury" and is a legal form of seizure by a government or other public authority. The word is also used, popularly, for any seizure of property as punishment or in enforcement of the law.[103] According to the Commentary, it means the appropriation of a ship by a State power without compensation.[104] It includes "condemnation in prize", where a warring power will invoke international or domestic condemnation in prize rules,[105] but there is no mention of war or political motive in relation to the term "confiscation". Brækhus/Rein argues that the provision also applies to confiscation as a criminal law sanction against the ship, if the ship has been involved in a breach of customs legislation or fishery legislation.[106] However, this is contrary to Brækhus' statement in the *Chemical Ruby* case, that a characteristic feature of all the measures listed in NMIP 1964 § 16 first sub-paragraph letter b, hereunder "confiscation", is that there is a political motive. If the interpretation in the *Sira* case is applied, a political motive will also be required for "confiscation".[107]

The Nordic terms "capture at sea" and "confiscation" are difficult to compare to the IWSCH regulation. It appears that the term "capture at sea" is different from the IWSCH term "capture" and is instead more comparable to "seizure" or "restraint" at sea. The IWSCH term "capture" is closely linked to condemnation by a prize court. NP Cl. 2-9 sub-clause 1 letter b previously included "condemnation in prize" as a separate peril, but this was deleted in the 2016 version because the term now sounds archaic, and must be regarded as being covered by the term "confiscation"".[108] It is unclear if the IWSCH term "confiscation" includes condemnation in prize. Common for both the UK and Nordic term "confiscation" is that the State takes over the ship without compen-

[103] https://en.wikipedia.org/wiki/Confiscation
[104] Commentary 2016 p. 48, see also Brækhus/Rein p. 71.
[105] Commentary 2016 p. 48.
[106] Brækhus/Rein p. 71.
[107] Wilhelmsen/Bull p. 96.
[108] Commentary 2016 p. 48.

sation. The Nordic cover for "capture at sea" seems to be similar to the cover for "restraint", in that there is no requirement for the use of force if the State had the option to use force. However, the IWSCH exclude restraint and confiscation, both under quarantine regulations, by reason of infringement of customs and trading regulations, as well as where arising from the operation of ordinary judicial process or failure to pay fines or penalties, whereas it is unclear to what extent the Nordic concepts "capture at sea" and "confiscation" are similarly limited.

5.1.1.3 Other similar interventions

The term "other similar interventions" indicates that the enumeration in letter (b) is not exhaustive, and that other types of interventions by a foreign State power may also be included. However, the condition is that the intervention be "similar" to capture at sea and confiscation. Typical for capture at sea and confiscation is the situation where the owner is deprived of the ownership or the right to use his vessel.[109] It would seem that the expression includes expropriation which is covered by the IWSCH Cl. 1.6, as well as requisition, but requisition is specially excluded, see below in 5.1.1.4.

There is no reference in the wording to the motive for the intervention, but it follows from the Commentary that:[110]

> "the wording is aimed at excluding from the war-risk cover the types of interventions that are made as part of the enforcement of customs and police legislation. The war-risk insurance therefore does not cover losses arising from the ship being detained by the authorities because there may be doubt as to whether the ship is compliant with the rules regarding technical and operational safety, or because the crew is suspected of smuggling. Obviously, losses arising from the ship being detained or seized as part of debt-recovery proceedings against the owners are not covered, either; this follows from the fact that «insolvency» has been excluded in sub-clause 2 (a)."

[109] Wilhelmsen/Bull p. 96.

[110] Commentary 2016 p. 49.

The difficult borderline problems, between "similar interventions" that are covered by the war risk insurance and measures taken by the police authorities, are demonstrated by three arbitration awards.[111] These decisions show that cover under the war-risk insurance is contingent on the shipowner being divested of the right of disposal of the ship, the authorities clearly exceeding the measures necessary in order to enforce police and customs legislation, and the intervention being motivated by primarily political objectives. The *Wildrake* case is referenced above. This case concerns capture at sea followed by detainment in port. The *Germa Lionel* award and ND 1988.275 NA *Chemical Ruby* both concern detainment in port without a previous capture:

> *Germa Lionel* was on a voyage from London to discharge her cargo first in Tripoli, thereafter in Benghazi in Libya. During the approach to the port of Tripoli the vessel had problems with the electric wiring which caused a lamp to blink. The Libyan authorities suspected that the vessel was communicating with groups in Libya which were opposed to the President, Colonel Ghaddafi. When the vessel had berthed, Libyan troops boarded the vessel. The crew was interrogated. One of the crew members died of mistreatment. The authorities checked the cargo and the vessel, but it appeared that the suspicions were without any foundation. The vessel's agents in the port incurred some costs, and the question was if these costs were covered by the war risk insurance. The main issue for the arbitrator was whether the Libyan authorities' action could be seen as a reasonable action as part of enforcing Libyan laws. The interrogation of the crew and the harshness shown were found to be of a nature which constituted a war peril under the Plan.
>
> In the *Chemical Ruby* case the vessel was detained for about 6 months by Nigerian authorities based on an unfounded suspicion that the vessel tried to ship contaminated soya oil into the country. The starting point was that it was an enforcement of Nigerian legislation, and thus not a war risk. Even if it took about 6 months for

[111] The *Germa Lionel* award 11 June 1985 (unpublished), ND 1988.275 NA *Chemical Ruby*, and a case that was settled (the *Wildrake* case), see Brækhus/Rein pp. 73–76 and Wilhelmsen/Bull pp. 94–97.

> the vessel to be released, this was not so extraordinary as to constitute a war risk. The detainment was not made to achieve some political gain or motivated by purposes which would be typical for war and war-like conditions as opposed to a State's right to enforce compliance with national laws.

The decisions in these two cases, as well as in the *Wildrake* case and the Commentary, are further analyzed in the *Sira* arbitration award from 2016:[112]

> *Sira* arrived at Lagos, Nigeria, 1 February 2015 for discharge of palm oil, and was the same day boarded by a security team engaged by the ship-owner, consisting of an unarmed British security advisor and four armed men from the Nigerian Navy. Permission had been obtained in advance from the immigration authorities for the advisor to visit *Sira* for inspections. Between 2 and 14 February, *Sira* and its documents were inspected several times by the Nigerian Maritime Administration and Safety Agency (NIMASA), whose task it is to secure safety at sea. On 5 February there were two attempts to board *Sira*, presumably by Nigerian pirates, which were stopped by the security guards on board. On 14 February the cargo was discharged and *Sira* was ready to sail. However, the captain was told by NIMASA that *Sira* could not sail before this had been clarified with the Commanding Officer. On 13 March NIMASA formally arrested the ship because it had a foreign security advisor on board, which was claimed to be «illegal and unacceptable as it is not supported under our constitution». *Sira* was released on 31 March after having signed a letter of indemnity holding NIMASA free from the losses caused by the detainment. The owner argued that the detainment of *Sira* constituted a war peril according to NP Cl. 2-9 letter (b), whereas the insurer argued that the detainment was outside the scope of this provision.

The arbitrator made the following summary of the legal sources as defined above:

[112] Wilhelmsen/Bull pp. 98–99.

> "For the intervention to be covered under the war risk insurance, the intervention must be made for the furtherance of overriding political goals. Such interventions are interventions typical for war and times of crises, and can often be explained by foreign policy considerations. The reason for the intervention may be a warranted or not warranted suspicion that the ship has breached rules to protect the security of the State involved. It is not decisive that the general political situation in the State involved has been contributory to the intervention.
>
> A State intervention which is tied to regulation or control of normal commerce and shipping is not covered by war risk insurance. Relevant interventions will first and foremost be tied to breach of or suspicion of breach of customs, currency, or police legislation. It is normally not decisive if such intervention due to its duration represents misuse of power. However, this can be different if the misuse of power takes the form of a regular police act or similar act, but in reality is part of an action motivated primarily by overriding political objectives."

The arbitrator found, based on these guidelines, that the detention of *Sira* did not constitute "other similar interventions" in regard to NP Cl. 2-9 sub-clause 1 letter (b). Even if a detention of 1 ½ months did constitute an "intervention", it was not documented as to whether the action was motivated primarily by political objectives. This latter expression represented a somewhat imprecise translation of the Norwegian text «til fremme av et overordnet politisk mål», meaning that the intervention should be connected with the State's actual policy in general and in relation to that particular area. It is typically the task of the central authorities to outline such overriding political goals, such as the president, the parliament, the government at large, or a particular ministry. Authorities at a lower level will not have the power or authority to make this type of political assessment, since their mandate will be limited to exercising given authority in a specific and limited area. NIMASA was seen as an organ at a lower level in the State hierarchy, and this organ did not make decisions at a superior level, but instead exercised its agency within a legal framework and in conformity with political guidelines provided by others.

The arbitrator also held that since one of NIMASAS' tasks was to fight piracy, the regulation of how piracy should be avoided and the role that foreign security guards should have in this respect, must be seen as ordinary police legislation. Even if it constituted a misuse of power to detain *Sira* without issuing an immediate written decision, it was not documented as to whether an overriding political goal had played a significant role in the detainment.

This means that the expression "similar interventions" only includes interventions made by the State if the intervention is made for the furtherance of overriding political goals. In addition, the intervention must normally be typical for times of war and crises and must represent a sanction against breach of security rules and/or be explained by foreign policy considerations. It is not sufficient for the intervention to be explained by the general political situation in the State. A State intervention which is tied to the regulation or control of normal commerce and shipping is not covered by the war risk insurance. This is true even if the intervention constitutes a misuse of power, unless the misuse of power is in reality motivated by overriding political objectives.

The requirement for there to be an overriding political goal seems to be similar to the interpretation of restraint, detainment and arrest according to rule 10, in the sense that the intervention must be a political or executive act and not "the operation of ordinary judicial process". However, the requirement of a political goal goes further, because "judicial process" only applies to private law and "ordinary" rules out extortion and corruption. But many of the relevant public law issues will be ruled out in the exclusions in Cl. 5.1.5 and 5.1.6.

5.1.1.5 Requisition

According to NP Cl. 2-9 sub-clause 1 letter (b) third sentence, requisition for ownership or use by a State power "shall not be regarded as an intervention". The term "requisition" covers an enforced acquisition of the ship by a State power.[113] The provision means that this is outside the scope of the term "intervention" and thus outside the cover in Cl. 2-9

[113] Commentary 2016 p. 48.

sub-clause 1 (b). The difference between "requisition" and "confiscation" is that – in principle – compensation is payable for the loss caused under a requisition, which means that requisition is in actual fact the same as expropriation.[114] There is no express reference to motive, but the Commentary 2016 implies that the requirement for political motive also applies here:[115]

> "Requisition as an intervention typically occurs in times of war or in times of war-like conditions, or during a political crisis. A general criterion for defining requisition as a war peril is therefore that the intervention is politically motivated. If the State expropriates the ship for other reasons, for instance, pursuant to quarantine provisions to prevent the spread of a virus, this does not constitute "requisition" in accordance with this provision".

It is somewhat surprising that the Commentary refers to "requisition" as a war peril, since requisition is excluded from Cl. 2-9 sub-clause 1 (b). The explanation is probably that the previous Commentary referred to insurance cover for requisition provided by the Norwegian War Risk Association in ch. 15 section 9, where requisition for ownership and use was covered by § 15-24 (a) and 15-27 (a). Section 9 was deleted in 2013 when the NP was launched as a Nordic Plan, and the reference in the Commentary was deleted in the 2016 Version of the NP without making any adjustments in the surrounding text. The point to be made here is that requisition by a foreign State, being inherently politically motivated, constitutes an intervention that is a war risk peril, but that this peril is excluded from cover in Cl. 2-9 sub-clause 1 (b). It is however confusing to impose such an exclusion by stating that requisition "shall not be regarded as an intervention".

It appears from the Commentary that "requisition" is the same as politically motivated expropriation, i.e. that expropriation is a broader concept than requisition. As "expropriation" is not mentioned in Cl. 2-9 sub-clause 1 (b), cover for expropriation that is not requisition must be

[114] Commentary 2016 p. 48.

[115] Commentary 2016 p. 49.

decided by the expression "other similar interventions". Such interventions are only covered if they are politically motivated, which means that expropriation without this motive is not covered by the war risk insurance. This is a narrower interpretation that that of the UK conditions, where "expropriation" is covered unless it constitutes "requisition" (Cl. 5.1.3) or is based on "quarantine regulations" or "infringement of any customs or trading regulations" (Cl. 5.1.5). It would appear that the UK conditions cover expropriation which is based on other types of rules, or which constitute misuse of power or corruption – but presumably subject to the condition that no compensation is paid, cf. 4.1 above.

5.1.2 Marine risk cover for state interventions

The starting point in NP Cl. 2-8 is that the insurer is liable for all perils, unless the peril is expressly excluded. According to (a), perils covered by the war risk insurance are excluded, meaning that capture, confiscation and other similar interventions by a foreign State power, as outlined in 5.1.1, are all excluded. In addition, (b) excludes "intervention by State power".

The concept of "intervention" is not defined in the text. The Commentary refers to Cl. 2-9 sub-clause 1 (b) and states that "this provision provides the necessary background for understanding the term".[116] It is clear from the presentation of Cl. 2-9 sub-clause 1 (b) above that capture at sea and confiscation are interventions, and also that the concept includes detainment and arrest. It presumably includes "expropriation", where it is not "requisition". On the contrary, requisition for ownership or use is according to Cl. 2-9 sub-clause 1 (b) not "an intervention". From the wording, this would mean that requisition is outside the scope of the term "intervention" and thus not excluded in Cl. 2-8 (b). The result would then be that requisition, be it from own or foreign State power, is covered by the all risks principle. The Commentary, however, implies that this was not the intention:[117]

[116] Commentary 2016 p. 40.

[117] Commentary 2016 p. 40.

> "*Sub-clause (b)* excludes from the marine perils "intervention by a State power". It follows from Cl. 2-9, sub-clause 1 (b), that an insurance against war perils covers certain types of intervention by a foreign State power, such as capture at sea, confiscation etc. On the other hand, an ordinary war-risk insurance does not cover interventions in the form of requisition for ownership or use by a State power, cf. Cl. 2-9, sub-clause 1 (b), last sentence. In that sense, it already follows from the exception in Cl. 2-8 (a) that this type of intervention will not be covered by an insurance against marine perils."

The expression "this type of intervention" in the last sentence appears to refer to "requisition". If this is the case, the Commentary is stating that requisition is not covered by an insurance against marine perils. The reason is however, confusing. Since requisition is not an "intervention", it is outside the scope of Cl. 2-9 (b) and not covered by the war risk insurance, and is thus not excluded by Cl. 2-8 (a).

Viewed within the historical context, it must be clear however that requisition is an intervention, according to Cl. 2-8 (b).[118] Under NMIP 1964 § 16 (b), "requisition for title or use" was covered as a war risk peril. Coverage for requisition was discussed under the amendment of the NP in 1996, where it was noted that requisition is in actual fact the same as expropriation. If the ship is registered in the Nordic countries or in an allied State, or the main ownership is within such States, the Norwegian or allied authorities may pay compensation. On the other hand, it cannot automatically be expected that other States of register or ownership will be willing to pay compensation if they take over ships that are registered or owned in their own country. There is, therefore, a financial need for coverage in this situation. However, neither the marine insurers nor the ordinary war insurance market were willing to accept this risk in 1996.[119] The conclusion must therefore be that the concept of "intervention" in Cl. 2-8 (b) includes requisition, even if the wording is very confusing.

[118] See also Wilhelmsen/Bull p. 108.

[119] Wilhelmsen/Bull p. 107–108.

Cl. 2-8 (b) makes a general exclusion for "interventions by State power". There is no reference to the cause of the intervention, and from the wording this should be irrelevant. Despite this, it is stated in the Commentary that "Interventions made as part of the enforcement of customs and police legislation will thus, as a main rule, be covered by the insurance against marine perils to the extent the losses are recoverable in the first place".[120]

The Commentary refers to "interventions" and thus appears to include all types of interventions, including capture, confiscation, requisition/expropriation and detainment. The condition is that the intervention is made as part of enforcement of customs and police legislation. This would include both situations where there is a misuse of power by the State if the intervention is formally based on customs or police legislation, as well as situations where the reason for the intervention is that the assured has committed a criminal act. However, the insurer's liability would be limited here by the provision in Cl. 3-16 on illegal undertakings.

The Commentary does not make a distinction between own and foreign State power. The implication of the remark in the Commentary would therefore be that the marine insurer is liable for any intervention by own or foreign State power for the enforcement of customs and police legislation, except for those interventions by a foreign State power that are covered by Cl. 2-9 (b). The exclusion in Cl. 2-8 (b) would then be limited to the said interventions with a political motive, which would correspond to the regulation in Cl. 2-9 (b) for foreign state power.

The development of the regulation indicates, however, that this interpretation is not correct. NMIP 1964 § 15 (b) excluded "measures taken by Norwegian or allied State authorities". The above referenced remark in the Commentary was placed in the 1964 Commentary within the discussion of war risk cover for capture at sea and similar interventions in § 16 (b), with the effect that such interventions for the purpose of enforcing police regulation by a foreign State should be covered by the all risks principle in § 15. The exclusion in § 15 (b) was amended in 1996 to a general exclusion

[120] Commentary 2016 p. 40 in relation to Cl. 2-8 (b) and p. 49 in relation to Cl. 2-9 sub-clause 1 (b).

for intervention by State power, and the remark from the Commentary to § 16 (b) was included, both in the Commentary to Cl. 2-9 sub-clause 1 (b), where it refers to interventions by foreign States only, and also in the Commentary to Cl. 2-8 (b) where it (by a mistake?) refers to all types of State intervention. Seen in this historical context, the correct interpretation seems to be that the remark only refers to interventions from a foreign State power that are not covered by Cl. 2-9 (b). Presumably, it would then cover any intervention, including expropriation, but would not cover requisition by a foreign power that is not politically motivated. However, as the relationship between the wording and the commentary here is rather confusing, the result is far from certain.

The exclusion in NP for interventions by own State power conforms to the exclusion in IWSCH Cl. 5.1.3. Cover for interventions by foreign State power for the purpose of enforcing police and customs regulation means however, that the exclusions in IWSCH Cl. 5.1.4 and 5.1.5 will not apply.

5.2 The 2019 revision

5.2.1 Background, main results and overview

It follows from the presentation in 5.1 that the regulation of state intervention in NP Version 2016 is very confusing and raises a lot of difficult issues of interpretation. Some of these issues, but not all, were clarified in the *Sira* case. In addition to this, it is clear that the interpretation of the provisions has gained importance over recent years, as there have been several situations where ships have been detained in foreign ports and kept there for a long period without a clear legal basis. Examples are the detainments of the vessels *B Atlantic* in Venezuela, *Sira* in Nigeria, and *Poavosa Ace* in Algeria. Such cases often include some fraudulent or criminal behaviour by a third party, for instance by the charterer or the receiver of the goods. The Standing Revision Committee therefore agreed on two points. First, they agreed that it was necessary to adjust the regulation in line with the result of the *Sira* case and further clarify the cover both under the marine risk insurance and under the war risk

insurance. Secondly, they also agreed that it should be discussed as to whether a more appropriate cover could be established to cope with the situation where ships are detained in foreign ports without any clear justification. The main results of the discussions were as follows:

1) Requisition by State is not covered by any insurance,
2) the marine risk insurance excludes certain qualified interventions by own State power, provided these have been made for the furtherance of overriding national political goals,
3) the war risk insurance does cover such interventions by foreign State power or a supranational power,
4) the marine risk insurance covers interventions by own and foreign State power and supranational powers that are not either excluded in Cl. 2-8 (b), (c) or (d) or covered by Cl. 2-9 (b).

The structure of the new regulation is the same as before, in that Cl. 2-8 covers all risks that are not excluded, while war risks and certain interventions are expressly excluded. However, the exclusion in Cl. 2-8 (b) is narrowed significantly compared to the 2016 wording, the cover in Cl. 2-9 sub-clause 1 (b) is narrowed somewhat, with requisition in both provisions being singled out in separate exclusions to avoid uncertainty, cf. Cl. 2-8 (c) and Cl. 2-9 sub-clause 2 (c), and a new provision has been added that excludes the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance is inserted in Cl. 2-8 letter (d) and Cl. 2-9 sub-clause 2 letter (a). In the following sections, the regulation in Cl. 2-9 sub-clause 1 (b) and sub-clause 2 (c) will be outlined first, followed by the exclusion in 2-8 (b) and (c), and finally the common exclusion in Cl. 2-8 letter (d) and Cl. 2-9 sub-clause 2 letter (a).

5.2.2 The new Cl. 2-9 sub-clause 1 (b) and sub-clause 2 (c)

Version 2019 Cl. 2-9 sub-clause 1 (b) states that the war risk insurance cover

> (b) **capture at sea, confiscation, expropriation and other similar interventions by a foreign State power, provided any such intervention is made for the furtherance of an overriding national or supranational political objective. Foreign State power is understood to mean any State power other than own State power as defined in Cl. 2-8 (b), second sentence, as well as organisations and individuals exercising supranational authority or who unlawfully purport to exercise public or supranational authority,**

The interventions "capture at sea", "confiscation" and "other similar interventions" are the same as under the 2016 Version, but the intervention "expropriation" is new. The definition in the Commentary provided for the term "capture at sea" is mainly as before, but the Commentary clarifies several issues discussed in *Brækhus/Rein* by stating that:[121]

> "It is not capture "at sea" if the ship is arrested and detained in port without a foregoing capture. On the other hand, when the ship is captured at sea, it will normally be escorted by power into port for further control. As long as the detainment in port is due to the same cause as the capture, the stay in port must be regarded as part of the capture. If the ship sails into port without any threats from the foreign State, this is outside the concept of "capture at sea". This is true even if the State could have forced the ship to enter the port."

This change means that "capture at sea" is more narrowly than the UK concept of "restraint", which includes situations where no force is used, provided such force could be used.

In addition to the intervention "confiscation", which is the same as in the previous NP, the regulation now also includes "expropriation", which according to the Commentary means that "the State takes over the vessel for a purpose deemed to be in the public interest". Expropriation was not among the interventions listed in the previous NP, and it was not clear whether this should be treated as being similar to requisition or instead constituted "other similar interventions". However, the Plan Committee found that expropriation is more similar to confiscation than it is to

[121] Commentary 2019 pp. 56–57 to Cl. 2-9 sub-clause 1 (b).

requisition. Both expropriation and confiscation mean a permanent loss of ownership, whereas requisition is typically for a limited period in time and can also be limited to use. It was therefore agreed that expropriation by a foreign State should be covered on a similar basis to confiscation. However, whereas confiscation does not generate compensation, when the vessel is expropriated, the assured may be compensated for his loss. It follows from general insurance principles and is also stated in the Commentary that any "such compensation must be deducted from the liability of the insurer".[122]

The term "other similar interventions" is also the same as before, but the criteria from the *Sira* case is inserted, stating:[123]

> "the intervention must have similar consequences for the assured as "capture at sea" and "confiscation". Typical for these interventions is that the ship-owner is being divested of the right of disposal of the ship. This is therefore a necessary condition for an intervention to be covered under this group. An intervention that satisfies this criteria can of course take place while the vessel is in port."

The most significant amendment is the introduction of the condition that "any such intervention is made for the furtherance of an overriding national or supranational political objective". A similar requirement followed from the 2016 Commentary with regard to "other similar interventions", but it has not been clear whether this was also the case for capture at sea and confiscation. It follows from the 2019 Commentary that the purpose is to delimit the cover in relation to both ordinary administrative procedures and the misuse of power or corruption by the administration:[124]

> "It is therefore clear that interventions in accordance with applicable law for the purpose of enforcing customs-, police-, safety- or navigation-regulations or any private law rights against the insured

[122] Commentary 2019 p. 57 to Cl. 2-9 sub-clause 1 (b)
[123] Commentary 2019 p. 57 to Cl. 2-9 sub-clause 1 (b).
[124] Commentary 2019 pp. 57–58 to Cl. 2-9 sub-clause 1 (b).

> vessel are outside the scope of the war insurance cover. If the ship is arrested/captured at sea by the Coast Guard or representations of the police or customs authorities to hinder or investigate illegal fishery, import or export or breach of trade regulations, this will not be covered. The same is true if the ship is arrested or detained in port because of doubt as to whether the ship is compliant with the rules regarding technical and operational safety, or because the crew is suspected of smuggling. Obviously, losses arising from the ship being detained or seized as part of debt-recovery proceedings against the owners are not covered, either; this follows in any event from the exclusion in sub-clause 2 (a).
>
> It does not matter whether such police or customs intervention is caused by illegal acts performed by a third party, for instance the charterer or the master or crew. Further, it is not decisive whether the State intervention is based on the legislation of the country or may be seen as abuse of power or corruption, if the intervention does not have an overriding national or supranational political objective. However, if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or if the intervention has the character of abuse of power or corruption."

The expression "overriding national … political objective" is based on the four arbitration cases relating to the war risk cover for interventions by foreign State power under the 1964-Plan and the 2013 Plan Version 2016, as discussed under 5.1.1 above,[125] but the word "national" is added to emphasize that a public State is involved.[126] The expression is explained above under 5.1.1, in the discussion of the *Sira* case. It follows from this that abuse of power is neither a necessary nor a sufficient condition for war risk cover. If an overriding national political goal is detected, there is no need to establish misuse of power. On the other hand, misuse of power need not be explained by such overriding political motives. Misuse

[125] Unpublished award of 11 June 1985 relating to the *Germa Lionel*, ND 1988.275 NV *Chemical Ruby*, The *Wildrake* case, which was settled, and the unpublished award "MT *Sira*" of 27 October 2016, cf. above.

[126] Commentary 2019 p. 58 to Cl. 2-9 sub-clause 1 (b).

of power may be a reflection of a dysfunctional State and may indicate another motive, but misuse of power is not in itself a necessary condition for cover.[127]

The term "supranational" is added in order to emphasize that the concept of "foreign State power" includes both public and supranational power. This is an extension of the previous rule, which only applied to foreign State power. Supranational cover was included in the exclusion in Cl. 2-8 b for interventions by State power in general. The content of the terms "foreign State power" and supranational power is not amended.

The last sentence in (b), which sought to exclude requisition, has now been moved to a separate exclusion for requisition by State power in sub-clause 2 (c). The exclusion is absolute and applies to requisition by any State power, regardless of whether it is for owner-ship or other use. Even if it is argued in that UK that a State only has authority to requisite vessels under its own flag, requisition by a foreign State is also excluded. There is no court decision providing a definition of the concept of requisition, and the concept is not clear in either Nordic or in English marine insurance. However, according to the Commentary, the typical characteristics are that the State will "requisite" the vessel for ownership or use according to legislation and in national interest and that the relevant legislation provides a formal procedure to be followed. Requisition is typically limited in time and the intention is that the vessel shall be redelivered to the owner after a certain period. The rule is also that the State should compensate for the use of the vessel and pay for any damages during the period of use, but this is not a requirement in order for the exclusion to apply.[128]

5.2.3 The new regulation in Cl. 2-8 (b) and (c)

Cl. 2-8 (b) is amended, from the previous general exclusion for intervention by state power, including supranational power, to instead being an exclusion for "capture at sea, confiscation, expropriation and other

[127] Commentary 2019 p. 58 to Cl. 2-9 sub-clause 1 (b).

[128] Commentary 2019 pp. 45–46 to Cl. 2-8 (c).

similar interventions by own State power". The interventions are the same as those defined in Cl. 2-9 sub-clause 1 (b) and are meant to be identical. The clauses are also identical in terms of both having the requirement for an overriding political goal, which is to be distinguished from ordinary administrative proceedings and misuse of power, corruption or extortion by the authorities. Apart from the exclusion in Cl. 2-8 (d) for "operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability", the all risks principle will provide cover for losses caused by administrative proceedings or the misuse of power, corruption or extortion by the authorities.

The result is that interventions such as capture at sea, arrest or detainment in port or the like – due for instance to suspicion or investigation of breach of regulations concerning fishery, customs, pollution, safety or navigation, will all be covered. However, if the breach means that the ship is being used for "illegal purposes" and the assured knew or should have known about this, the loss will be excluded according to Cl. 3-16. If the assured was acting in good faith and the breach is the result of a fraudulent or criminal act or omission from a third party, for instance by the master or crew, the charterer or the receiver of the goods, cover remains in place. This widening of the cover compared to the previous wording of Cl. 2-8 (b) is a response to situations where vessels are captured and/or detained in foreign ports for a longer period of time due to some criminal behaviour by, for instance, a third party, the charterer or the master and crew. The amendment is also intended to bring the exclusion into alignment with the terms of Cl. 3-16 on illegal undertakings.[129]

It is also clear that interventions due to abuse of power or corruption are outside the scope of the exclusion in (b) and are thus covered by the all risks principle. In some countries, cases which commence as a regular administrative, police or judicial process can easily degenerate into excessive delays or attempts at extortion. If the intervention in such cases turns out to be for the purpose of an overriding national political objective, the intervention will be covered by the war risk insurer, ac-

[129] Commentary 2019 p. 43 to Cl. 2-8 (b).

cording to Cl. 2-9 sub-clause 1 (b). However, there may be cases where no such national political motive can be detected, but the interventions are nonetheless clearly outside the scope of normal due process.[130] Such cases will then be covered by Cl. 2-8, according to the all-risks principle.

The new provision in Cl. 2-8 (b) only regulates the peril that is insured. There are no changes to the regulation of losses that are covered by the marine insurer. The traditional difference between losses covered under a marine policy and those covered under a war policy, as outlined in ch. 3 above, is therefore upheld. The standard cover provided by the Plan is not intended to provide the kind of "political risk" cover that would more fully protect owners of vessels trading to countries that have a more or less dysfunctional political system. Insurance against political risk is available in the market and it would not be appropriate to spread this risk over all assureds that do not trade in these areas.[131]

Cl. 2-8 (c) excludes "requisition by State power". In the previous NP, this exclusion followed from the broad exclusion for "intervention by State power" in (b). With the narrower provision in the new letter (b), it is necessary to provide a separate clause for requisition in order to emphasize that requisition by State power is excluded, regardless of the motive for the requisition. If the ship is registered in one of the Nordic countries, it must be expected that the State will pay compensation if they take over the ship for ownership or use, regardless of the motive for the requisition, and it is not appropriate to cover this under the insurance. Requisition of the ship for instance to use it as a hospital ship will according to this exclusion not be covered.[132]

5.2.4 The exclusions in Cl. 2-8 (d) and Cl. 2-9 sub-clause 2 (a)

Since Cl. 2-8 (b) is now limited to interventions for the furtherance of overriding national political goals, any other intervention would, as

[130] For example the *Chemical Ruby* and *Sira* arbitration cases referred in Wilhelmsen/Bull, Handbook on hull insurance, 2017, pp. 94–99, where there were excessive delays but no clear overriding political objective

[131] Commentary 2019 p. 44 to Cl. 2-8 (b).

[132] Commentary 2019 p. 46 to Cl. 2-8 (c).

a starting point, be covered by the all risks principle. As this is a very wide scope of cover, it was necessary to restrict it somewhat, which is done through an exclusion for "the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to any claim or liability covered by the insurance" in Cl. 2-8 (d). A similar exclusion is found in Cl. 2-9 in sub-clause 2 (a). Since war risk insurance is based on specifically named perils, this exclusion is of less importance, but will be relevant in cases which have a combination of excluded and covered perils. It should be noted that the exclusion only applies to legal proceedings to enforce a debt or obtain security for a debt. It does not apply to e.g. proceedings relating to public law matters, such as the enforcement of customs or trading regulations. Such cases are governed by the rules in Cl. 3-16.[133] Furthermore, the provision has a rather limited application, as it is unlikely that the operation of ordinary legal processes will be the direct cause of physical damage to a vessel or lead to the owner being deprived of the vessel without any prospect of recovery. However, the possibility cannot be entirely discounted, and the aim is also to avoid insurance cover if damage triggers a delay or legal costs for enforcing the payment of debts or other legal rights against the assured or the vessel.[134]

6 Summary and some conclusions

The new regulation of intervention of State power in the NP 2013 Version 2019 is aimed at clarifying the cover for such interventions and extending the cover for non-politically motivated measures taken by any State. The presentation indicates that State interventions may be classified into 5 different groups:

[133] Commentary 2019 p. 49 to Cl. 2-8 (d).
[134] Commentary 2019 p. 48 to Cl. 2-8 (d).

1) The catastrophe and political oriented risk inherent in measures taken by a State for the furtherance of an overriding national or supranational goal. Such a risk is most naturally placed under war risk insurance if the measure is taken by a foreign State or supranational power, cf. Cl. 2-9 sub-clause 1 (b), but is outside the scope of normal insurance if the measure is taken by own State, cf. Cl. 2-8 (b).
2) Requisition, which would typically be performed by own State against compensation, and is therefore also outside the normal insurable risk, Cl. 2-8 (c) and 2-9 sub-clause 2 (c).
3) State interventions in relation to illegal entities where the insurer is not liable according to Cl. 3-36 will not be covered.
4) State intervention performed in the operation of ordinary legal process in order to enforce payment of any fine, penalty, debt or right to security unrelated to any claim or liability covered by the insurance", which is excluded in Cl. 2-8 (d) and Cl. 2-9 sub-clause 2 (a).
5) All other State interventions by own or foreign States, which are covered by the all risks principle in Cl. 2-8. This group consists of non-political interventions based on any legislation not excluded above and any interventions that, from a Nordic perspective, have the character of misuse of power, corruption and extortion. This cover is the main amendment in the new version and represent a clear extension compared to the previous wording.

Compared to the UK war risk conditions, the war risk cover under 1. above is somewhat narrower, since there is no explicit reference to motive, but some of the same limitations are obtained through rule 10 requiring a "political or executive act", as well as not covering loss caused "by ordinary judicial process", as well as the exclusions in IWSCH Cl. 5.14 and 5.1.5. The exclusions in 2-4 correspond to similar exclusions in IWSCH Cl. 5.1.2, 5.1.4 and 5.1.5. The main difference therefore is that of group 5, where the NP cover now offered for marine risks goes much further than the UK conditions.

The process has demonstrated the advantages of operating with a Standard Revision Committee and undertaking continuous renewal procedures to amend the Plan, in order to adjust to the political development and the changing financial needs of the assureds.

The impact of the third energy market package on national resource management

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Contents

1 Introduction

In 2018, Norway witnessed an extraordinary public debate concerning the effects of the EU´s third energy market package on national energy sovereignty. A similar debate is now taking place in Iceland. In the wake of these discussions, popularly referred to as "the ACER debate", this article aims to analyse what impact, if any, the third energy market package has on national energy resource management.[1]

The third energy market package is a term comprising five pieces of legislation adopted by the EU on 13 July 2009 in order to promote the further development of the EU´s internal energy market. The legislative package consists of Electricity Directive 2009/72/EC and Electricity Regulation (EC) No. 714/2009 for the electricity market, Gas Directive 2009/73/EC and Gas Regulation (EC) No. 715/2009 for the gas market, and Regulation (EC) No. 713/2009 establishing ACER ("the ACER Regulation") which is relevant for both markets.

The EEA Committee decided to incorporate the third energy market package into the EEA Agreement on 5 May 2017.[2] This incorporation decision becomes binding for the Contracting Parties when national constitutional requirements have been fulfilled, i.e. ratification by all the national Parliaments.[3] The Norwegian Parliament, *Stortinget,* ratified the decision on 22 March 2018.[4] The necessary amendments to the Norwegian Energy Act were adopted on the same date.[5] The Icelandic Parliament,

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1 The article is a revised version of a legal report dated 8 January 2019, written for Energi Norge and available here: https://www.energinorge.no/contentassets/bcee1a1d4b-d842aaa7bf1b74f0441a07/legal-analysis-third-energy-market-package-080119.pdf (last visited 13 February 2019).

2 EEA Committee decision No. 93/2017.

3 Article 3 of decision No. 93/2017 and

4 See Prop. 4 S (2017-2018) and Innst. 178 S (2017–2018).

5 See Prop. 5 L (2017–2018) Innst. 175 L (2017–2018) and Lovvedtak 44 (2017–2018). Less controversial amendments to the Norwegian Natural Gas Act were also adopted on the same date, see Prop. 6 L (2017–2018), Innst. 176 L (2017–2018) and Lovvedtak 45 (2017–2018).

Alþingi, has yet to ratify the decision and is expected to put it to a vote in 2019.

Some in the public debate have claimed that the third energy market package has an impact on key national resource management decisions, such as the choice of public ownership for energy resources and whether to issue permits for the building of new interconnectors to other EEA and EU Member States. This article seeks to clarify whether and to what extent the third energy market package affects sensitive issues of national resource management relating to public ownership and the building of interconnectors.

Given the lack of onshore natural gas transmission and distribution pipelines in both Norway and Iceland, the adoption in these countries of internal gas market legislation has been less controversial than the corresponding implementation of internal electricity market legislation.[6] In the following I will therefore focus on the legislation relevant for the electricity market. Furthermore, I will not discuss the question of whether the qualified majority procedure in § 115 of the Norwegian Constitution should have been applied to the Norwegian parliamentary procedure. The Parliament chose not to apply this procedure on the basis of two thorough legal opinions submitted by the Legislation Department of the Norwegian Ministry of Justice and Public Security.[7] The Icelandic Constitution does not include similar qualified majority procedures.

In the following I will first provide a general overview of EEA law relevant for the energy market, in sections 2 and 3 below. It is important to emphasise that the third energy market package is only one of several parts of the EEA legislation with an impact on energy markets. I will therefore include a brief general overview that also includes other

[6] The Norwegian offshore gas pipeline system on the Norwegian continental shelf owned by Gassled is considered to be an upstream gas pipeline system which is only subject to modest regulation under the EU´s internal gas market legislation.

[7] Letters from Justisdepartementets lovavdeling 25 April 2016 and 27 Februar 2018, where the latter is available at https://www.regjeringen.no/contentassets/d2f95b6c30824313a887d9b146b61133/svar-fra-lovavdelingen.pdf (last visited 8 January 2019). The Norwegian association Nei til EU on 8 November 2018 initiated a court case before the Oslo City Court claiming that the State is required not to implement the third energy market package in Norwegian law. This case is currently pending.

relevant parts of EEA law, such as the rules in the main part of the EEA Agreements and the previous energy market packages. Section 4 considers in more detail the impact of the third energy market package on national decisions relating to public ownership of energy resources. The impact of the third energy market package on decisions relating to the building of new interconnectors is analysed in chapter 5. Chapter 6 concludes.

2 Energy and the main part of the EEA Agreement

The EEA Agreement consists of both the main part of the Agreement and secondary legislation included in the attachments to the Agreement. The main part of the EEA Agreement includes the fundamental provisions of EEA law, such as the rules on free movement, State aid and competition. The provisions are based on the corresponding rules in the Treaty on the Functioning of the European Union (TFEU) and they apply to the energy sector as to other sectors of the economy.[8] Consequently, there are many examples of cases invoking these provisions in the energy sector, both at EEA and EU level.

The free movement rules prohibit restrictions on the free movement of goods, services, persons and capital and on the freedom of establishment. Such restrictions are only compatible with the Agreement if they pursue further defined legitimate interests and are suitable and necessary for attaining those aims.

It has long been settled law that electricity is to be regarded as goods within the meaning of TFEU and, consequently, also within the meaning of the EEA Agreement.[9] Restrictions on the free movement of electricity between Member States may therefore amount to import or export

[8] Except for the specific EEA exceptions applicable for the fisheries and agricultural sectors.

[9] See case C-393/92, *Almelo*, para. 28.

restrictions under Articles 11 and 12 EEA, correspondingly, based on the criteria developed in case law. For example, in case C-573/12, Ålands *vindkraft*, the EU´s Court of Justice found that the Swedish electricity certificate scheme at issue was capable of impeding electricity imports from other Member States and therefore constituted a measure having equivalent effect to quantitive import restrictions under Article 34 TFEU (corresponding to Article 11 EEA).[10] The subsidy scheme was nevertheless considered compatible with the Treaty, as the objective of promoting the use of renewable energy resources was a legitimate aim and the measures at issue were suitable and necessary for pursuing that aim.[11]

The EFTA Court case E-02/06, *hjemfall*, is another prominent example of how the free movement rules have been subject to scrutiny within the electricity sector. The court considered whether the then-prevailing Norwegian legislation providing time-unlimited licences for the acquisition of large waterfalls by Norwegian public actors and time-limited licences followed by reversal to the State ("hjemfall") for all other actors was contrary to the EEA Agreement. More specifically, the Court considered whether the difference in treatment between public and private participants was contrary to the rules on the freedom of establishment and the free movement of capital.[12] The Court ruled that the legislation was contrary to the EEA Agreement, but emphasised that pursuing public ownership of hydropower resources might in itself amount to a legitimate interest on the basis of Article 125 EEA. I will revert in more detail to this case below in section 4.

The Ålands *vindkraft* and *hjemfall* cases are two of many court cases illustrating the point that the free movement provisions of the EEA Agreement and the TFEU also apply to the electricity sector. As a point of departure, these general principles apply in addition to the secondary legislation, such as the third energy market package.[13] Consequently, it

[10] Case C-573/12, paras 56–75.

[11] Case C-573/12, paras 76–119.

[12] Articles 31 and 40 EEA.

[13] This would be different only if the secondary legislation requires full harmonisation of national laws or if the secondary legislation sufficiently guarantees the specific interests under consideration, see case C-112/97, *Commission v. Italy* and case 72/83, *Campus*

is important to emphasise that even if the third energy market package were to end up not being incorporated into the EEA Agreement, the general free movement rules in the EEA Agreement would still apply to the electricity sector, including the import restriction prohibition in Article 11 EEA and the freedom of establishment rules in Article 31 EEA.

According to Article 61 EEA, State aid is prohibited unless declared compatible by the EFTA Surveillance Authority on the basis of prior notification by the relevant Member State. State aid is an aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and which affects trade between Member States. These conditions have been subject to wide interpretations by the community courts. State aid to the energy sector is the second largest category of aid in the EU Member States, illustrating the importance of these rules to the energy market.[14] It is clear that the State aid provisions in the EEA Agreement apply in addition to the secondary legislation relevant to the energy market, including the third energy market package. This means that the question of whether an energy market measure amounts to State aid under Article 61 EEA and may nevertheless be declared compatible with the Agreement based on, for example, the State aid energy and environmental guidelines will be subject to scrutiny, regardless of whether or not the third energy market package is incorporated into the EEA Agreement.

Finally, it is also worth noting that the competition rules of the EEA Agreement, including the prohibitions on the abuse of a dominant posi-

Oil, para. 27, correspondingly. In the latter two situations, a Member State would no longer have recourse to the general exemption grounds from the free movement rules in the EEA Agreement. However, as the third energy market package does not require total harmonisation of national laws and cannot be considered to sufficiently guarantee certain interests, it is clear that the free movement provisions still apply in addition to the third energy market package, see also Henrik Bjørnebye, Investing in EU Energy Security (Kluwer Law International, 2010) p. 83.

14 Leigh Hancher, Adrien de Hauteclocque and Francesco Maria Salerno, State aid and the energy sector (Hart Publishing, 2018), first page of the editors´preface.

tion and on agreements and concerted practices restricting competition, also apply to the energy markets, in addition to the secondary legislation.[15]

In conclusion, this means that even in the absence of secondary legislation, the provisions in the main part of the EEA Agreement will apply to the Norwegian and Icelandic electricity market with full effect. Since the provisions in the third energy market package are ultimately based on the overall principles in the main part of the Agreement, the third energy market package as such may arguably have less impact on resource management than perceived in much of the public debate.

3 The internal electricity market

3.1 Introduction

EU efforts to build an internal energy market started in earnest 30 years ago.[16] At the time that the EEA Agreement was signed in Oporto on 2 May 1992, this work was well-known, although it was far from well-advanced. As held in a Norwegian report to the Parliament concerning the ratification of the EEA Agreement, the EC did not have a common energy policy at that time, and the energy sector therefore did not have a prominent place in the EEA negotiations.[17]

The development of EU energy policy and law has been enormous over the past decades. At policy level, the efforts to establish a sustainable, secure and competitive internal energy market culminated in 2015 with

[15] The Svenska kraftnät case initiated by the European Commission is one example from the electricity sector, see Commission decision 14.4.2010, case 39351 – Swedish Interconnectors.

[16] See *inter alia* the Commission working document The internal energy market, COM(88) 238 final, 02.05.1988.

[17] St.prp. No. 100 (1991–92), p. 164.

the establishment of the Energy Union strategy.[18] This strategy consists of five policy dimensions: security, solidarity and trust; a fully-integrated internal energy market; energy efficiency; climate action and decarbonisation; and research, innovation and competitiveness within low-carbon and clean energy technologies. Climate action and renewable energy, as well as a focus on consumers, are at the top of the agenda of the strategy. Consequently, a large part of the legislation pursuing the Energy Union goals seeks to promote a market design for a future decarbonised and sustainable energy sector at EU level.

The Energy Union is not a legal concept or a body with distinct legal personality. The legislation to pursue EU energy policy must be adopted on the basis of the ordinary legislative procedures enshrined in the TFEU, and then made subject to the ordinary EEA Committee procedures for potential EEA incorporation.

There are many different legal bases in the TFEU for the adoption of secondary legislation by the EU institutions. The choice of legal basis is also important for the EEA dimension, since the TFEU legal basis is a natural point of departure for the assessment of whether an EU secondary law measure is EEA relevant. Given that the primary function of the EEA Agreement is to extend the EU´s internal market to all EEA Member States, EU legislation adopted pursuant to the internal market provision in Article 114 TFEU (former Article 95 EC) is EEA relevant, as a clear point of departure. Secondary legislation adopted at EU level, where considered EEA relevant, is included in the relevant attachments to the EEA Agreement, by decision in the EEA Joint Committee.

The internal energy market legislation, including the third energy market package, has been adopted on the basis of Article 114 TFEU. All of this legislation is EEA relevant. I will discuss this legislation below in section 3.2.

A separate legal basis for energy was adopted in the Treaty of Lisbon as Article 194 TFEU, coming into force after the adoption of the third energy

[18] The Energy Union strategy was launched by the Commission in COM (2015) 80 final, 25.02.2015 and further acknowledged and committed to by the European Council on 19 March 2015.

market package. This provision confers powers on the EU institutions to adopt legislation to ensure the functioning of the energy market as well as security of supply, sustainability and interconnection. A measure adopted pursuant to this provision having other primary aims than ensuring the functioning of the internal energy market, such as for example supply security, is not necessarily EEA relevant. This question must, however, be considered with regard to the specific merits of each measure and on the basis of a broader evaluation of the criteria for determining EEA relevance.

Several secondary law measures have been adopted on the basis of Article 194 TFEU. Moreover, measures pursuing environmental objectives adopted on the basis of the environmental provision in Article 192 TFEU also in many cases have a profound impact on energy markets. Finally, a regulation relevant for the energy market has also been adopted on the basis of the trans-european network provisions in the TFEU. In section 3.3 below, I will briefly describe these other measures of relevance to the electricity market that are not part of the third energy market package.

Following the adoption of the third energy market package in 2009, the EU has adopted and drafted a large body of new legislation relevant to the electricity sector. This legislation has yet to be considered for incorporation into the EEA Agreement and is not subject to approval by the Norwegian and Icelandic Parliaments at this time. An overview of this legislation is presented in section 3.4.

3.2 The internal electricity market legislation

The internal electricity market legislation consists of directives and regulations adopted at EU level on the basis of Article 114 TFEU (former Article 95 EC) with a view to establishing an internal market without internal frontiers for trade in electricity. Three generations of legislation have been adopted for the electricity sector: the first Electricity Directive 96/92/EC was adopted in 1996, the second Electricity Directive 2003/54/EC and a first Electricity Regulation No. (EC) 1228/2003 were adopted in 2003 and the third energy market package was adopted in 2009.

Each package repeals and replaces the earlier one. A separate Security of Electricity Supply Directive 2009/89/EC has also been adopted, but this Directive has little substance and its proposed repeal by the Clean Energy for All Europeans legislative package is further described below in section 3.4.

As internal market measures, it is clear that all three generations of energy market packages adopted at EU level are EEA relevant. Consequently, the second package, including Electricity Directive 2003/54/EC and Electricity Regulation No. (EC) 1228/2003, was incorporated into the EEA Agreement on 2 December 2005 and there is no doubt that the third energy market package is also EEA relevant.[19]

The internal electricity market legislation contains a number of different requirements for Member States aimed at further developing the internal markets in electricity and natural gas.

The backbone of internal electricity market legislation is the Electricity Directive, where *Directive 2009/72/EC* in the third energy market package builds on and expands the regulation in Directive 2003/54/EC. Since Directive 2003/54/EC is already incorporated into the EEA Agreement, it is of particular importance to identify in what areas the new Directive 2009/72/EC includes new obligations for the Member States that are not already included in the second Directive.

The overall objective of Electricity Directive 2009/72/EC is to improve and integrate competitive electricity markets in the EU.[20] This is in practice the same objective as the second Electricity Directive 2003/54/EC.[21] The facilitation of functioning electricity markets by ensuring non-discriminatory, objective and transparent grid access is an important background for many of the provisions in the Directive. Chapters I, II and III of the Directive include, respectively: overall objectives, scope and definitions; organizational rules including the regulation of general public service obligations; and overall provisions on electricity generation.

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[19] Decision of the Joint EEA Committee No. 146/2005 of 2 December 2005 (OJ L 53/43, 23.2.2006).

[20] Article 1 of the Directive.

[21] See inter alia case C-439/06, *Citiworks*, para. 38.

Chapters IV and V concern transmission system operation and include in particular important obligations relating to the unbundling of transmission system operators (TSOs) from other electricity market activities. Chapter VI governs the tasks and activities of distribution system operators (DSOs), while chapter VII contains provisions on transparency of accounts in order to ensure compliance with unbundling requirements. Chapter IX sets out requirements for the national regulatory authorities (NRAs), chapter X deals with electricity retail markets and chapter XI contains final provisions. It is noteworthy that the Electricity Directive is primarily preoccupied with governing grid access on fair terms, and less concerned with electricity generation as such, which is primarily touched upon in Article 7 and 8 of the Directive.

When comparing the content of Electricity Directive 2009/72/EC with the earlier Electricity Directive 2003/54/EC, the two most important developments in the third Directive concern stricter obligations for the organisation of TSOs and stricter requirements for NRAs. The later 2009 rules introduced the concept of ownership unbundling, as well as two other alternatives for TSOs, which were only subject to so-called legal unbundling under Directive 2003/54/EC. This requirement has at the outset been considered acceptable in Norway since the Norwegian TSO Statnett could already be considered ownership unbundled.[22] The later 2009 obligations set out that the NRAs must be legally distinct and functionally independent from any other public or private entity and not seek or take instructions from any government, public or private entity.[23] This requirement has necessitated amendments in the Norwegian institutional set-up and for Norway it is arguably the most important new feature in the third Electricity Directive 2009/72/EC, compared to the

[22] Statnett SF is wholly owned by the State and the ownership interest is administered by the Ministry of Petroleum and Energy. Since a different ministry (the Ministry of Trade, Industry and Fisheries) administers State ownership to electricity producer Statkraft SF, the ownership undbundling requirements are deemed to be met, see Electricity Directive 2009/72/EC Article 9(1) and (6). Since the ownership unbundling alternative requires that the TSO in question also owns the transmission infrastructure, certain acquisitions have to be carried out as Statnett owned most but not all of the transmission infrastructure prior to implementation of the Directive.

[23] Article 35 of the Electricity Directive 2009/72/EC.

second Directive 2003/54/EC. I will revert to the Directive´s regulation of NRAs below in more detail below in section 5.

Electricity Regulation (EC) No. 714/2009 became applicable to EU Member States on 3 March 2011, repealing the former second Electricity Regulation (EC) No. 1228/2003 from that same date.[24] Once made part of the EEA Agreement, the Regulation adopted by the EEA Joint Committee (including technical amendments) must be implemented in national legislation as such, see Article 7 a) EEA. The overall aims of the Regulation are to enhance competition in the internal market by setting fair rules for cross-border electricity exchange and to facilitate the emergence of a well-functioning and transparent wholesale market with a high level of security of supply.[25] General rules are included in the Regulation itself, which are subject to more detailed provisions in binding Guidelines adopted pursuant to the Regulation.[26]

Electricity Regulation (EC) No. 714/2009 is based on the same structure and builds on Electricity Regulation (EC) No. 1228/2003. In the same way as in the relationship between the third and second Electricity Directives, the new Regulation expands on some of the obligations included in the former Regulation, but many of the fundamental provisions remain the same. The most important developments in the new Regulation are arguably that it contributes to strengthening the cooperation between national TSOs by establishing the European Network for Transmission System Operators for Electricity (ENTSO-E) and that it lays down a procedure for the development of comprehensive network codes and guidelines to govern the electricity market. The network codes and guidelines must be incorporated separately by the EEA Joint Committee under the EEA Agreement and they are therefore not a part of the current decision to incorporate the third energy market package. I will comment briefly on these codes and guidelines below in section 3.4.

Regulation (EC) No. 713/2009 establishes the Agency for the Cooperation of Energy Regulators (ACER) at EU level. ACER is one of a

[24] Articles 25 and 26 of the Regulation.

[25] Article 1 of the Regulation.

[26] See in particular Articles 18 and 23 of the Regulation.

number of agencies established at EU level over the past decades, and it replaced the less formalised European Regulators´ Group for Electricity and Gas (ERGEG). ACER´s purpose is to assist the national regulatory authorities for electricity and natural gas "*in exercising, at Community level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action.*"[27] To achieve this aim, ACER may issue opinions and recommendations within a number of areas and contribute to the further development of codes and guidelines, as well as adopting individual decisions within certain defined areas.[28]

In order for ACER to adopt a binding decision, a 2/3rds majority vote is required of ACER´s Board of Regulators, which consists of one representative from each of the NRAs for electricity and gas in the EU Member States. The EEA incorporation of this model raises some particular challenges. From the perspective of the EU Member States, it is not acceptable to allow representatives from non-EU Member States such as the EFTA States to vote in decisions that are binding for market participants in EU Member States. From the perspective of the EFTA States, it is unacceptable to submit to a procedure where representatives from EU Member States issue decisions directly binding for EFTA country participants. Consequently, the decision by the EEA Committee involves a solution where the representatives from the EFTA States are allowed to participate in the ACER meetings, but without voting rights. A binding decision within areas decided by ACER for the EU Member States shall be formally decided by the EFTA Surveillance Authority when directed to EFTA States. The binding decision by ESA shall be based on a draft provided by ACER. Moreover, ESA´s decision shall not be directly binding for market participants in the EFTA States, but shall rather be directed towards the national NRA, which in turn will be required to implement the decision towards the national market participants.

The decision-making powers of ACER, and formally for ESA under the EEA Agreement, are discussed in more detailed in section 5 below.

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27 Article 1(2) of the Regulation.

28 Article 4 of the Regulation.

3.3 Other secondary legislation relevant to the energy sector

For the sake of completeness, it is important to emphasise that the EU has, in addition to internal market legislation, also adopted other legislation of large importance for the energy sector.

First, several measures have been adopted on the basis of the energy title in Article 194 TFEU. While the third energy market package was adopted before Article 194 TFEU came into force, subsequent energy market legislation is likely to be based on this provision. Regulation (EU) No. 1227/2011 on wholesale energy market integrity and transparency (REMIT) was based on Article 194 TFEU, as were the environmental and energy efficiency related Buildings Directive 2010/31/EU, Energy Labelling Directive 2010/30/EU and Energy Efficiency Directive 2012/27/EU. A new Directive (EU) 2018/844 amending the Buildings Directive and the Energy Efficiency Directive has also been recently adopted at EU level. All of these pieces of legislation have an impact on the energy market in broad terms, but they do not influence the more fundamental questions of resource management raised in sections 4 and 5 below.

Second, important legal measures of relevance to the energy sector have been adopted on the basis of the environmental provision in Article 192 TFEU. Renewables Directive 2009/28/EC has important implications for the promotion of new investments in renewables based on the national binding targets for renewable sources in end-use of energy. The former and new EU ETS Directives affect electricity prices and investments by pursuing emission reductions and low-carbon investments through the EU Emissions Trading System.[29] The Water Directive 2000/60/EC, setting out to protect and enhance water resources, has important implications for hydropower reliant energy systems such as the Norwegian.

Finally, Infrastructure Regulation (EU) 347/2013 concerning energy interconnector projects has been adopted on the basis of the trans-european networks provision in Article 172 TFEU.

[29] Directives 2003/87/EC and (EU) 2018/410.

Some of the legislation described above has already been considered EEA relevant and has been incorporated into the Agreement. Environmental legislation is as a point of departure considered EEA relevant, and the Renewables Directive 2009/28/EC, the Water Directive 2000/60/EC as well as the former EU ETS Directive 2003/87/EC (and likely soon also the new Directive (EU) 2018/410) have all been incorporated into the Agreement.

With respect to measures adopted pursuant to Article 194 TFEU, REMIT 1227/2011 and the Energy Labelling Directive 2010/30/EU have not yet been incorporated into the EEA Agreement. The Buildings Directive 2010/31/EU and Energy Efficiency Directive 2012/27/EU have not yet been incorporated into the EEA Agreement, but the EFTA States are currently discussing the matter.[30]

The EEA relevance of Infrastructure Regulation (EU) 347/2013 is still being considered by the EFTA States. The EEA relevance of this act is not obvious given that the EEA Agreement does not include provisions corresponding to the trans-european network provisions in TFEU.

3.4 EU measures adopted after the third energy market package

Energy has been high on the EU agenda after the adoption of the third energy market package in 2009, in particular following the adoption of the Energy Union strategy in 2015. At regulatory level, two major developments have taken place since 2009. First, a number of network codes and guidelines have been adopted at EU level pursuant to the provisions of Electricity Regulation (EC) No. 714/2009. Second, the Commission has launched a proposal for an extensive new legislative package entitled Clean Energy for All Europeans (often also referred to as "the Winter Package") where some of the legislation has already been

[30] See hearing document published by the Norwegian Ministry of Petroleum and Energy on 2 November 2018, available here: https://www.regjeringen.no/no/dokumenter/horing---endringer-i-energiloven-og-naturgassloven-energibruk-i-bygninger-og-store-foretak/id2617849/?expand=horingsnotater (last visited 8 January 2019).

adopted and the rest was recently made subject to political agreement and is expected to be finally adopted soon.[31]

The Electricity Regulation sets out a process in which the European network of transmission system operators for electricity (ENTSO-E) shall elaborate draft network codes within a number of defined areas pursuant to framework guidelines submitted by ACER to be finally adopted by the Commission. The network codes may cover a wide range of areas, such as network security and reliability rules, network connection rules and rules regarding harmonised transmission tariff structures, in addition to a number of other areas.[32] In addition, the Commission may adopt guidelines following similar procedures.[33]

The ordinary process for the adoption of network codes runs through three institutional layers, starting with the Commission establishing an annual priority list in consultation with stakeholders identifying which areas are to be included in the code development process.[34] On this basis, the Commission shall require ACER to submit a non-binding framework guideline setting out the overall principles for the development of the network codes.[35]

ACER shall consult ENTSO-E and other stakeholders in the development of the framework guideline.[36] The Commission may request ACER to review the guideline if it does not, in the Commission's view, contribute to non-discrimination, effective competition and efficient market functioning, and the Commission may also ultimately elaborate the framework guideline itself, if ACER should fail to submit or re-submit a guideline.[37]

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31 See the Communication from the Commission COM(2016) 860 final, 30.11.2016, as well as an update on the legislative process here: https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/clean-energy-all-europeans (last visited 8 January 2019).

32 See further Article 8(6) of the Electricity Regulation.

33 Article 18 of the Electricity Regulation.

34 Article 6(1) of the Electricity Regulation.

35 Article 6(2) of the Electricity Regulation.

36 Article 6(3) of the Electricity Regulation.

37 Articles 6(4) and 6(5) of the Electricity Regulation.

Upon a request from the Commission, ENTSO-E shall within 12 months at the latest submit to ACER a network code which is in line with the framework guideline.[38] ACER shall, in turn, provide a reasoned opinion on the draft code, and ENTSO-E may amend the code on the basis of the opinion and re-submit the draft to ACER.[39]

ACER shall submit the draft code to the Commission when it finds the draft to be in line with the framework guideline, and it may recommend that the draft is finally adopted by the Commission.[40] Finally, the draft code may then be adopted by the Commission, making it binding as a code pursuant to the Electricity Regulation.[41] The Regulation also confers certain powers on ACER to develop the draft network code if ENTSO-E fails to develop such code, and on the Commission to develop network codes if ENTSO-E or ACER fails to perform their tasks.[42]

Eight electricity network codes and guidelines have been adopted by the Commission. These codes and guidelines concern demand connection, high voltage direct current connections, requirements for generators, system operations, emergency and restoration, forward capacity allocation, capacity allocation and congestion management and electricity balancing.[43]

All eight network codes and guidelines are formally adopted as Commission Regulations. This means that inclusion in the EEA Agreement will need to take place through the ordinary procedures where the EEA Committee determines to incorporate the legislation into the EEA

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38 Article 6(6) of the Electricity Regulation.

39 Articles 6(7) and 6(8) of the Electricity Regulation.

40 Article 6(9) of the Electricity Regulation.

41 Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett No. 3 2018, pp. 170–190, at p. 171, suggests that decision-making powers have been conferred on ENTSO-E under EU legislastion. Although ENTSO-E in practice plays an important role in developing draft network codes, it is not correct that ENTSO-E has formal decision-making powers under EU law as the codes are ultimately adopted by the Commission.

42 Articles 6(10) and 6(11) of the Electricity Regulation.

43 For further information and access to the codes, see https://electricity.network-codes.eu/network_codes/ (last visited 6 December 2018).

Agreement as separate regulations. These regulations will then in turn have to be implemented as such in national legislation, in accordance with Article 7 a) EEA. Consequently, the incorporation of the third energy market into the EEA Agreement does not include the network codes and guidelines, which would instead be subject to separate procedures at a later stage.

The Clean Energy for All Europeans legislative package was launched by the Commission on 30 November 2016 and is now in the final stages of legislative adoption in the EU institutions. The package consists of amendments to Electricity Directive 2009/72/EC, Electricity Regulation (EC) No. 714/2009, ACER Regulation (EC) No. 713/2009, Buildings Directive 2010/31/EU, the revised Renewables Directive and the Energy Efficiency Directive, as well as new Regulations on energy governance and risk-preparedness.

Directive (EU) 2018/844 amending the Buildings Directive and the Energy Efficiency Directive was adopted on 19 June 2018. On 4 December 2018 the Council of the EU adopted three of the legislative proposals included in the Clean Energy for All Europeans package: the new Energy Efficiency Directive requiring EU headline targets on energy efficiency of at least 32.5 % by 2030; a new Renewables Directive setting a headline target of 32 % renewable energy at EU level by 2030; and a Governance Regulation setting out cooperating requirements between Member States and the Commission.[44] Political agreement on the remaining legislation in the package was reached later in December 2018.[45]

The adoption of all the legislative proposals in the Clean Energy for All Europeans package entails a number of amendments to the legislation comprised by the third energy market package now being considered for EEA incorporation. These amendments will have to be considered by the EEA Joint Committee at a later stage. In this respect, the question of EEA

[44] See further https://www.consilium.europa.eu/en/press/press-releases/2018/12/04/energy-efficiency-renewables-governance-of-the-energy-union-council-signs-off-on-3-major-clean-energy-files/# (last visited 8 January 2019).

[45] See press release by the European Commission on 18 December 2018, IP/18/6870, available here: http://europa.eu/rapid/press-release_IP-18-6870_en.htm (last visited 7 January 2019).

relevance is also likely to arise, in particular for the Energy Governance Regulation.

3.5 Conclusion

The third energy market package is just one piece of a larger puzzle of EU and EEA legislation relevant to national management of electricity markets.

First, the provisions in the main part of the EEA Agreement discussed in section 3 above, such as the free movement of goods and State aid provisions, have played and will continue to play an important role in electricity market development. These provisions will continue to apply for the Contracting Parties to the EEA Agreement irrespective of whether the third energy market package is incorporated into the Agreement. Many of the provisions in the third energy market package build on the general principles enshrined in the EEA Agreement. Therefore, the EEA Member States will, for example, still be under an obligation not to restrict the free movement of electricity across borders, even if the third energy market package is not incorporated into the EEA Agreement.

Second, the third energy market package builds on earlier internal energy market packages and most notably the second energy market package from 2003 which is already incorporated into the EEA Agreement. In many areas the third energy market package only repeats or slightly develops the provisions in the second package. The most important new developments in the third energy market package are arguably stricter unbundling requirements for TSOs, stricter rules for the organisation of NRAs, the establishment of ACER and the procedure for the development of network codes and guidelines. Other aspects of the third package are to a large extent already adopted at EEA level, through the incorporation of the second package. Consequently, the decision to adopt the third energy market package is not a question of whether or not to become a member of the EU´s internal energy market, but rather a question of whether to continue the efforts commenced more than two decades ago to facilitate the functioning of the internal energy market.

Third, the third energy market legislation must also be considered in a wider EEA secondary law context, where other pieces of legislation such as the Renewables Directive are important for the development of electricity markets and will still have an impact on them, even if the third package is not adopted.

Fourth, it is important to distinguish between the third energy market package on the one hand and the legislation adopted or proposed at EU level subsequent to 2009 on the other hand. The decision by the EEA Committee to incorporate the third energy market package only comprises the legislation adopted in 2009. Network codes and guidelines subsequently adopted as regulations at EU level are subject to separate assessment and potential incorporation by the EEA Joint Committee at a later stage. This is also case for the legislation adopted at EU level on the basis of the Commission´s Clean Energy for All Europeans proposal. A decision to incorporate the third energy market package now does not bind the future competence of the EEA Joint Committee, any more than the adoption of the second energy market package now does in the evaluation of the third package. For each piece of legislation the question will be whether the legislation at issue is EEA relevant, in which case a reservation to incorporate it in principle will trigger the procedure in Article 102 EEA.

4 Public ownership to energy resources

4.1 Introduction

Public ownership to strategic energy resources is considered a fundamental interest in energy resource management in many States, including in Norway and Iceland. The question of public ownership can arise both for primary energy sources and electricity generation and for ownership

to strategic transport infrastructure such as transmission grids and interconnectors.

The questions to be addressed in this section are whether the third energy market package affects national ownership policies and, if so, to what extent. This question must, however, be seen in a broader EEA context, where the main part of the EEA Agreement is also considered. In particular, Article 125 EEA concerning the system of property ownership is important in this respect.

In the following I will first discuss the main part of the EEA Agreement with particular focus on Article 125 EEA below in section 4.2. The relationship to the internal energy legislation and the third energy market package is then discussed in section 4.3.

4.2 The main part of the EEA Agreement

Article 125 EEA in Part IX "General and final provisions" in the EEA Agreement sets out as follows:

> *"This Agreement shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership."*

The provision mirrors the wording of Article 345 TFEU (former Article 295 EC). The ECJ has consistently held that systems of property ownership are a matter for Member States by virtue of this provision, but that the article does not have the effect of exempting those systems of property ownership from the fundamental rules of the Treaty.[46]

The reasoning of the ECJ applies correspondingly to the interpretation of Article 125 EEA.[47] This means that each State is entitled to pursue

[46] See case 182/83, *Fearon*, para.7, case C-302/97, *Konle*, para. 38, case C-367/98, *Commission v. Portugal*, para. 48 and case T-457/09, para. 387.

[47] See Article 6 EEA and Article 3(2) of the Agreement establishing a Surveillaince Authority and EFTA Court. Peter Ørebech, *EØS-avtalens artikkel 125, med særlig vekt på diskusjonen i NOU 2004:26 Hjemfall*, Lov og Rett No. 1-2 2006, pp. 26–45, argues that Article 125 EEA is subject to a wider interpretation allowing for broader protection of public ownership rights than what is the case for (now) Article 345 TFEU. Peter Ørebech´s views were, however, not followed in the subsequent ruling

a policy of public ownership of energy resources, but that the policy must not contradict the fundamental rules in the main part of the EEA Agreement. The public ownership policy cannot, for example, be structured in a way that entails illegal State aid[48] or that amounts to an illegal restriction on the free movement of capital.[49]

In case E-02/06, *hjemfall*, the Norwegian authorities argued, *inter alia*, that the Norwegian legislation on waterfall reversion qualified as rules governing the system of property ownership falling outside the scope of the EEA Agreement on the basis of Article 125 EEA. The EFTA Court did not agree and held, with further reference to ECJ case law, that:

> *"It follows from the case law of the ECJ on Article 295 EC that Article 125 EEA is to be interpreted to the effect that, although the system of property ownership is a matter for each EEA State to decide, the said provision does not have the effect of exempting measures establishing such a system from the fundamental rules of the EEA Agreement, including the rules on free movement of capital and freedom of establishment".*[50]

The Court then went on to consider whether the national scheme at issue amounted to restrictions on the freedom of establishment and the free movement of capital and concluded that it qualified as restrictions under both Articles 31 and 40 EEA.[51]

With regard to the legitimacy of the aims pursued by the legislation, the Norwegian authorities argued that the goal of acquiring and maintaining public ownership over essential energy rersources was in itself a legitimate justification under the EEA Agreement.[52] In this respect, the Court held that:

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in case E-02/06, *hjemfall*, where the EFTA Court held that the provisions should be interpreted similarly, se in particular para. 61.

48 See case T-457/09.

49 See case C-367/98.

50 Case E-02/06, para. 62.

51 Case E-02/06, paras. 64–69.

52 Case E-02/06, para. 71.

> *"Article 125 EEA is to be interpreted to the effect that an EEA State's right to decide whether hydropower resources and related installations are in private or public ownership is, as such, not affected by the EEA Agreement. The corollary of this is that Norway may legitimately pursue the objective of establishing a system of public ownership over these properties, provided that the objective is pursued in a non-discriminatory and proportionate manner."*[53]

Consequently, the EFTA Court as a matter of principle accepted public ownership as a legitimate interest that could justify free movement restrictions. The Norwegian legislation applicable at the time was, however, not considered sufficiently consistent by the Court to pass a test of non-discrimination and proportionality.[54] The scheme was therefore considered to be contrary to the EEA Agreement. The Norwegian government subsequently amended national legislation to the effect that public ownership of large-scale waterfalls was pursued in a more consistent manner – in effect strengthening the scope of public ownership – and this regime has not been challenged under the EEA Agreement.

The specific questions dealt with by the EFTA Court in *hjemfall* have not been subject to scrutiny by the ECJ and existing ECJ case law does not contradict the EFTA Court´s reasoning. Consequently, the reasoning of the EFTA Court still prevails in EEA law. This entails that Norway and Iceland may legitimately pursue the objective of establishing a system of public ownership of strategic energy resources under the free movement provisions of the EEA Agreement, provided that the objective is pursued in a non-discriminatory and proportionate manner.

4.3 The third energy market package

The third energy market package does not include any provisions specifically restricting the right of the Member States to own strategic energy resources or restricting the Member States from pursuing a system of public ownership. This corresponds to the approach under other se-

[53] Case E-02/06, para. 72.

[54] Case E-02/06, paras 73–81.

condary legislation relevant to the energy sector, and to EU secondary legislation more generally for that matter, of not governing directly the right to ownership.

There are both political and legal reasons why Member States´ rights to pursue public ownership are not directly regulated in the internal energy market legislation. From a political perspective, the question of public ownership of energy resources is sensitive and controversial not only in Norway and Iceland, but also in a number of EU Member States. There is therefore most likely a limited political desire to directly regulate the issue at EU level. From a legal perspective, and partly as a result of the political considerations, Articles 345 TFEU and 125 EEA in my view restrict the right of the EU to abolish public ownership schemes in secondary legislation and consequently to incorporate such legislation into the EEA Agreement. The requirement that TFEU and the EEA Agreement shall in no way prejudice national rules governing the system of property ownership must also be interpreted to encompass rules adopted in secondary legislation.

Articles 345 TFEU and 125 EEA do not necessarily preclude the adoption of secondary legislation that may *indirectly* affect national rules governing the system of property ownership. This corresponds to the situation under the main part of the EEA Agreement, where free movement, State aid and competition rules may affect the means chosen by a Member State to pursue public ownership, although the interest as such is legitimate. However, the third energy market package also contains few provisions of indirect relevance to national choices of public ownership. The right to primary energy sources and electricity generation is only lightly regulated in the third energy market package and does not impose significant restrictions, even indirectly, on national ownership schemes. General non-discrimination criteria, such as those provided in Article 3(1) and 7(1) of Electricity Directive 2009/72/EC, may be relevant for the design of national schemes, but similar obligations in any case follow from the main part of the EEA Agreement and corresponding

non-discrimination requirements also follow from the second Electricity Directive 2003/54/EC already incorporated into the EEA Agreement.[55]

In principle, one might argue that the main rule for TSO unbundling in Article 9 of Electricity Directive 2009/72/EC could have an impact on public ownership, as the requirement that the same entity cannot own both electricity generation and TSO entities could force States with ownership interests in both to divest. However, since Article 9(6) of the Directive permits the State to own both interests as long as their control is exercised by two separate public bodies, the question of restrictions for public ownership does not arise. Each of Norway, Sweden and Denmark has relied on Article 9(6) by way of having different Ministries controlling the ownership interests in electricity generation and TSOs and the EU Commission has accepted this approach in the certification procedures for the Swedish and Danish TSOs.

Consequently, the third energy market package does not include any provisions that directly regulate the right of Member States to pursue a system of public ownership to strategic energy resources. Moreover, it includes few provisions of indirect relevance to national choices of public ownership. Except for the TSO unbundling rules, the indirect provisions of any potential relevance relate to general requirements such as non-discrimination, that already follow from existing law under the EEA Agreement.

In a legal opinion of 23 September 2018, Professor Peter Ørebech concludes that if Iceland does not want the free movement provisions of the EEA Agreement to have unconditional applicability to the energy sector, then it must also vote no to the third energy market package.[56] He discusses both the main part of the EEA Agreement, and in particular Article 125 EEA, as well as internal energy market legislation and other secondary law measures. It is, however, difficult to understand the arguments leading up to the conclusion that voting no to the third energy

[55] See Articles 3(1) and 6(1) of Electricity Directive 2003/54/EC.

[56] Professor Peter Ørebech. legal opinion of 23 September 2018, p. 12, available here: https://neitileu.no/aktuelt/peter-orebech-debatterte-acer-pa-island (last visited 18 March 2019).

market package is relevant for the applicability of the main part of the EEA Agreement to the energy sector. Irrespective of whether or not the third energy market package is incorporated into the EEA Agreement, the general provisions in the main part of the EEA Agreement will apply to the energy sector in the same manner as to other sectors of the economy. Article 125 EEA is of no relevance to this question. The conclusion above from Peter Ørebech´s opinion is therefore not correct.

4.5 Conclusion

Article 125 EEA must be interpreted to the effect that each State is entitled to pursue a policy of public ownership of energy resources, but that policy must not contradict the fundamental rules in the main part of the EEA Agreement. A public ownership policy cannot therefore, for example, be structured in a way that amounts to illegal State aid, is in breach of EEA competition law or amounts to an illegal restriction on the free movement of capital or freedom of establishment. Norway and Iceland may, however, legitimately pursue the objective of establishing a system of public ownership of strategic energy resources under the free movement provisions of the EEA Agreement, provided that the objective is pursued in a non-discriminatory and proportionate manner.

The third energy market package does not include any provisions that directly regulate the right of Member States to pursue a system of public ownership of strategic energy resources. The few provisions that may in practice have any indirect relevance for national management and regulation of ownership issues already follow from existing law under the EEA Agreement (except for the specific TSO unbundling provisions mentioned above).

Consequently, Norway and Iceland are entitled to pursue a policy of public ownership of energy resources under the EEA Agreement, as long as the policy does not contradict the fundamental rules of the Agreement. In the latter assessment of compatibility, the free movement provisions in the main part of the EEA Agreement are in practice of more importance

than the third energy market package, which does not govern public ownership issues as such.

5 Licences to build interconnectors

5.1 Introduction

The questions to be discussed in this chapter are whether and to what extent the third energy market package affects national decisions to permit the building of new electricity interconnectors to other EU or EEA Member States.[57]

The market situations for Norway and Iceland differ considerably in terms of interconnection to other States. Interconnectors have already been built between Norway and the other Nordic countries (except Iceland), as well as to the Netherlands and Russia. A cable between Norway and Germany is currently under construction and at least one cable will be built to the UK. Total interconnector capacity equals around 20 per cent of installed Norwegian production capacity. Consequently, Norway is a fully integrated part of the Nordic electricity wholesale market with power trade on Nord Pool Spot as well as being part of electricity exchange beyond the Nordic countries. The question in Norway is therefore whether to increase the number of interconnectors, integrating the Norwegian market even closer with other parts of the EU´s internal electricity market.

Iceland, on the other hand, is an isolated electricity market region with no interconnections to other countries at the moment. Most of the rules in the third energy market package will nevertheless apply to the

[57] The question of whether EEA law and the third energy market package allow Member States to decide that only the national TSO may own and operate interconnectors is beyond the scope of this article and will not be discussed in the following.

Icelandic market if incorporated into the EEA Agreement.[58] The electricity market as such will however remain national for as long as there is no interconnection to other countries. From a market and economic perspective, the decision to permit the building of interconnectors is therefore arguably more important than a decision to accept the third energy market package.

The building of interconnectors has provoked much discussion both in the Norwegian and the Icelandic third energy market debate. The questions are essentially whether the third energy market package affects the choice of which public body should issue licences and whether it affects the assessments made by the issuing body.

The first question is one of whether the third energy market package governs which institutions have powers to determine interconnector permits: Is each Contracting Party free to determine which public body should have the powers to decide on interconnector licensing? And what is the competence of ACER in matters concerning interconnector permits? These questions will be analysed below in sections 5.2 and 5.3, correspondingly.

The second question concerning the content of the assessment raises the substantive issue of whether the third energy market package affects the discretion of the competent authorities to allow or refuse a permit to build an interconnector. I will consider this question below in section 5.4.

5.2 Competence to decide on interconnector licenses

Decisions on whether to invest in and build an interconnector can at the outset be made by TSOs or other market participants. Such decisions require a permit or licence from the competent national authority. The procedures and form of the decision, as well as the choice of competent

[58] Article 44(1) of the Electricity Directive allows for significant derogations from the Directive if "substantial problems" for the operation of small isolated systems are demonstrated, but requirements relating to, *inter alia*, the organisation of national regulatory authorities are not subject to derogation. Iceland is considered a small isolated system under Electricity Directive 2003/54/EC, see the Decision of the Joint EEA Committee No. 146/2005 of 2 December 2005 (OJ L 53/43, 23.2.2006), para. 22.

authority, may vary from country to country. In Norway, for example, owning or operating an interconnector requires a separate interconnector licence to be issued by the Ministry of Petroleum and Energy in addition to the regular construction and operating licence.[59] The question to be addressed in this section is whether the third energy market package restricts the Member States´ choice of which public institution shall have competence to decide on an interconnector license.

The point of departure under the internal energy market legislation is that Member States shall fulfil the legal requirements *"on the basis of their institutional organisation"*, signifying that it is up to each State to organize its public administration.[60] Each State´s institutional freedom is, however, restricted by the obligations in the Electricity Directive to establish an independent energy regulator which must be vested with a set of minimum market responsibilities. This means that the full institutional freedom of Member States is confined to the areas of energy regulation that do not fall under the competence of the independent regulatory authority.

Article 35 of Electricity Directive 2009/72/EC requires Member States to designate one single national regulatory authority that is legally distinct and functionally independent from any other public or private entity. This authority shall be able to take autonomous decisions independently from any political body, shall not seek or take instructions from any government or other public or private entity and shall have budget autonomy.[61] The independent regulatory authority shall cooperate closely with other independent regulatory authorities at EU level and with ACER. Consequently, the independent regulatory authority is in practice detached from the traditional national public administration and made part of EU-wide regulatory cooperation.

Such level of independence is contrary to the traditional Norwegian approach to public administration, where a subordinate directorate may typically be subject to instructions from superior ministries and where the

[59] See Sections 4-2 and 3-1 of the Norwegian Energy Act, correspondingly.

[60] See Article 3(1) of Electricity Directive 2009/72/EC.

[61] Articles 35(4)a and b and (5)(a) of Electricity Directive 2009/72/EC.

decisions of a directorate may be appealed and are subject to full review by the superior ministry. This has also been the case in the electricity sector, where the regulatory authority NVE has been a directorate subject to the decisions of the Ministry of Petroleum and Energy. Therefore, arguably the most significant consequence of implementing the third energy market package for Norway concerns the establishment of the new independent regulatory authority "Reguleringsmyndigheten for energi" (RME), which is organised as an independent body within the broader mandated NVE.[62]

Given the strict independence requirements of the new national regulatory authorities, it is vital to consider what tasks that must be delegated to these authorities by virtue of Electricity Directive 2009/72/EC. These tasks are set out in Article 37 of the Directive, which governs the specific duties and powers of the NRAs. The extensive list of tasks contained in Article 37 Electricity Directive 2009/72/EC significantly expands the NRA tasks included in Article 23 of former Electricity Directive 2003/54/EC. However, both directives focus in particular on the regulatory authorities´ tasks to ensure non-discriminatory and transparent access to existing electricity grids, including interconnectors. The third party access requirements in the Electricity Directives particularly govern access to existing infrastructure, and not the physical tie-in of new grids.[63]

Following the approach discussed above, Article 37 of the Electricity Directive sets out that NRAs shall be responsible for, *inter alia*, fixing or approving the methodologies used to establish terms and conditions for access to cross-border infrastructure, including the procedures for the allocation of capacity and congestion management.[64] The latter competence, however, relates to the management of interconnectors already being built, and not to the question of whether an entity should be permitted to build the interconnector in the first place.

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62 See Amendment Act 25 May 2018 No. 21 to the Energy Act, which has yet to come into force.

63 See Articles 20 of Electricity Directive 2003/54/EC and the corresponding Article 32 of Electricity Directive 2009/72/EC and the ECJ´s interpretation of the former provision in case C-239/07, *Julius Sabatauskas and Others*.

64 Article 37(6)(c) of Electricity Regulation 2009/72/EC.

Article 37 also includes a wide range of other tasks for the NRAs, but it does not include decisions on licences or permits for the construction of interconnectors among those tasks. In fact, decisions to grant licences at all for the construction of new electricity infrastructure, whether electricity generation, transmission or distribution facilities, are not included among the mandatory NRA tasks in Article 37. In considering the influence of NRAs and ACER on national resource management, it is consequently important to take into account the fact that the Electricity Directive does not preclude such sensitive resource management decisions from remaining under the control of the traditional State administration.[65]

Member States are of course also permitted to confer competence on NRAs to issue permits for interconnectors and other electricity facilities, but the Electricity Directive does not require them to do so. The Norwegian approach to implementation of the third energy market package has followed the minimum requirements, delegating to the independent RME tasks typically related to grid tariffs and management and market surveillance. The competence to decide on licences for interconnectors, as well as on the competence to decide licences for other grids and for electricity generation facilities, will, however, still remain with the traditional Norwegian public authorities, i.e. the NVE and the Ministry of Petroleum and Energy.

Professor Peter Ørebech seems to assume in his legal opinion that the national NRA shall have the powers to decide on or overrule licence decisions for interconnectors.[66] This assumption is, however, not further substantiated and is in my opinion clearly not correct.

Consequently, the third energy market package does not require the Member States to confer competence on the independent NRA to decide on licences to interconnectors.

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[65] This important point is not considered by Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett No. 3 2018, pp. 170–190. The powers of RME are therefore in my opinion more limited than Ørebech seems to argue on pp. 177–180.

[66] Professor Peter Ørebech´s legal opinion 23 September 2018, p. 11.

5.3 The role of ACER in interconnector licensing

The next question is then whether ACER has any role in the interconnector licence decision in the sense that it could either instruct the national competent authority in its licensing decision, or instead that the licence decision could be appealed to ACER.

The overall acts of ACER are set forth in ACER Regulation (EC) No. 713/2009 Article 4. According to this provision, ACER may issue opinions and recommendations to TSOs, NRAs and the EU legislator institutions, submit non-binding framework guidelines to the Commission within further defined areas and *"take individual decisions in the specific cases referred to in Articles 7, 8 and 9"*.[67] Specific tasks are also conferred on ACER under other EU legislation, such as REMIT, Infrastructure Regulation (EU) 347/2013 and the network codes, but these are not part of the third energy market package and will not be discussed further here.

The question is whether ACER´s powers to issue binding, individual decisions under Articles 7, 8 or 9 of the ACER Regulation include competence to take decisions on interconnector licensing.[68] At the outset, it would be peculiar if ACER were to have powers to determine interconnector licensing, given that Electricity Directive 2009/72/EC does not confer such tasks on the NRAs.[69] Given that ACER´s Board of

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67 The latter competence to take individual decisions is included in Article 4(d). Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett No. 3 2018, pp. 170–190 argues on p. 176 that ACER can manage the income of electricity companies through RME (as the Norwegian national NRA) electricity company income. He seems to be referring to congestion revenue on interconnectors and bases his view on recital 20 and 21 of the Electricity Regulation. Although it is correct that NRAs have a key role in determining tariff methodologies as well as distribution of congestion revenue, the statement by Ørebech is in my view too general.

68 ACER can only adopt binding decisions within those areas where competence to adopt such decisions has been conferred on the Agency. ACER cannot, for example require a Member State to export all of its hydropower electricity production. This example, made by Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett No. 3 2018, pp. 170–190 on p. 179 is therefore not relevant to the ACER and third energy market package discussion.

69 See section 5.2 above.

Regulators consists of representatives from the national NRAs, it would be inconsistent to grant this decision-making body powers to decide on matters that are beyond the scope of work for the NRAs.

Article 7 of the ACER Regulation sets out, first, that ACER may adopt decisions on technical issues where those decisions are provided for in the Electricity Directive or Electricity Regulation (and, correspondingly, for the gas market legislation). This competence refers in particular to the powers in Article 5 of the Electricity Directive, which provides that NRAs or Member States *"shall ensure that technical safety criteria are defined and that technical rules establishing the minimum technical design and operational requirements for the connection to the system of generating installations, distribution systems, directly connected consumers' equipment, interconnector circuits and direct lines are developed and made public."* The provision does not concern interconnector licensing as such.

Article 7(7) of the ACER Regulation provides that ACER *"shall decide on the terms and conditions for access to and operational security of electricity and gas infrastructure connecting or that might connect at least two Member States (cross-border infrastructure), in accordance with Article 8."* The question then is what follows from Article 8.

The heading of Article 8 is "Tasks as regards terms and conditions for access to and operational security of cross-border infrastructure". This heading already signifies that the provision confers competence to decide on interconnector access issues, but not on those concerning licences for the building of interconnectors. This impression is confirmed by the wording in Article 8(1), which sets out that for interconnectors ACER *"shall decide upon <u>those regulatory issues that fall within the competence of national regulatory authorities</u>, which may include the terms and conditions for access and operational security, only (…)".*[70] Since the competence to adopt interconnector licensing decisions is not conferred on the NRAs pursuant to Electricity Directive 2009/72/EC, ACER does not have the competence to adopt decisions concerning such licensing under Article 8(1) of the ACER Regulation.

[70] Emphasis added.

Furthermore, Article 8(1)(a) and (b) set out the conditions that ACER may only adopt a decision within its sphere of competence if the NRAs on each side of the interconnector have not been able to agree within six months or if they submit a joint request for an ACER decision. Given that an interconnector licence decision would have to be made individually by the competent authority on each side of the interconnectors, it would not make sense to have as a condition for an ACER decision that the NRAs do not agree. A national interconnector licence is not subject to agreement between NRAs in the first place.

Finally, the scope of ACER´s competence under Article 8 relates to "terms and conditions for access to and operational security" of interconnectors. A natural interpretation of this wording suggests that it relates to the rules of access for the use of the interconnector, and not to the assessment of whether the construction of an interconnector should be permitted. Article 8(2) substantiates this finding further by emphasising that those terms and conditions shall include a procedure and timeframe for capacity allocation, congestion revenues and tariffs. These terms are the key conditions for the use of an interconnector. The ECJ´s interpretation in case C-239/07, *Julius Sabatauskas and Others* of the term "access" in Article 20 of Electricity Directive 2003/54/EC (corresponding to Article 32 in Electricity Directive 2009/72/EC) also supports the conclusion above.

Professor Peter Ørebech argues that ACER has the competence to decide on whether interconnectors may be built if the Member States concerned do not agree. He bases this argument on Article 8(1) of the ACER Regulation and he also refers to the Infrastructure Regulation.[71] As emphasised above, Article 8 of the ACER Regulation refers to the rules for access to and use of interconnectors, and not to the decision on whether to permit the building of interconnectors. The Infrastructure Regulation is not part of the third energy market package, it is not obvious that it is EEA relevant and it is in any case difficult to see how the PCI scheme under that Regulation should have relevance for the question of ACER´s

[71] Professor Peter Ørebech´s legal opinion 23 September 2018, p. 10.

powers in licensing decisions. Professor Peter Ørebech´s argument is therefore in my opinion not correct.

Under Article 9 of the ACER Regulation, ACER also has the competence to finally decide on questions of exemptions from third party access for new interconnectors pursuant to Article 17(5) of Electricity Regulation (EC) No. 714/2009 in cases where national NRAs are unable to agree or submit a joint request to ACER. This exemption possibility, intended to promote the decision of investors to build interconnectors by temporarily shielding them from a market based capacity scheme, does not impact the interconnector licensing decision as such.[72]

Based on the above, it is clear that ACER does not have competence to decide on matters relating to the evaluation by the competent national authority of whether to grant an interconnector licence.

The EEA Joint Committee decision on third energy market package incorporation confers competence on the EFTA Surveillance Authority to formally adopt those decisions addressed to the EFTA Member States that would be taken by ACER for EU Member States. The scope of ESA´s powers will correspond to ACER´s decision-making competence, and the conclusion above will therefore also apply under the EEA Agreement.

5.4 The third energy market package´s influence on national interconnector licensing decisions

Based on the analysis above, it can be concluded that Norway and Iceland have discretion to decide on which national public body shall have the

[72] Peter Ørebech, Grunnloven § 1 og EU – med særlig vekt på implementeringen av vedtak truffet av EU-kommisjonen og EUs energibyrå ACER, Lov og Rett No. 3 2018, pp. 170–190 discusses this exemption on pp. 175–176. His description of the nature of the exemption possibility is not clear, but he seems to argue that the assessment is of vital importance for the establishment of new interconnectors. This is not necessarily the case. The parties did not, for example, apply for such exemption for the NorNed cable between Norway and the Netherlands. In those cases where the parties have applied for exemptions, the EU Commission appears to follow a fairly liberal practice where exemptions are mostly accepted, see https://ec.europa.eu/energy/sites/ener/files/documents/exemption_decisions2018.pdf for an overview of cases (last visited 8 January 2019).

powers to adopt licence decisions for the building of interconnectors, and that ACER/ESA do not have specific competence to overrule these decisions. A different matter to be addressed in this section is whether the third energy market package may nevertheless influence the licence decision by restricting the discretion of the relevant national body in its assessment of the licence application.[73]

The third energy market package does not include specific provisions concerning the granting of licences for the establishment of interconnectors. The obligation in Article 3(1) of Electricity Directive 2009/72/EC for Member States not to discriminate between electricity undertakings as regards either rights or obligations applies to all actions by Member States. Consequently, this provision requires Member States not to discriminate between electricity undertakings in decisions relating to interconnector licences, just as it does for any other public decision in the electricity sector.

The non-discrimination requirement in Article 3(1) of Electricity Directive 2009/72/EC is identical to the same requirement in Article 3(1) of Electricity Directive 2003/54/EC. The third energy market package therefore does not introduce any new obligations at this point that are not already part of the EEA Agreement. Moreover, the requirement in Article 3(1) is only a sector specific expression of the general principle of equality.[74] The prohibition of discrimination is a fundamental principle of EU and EEA law reflected in the general prohibition of discrimination in Article 4 EEA as well as in the prohibitions on free movement restrictions. Consequently, the prohibition in Article 3(1) of the Electricity Directive is in any case unlikely to provide any further restrictions for Member States than what already follows from the main part of the EEA Agreement.

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[73] In such a case, the matter may ultimately arise before ESA or the EFTA Court either on the basis of a request for an advisory opinion by a national court to the EFTA Court in a specific case (submitted to the EFTA Court) or as an investigaton of a failure to fulfil EEA obligations (by ESA and which may ultimately be decided by the EFTA Court). These would be the same procedures under the EFTA Surveillance Authority and Court Agreement (SCA) that apply for enforcement of EEA law in general, and would not be affected by the ACER Regulation or the establishment of ACER as such.

[74] See case C-17/03, *VEMW*, para. 47.

It would be beyond the scope of this article to assess to what extent the provisions in the main part of the EEA Agreement, such as the prohibitions in Articles 4 and 11 EEA, might influence national interconnector licensing decisions. For the purpose of the topic addressed here, it suffices to conclude that the adoption of the third energy market package does not entail any new restrictions for the interconnector licence assessments of national authorities that do not already follow from the EEA Agreement.

5.5 Conclusion

The questions discussed in this chapter have been whether and to what extent the third energy market package affects national decisions to permit the building of new electricity interconnectors to other EU or EEA Member States. The conclusion is that the third energy market package as such does not influence such decisions beyond what already follows from the EEA Agreement.

The third energy market package does not set out which national institutions should be responsible for interconnector licence decisions. More specifically, it does not require the Member States to confer competence on the independent national regulatory authority to decide on licences for interconnectors. Therefore, each Member State has discretion to determine that such powers should remain with another public body, such as a Ministry or a Directorate. Under the Norwegian implementation of the third energy market package, the competence to grant interconnector licences is conferred on the Ministry of Petroleum and Energy.

Furthermore, it is clear that ACER (and, correspondingly, ESA in its "ACER function" under the EEA Agreement) does not have competence to decide on matters relating to the evaluation by the competent national authority of whether to grant an interconnector licence.

Finally, the third energy market package does not introduce any new restrictions for the interconnector licence assessments carried out by the competent national authority beyond those obligations already following from the EEA Agreement.

6 Conclusion

The aim of this article has been to analyse the impact of the EU's third energy market package on national energy resource management in the EEA Contracting Parties Norway and Iceland, and in particular the impact on public ownership of energy resources and on the building of new interconnectors. The analysis has shown that the third energy market package as such does not influence such resource management decisions to any significant extent.

The fundamental principles in the main part of the EEA Agreement, such as the rules on free movement, State aid and competition, apply to the energy sector as to other sectors of the economy. These provisions will continue to apply for the EEA Contracting Parties irrespective of whether the third energy market package is incorporated into the Agreement. Moreover, the third energy market package builds on the second energy market package that is already incorporated into the EEA Agreement. Consequently, the decision to adopt the third energy market package is not a question of becoming a member of the EU's internal energy market, but rather a question of continuing and expanding an on-going cooperation.

The decision by the EEA Joint Committee to incorporate the third energy market package comprises only the legislation adopted in 2009 and not subsequent EU legislation such as network codes and the Clean Energy for All Europeans package. A decision taken now to incorporate the third energy market package does not bind the future competence of the EEA Joint Committee any more than the adoption of the second energy market package does in the evaluation of the third package.

With respect to public ownership of energy resources, it follows from Article 125 EEA that each Contracting Party is entitled to pursue a policy of public ownership of energy resources provided that the policy does not contradict the fundamental rules in the main part of the EEA Agreement. In line with this principle, the third energy market package does not

include any provisions that directly regulate the right of Member States to pursue a system of public ownership of strategic energy resources.

Considering interconnectors, the third energy market package does not influence national decisions to permit the building of new electricity interconnectors to other EU/EEA Member States beyond what already follows from the EEA Agreement. First, the third energy market package does not regulate which national institutions should be responsible for interconnector licence decisions. More specifically, it does not require the Member States to confer competence on the NRAs to decide interconnector licences. Therefore, each Contracting Party has discretion to determine that such powers should remain with another public body, such as a Ministry or a Directorate. Second, it is clear that ACER (and, correspondingly, ESA in its "ACER function" under the EEA Agreement) does not have competence to decide on matters relating to the evaluation by the competent national authority of whether to grant an interconnector licence. Finally, the third energy market package does not introduce any new restrictions on the interconnector licence assessments carried out by the competent national authority beyond those obligations already following from the EEA Agreement.

From the role of classification societies, to theories of norms and autonomous ships – some cross-disciplinary reflections[1]

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[1] The essay is an expanded version of a presentation given at DNV-GL 30 April 2019 as part of a seminar entitled 'Maritime classification in perspective'.

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Contents

1 The dual role of classification societies

As readers will know, DNV-GL is the abbreviation of Det Norske Veritas – Germanischer Lloyds. The term 'veritas' carries an important symbolic value. Veritas means truth, and truth has a close connection to trust. Those renowned for stating the truth will enjoy peoples' trust. DNV-GL takes on the role of stating the truth in a number of ways. Truth, used in this sense, typically involves empirical knowledge and empirical sciences. Trust invested in such a truth may involve trust in the legal sense. And if the foundation for such legal trust should fail, liability may ensue. Hence, what I am seeking to introduce through these general terms is the idea that DNV-GL – or other classification societies (hereinafter: 'Class') – has an important empirical role to play, and that this role within the realm of empiricism transcends into the realm of law.

Some examples: In the area of ship safety and seaworthiness, Class establishes empirical standards and applies these standards through its licensing and approval systems. These tasks are delegated by governmental agencies, and hence *entrusted* to Class. And within the community at large, *trust* is placed in the fact that these tasks are fulfilled in a truthful manner; that the empirical basis for ship safety standards is sound, and that the licensing process for approving ships according to these standard is performed in a sound manner.

This example of delegated authority by governmental authorities involves areas of public and administrative law. However, the tasks performed by Class play an equally – if not more – important role in private law, specifically in contractual relationships. Ships must be built according the requirements of Class and will not be in a contractual state of delivery unless approved by Class. And the same key role is played by Class in virtually all contracts relating to ships which, in one way or the other, require the ship to meet certain requirements of Class: marine insurance, ship finance, charterparties, and secondhand sale and purchase.[1]

[1] Of these examples, Class's connection to marine insurance is perhaps the most predominant one, also taking into account its origin as an agent for marine insurers to

As a result, one can state without hesitation that Class, by providing empirical standards and adopting them in licensing processes relating to ships, is a cornerstone of everyday life – in many ways bridging safety considerations arising from both the private and public societal sectors.

If we stick to the legal perspective, one can say that Class is not a prime legal player, nor is it intended to be. In my first example, the legal players are the governmental agencies delegating the said ship safety tasks to Class. In the second example the legal players are the parties to the contract, for example the shipbuilder and the buyer. Class here plays an important facilitating role, by providing the key requirements for enabling the contract to be fulfilled, or conversely, the means for ascertaining that it is not fulfilled.[2]

I mention this point because the law may have some difficulty in properly positioning the role of certifying agencies, such as Class, within its system. The legal system by and large revolves around what might be called the prime legal players. Again some examples:

When delegated tasks concerning ship safety are entrusted to Class by governmental agencies, questions may arise as to whether the 'semi-private' role of Class is subject to the same legislative requirements as those applicable to the governmental agencies themselves – e.g. under the Public Administration Act ('forvaltningsloven' 1967) or the Public Accessibility Act ('offentlighetsloven' 2006).[3]

Moreover, if Class fails in its function, leading to a third party suffering damages, it may be unclear as to how its role should be legally assessed. One example is that of the English case, *The Nicholas H*,[4] which deals with the concept of duty of care under English tort law: does Class owe a duty of care to a third party cargo owner, when – wrongfully as it

assess the insurability of any given ship. However, for the purpose of this essay marine insurance plays no particular role.

2 A case involving difficult questions concerning the requirements for delivery under a shipbuilding contract where Class issued a provisional notation, is found in the *Fernbay* (ND 1974.27) – as further discussed in my article, *Naturalkreditors avvisningsrett* (buyer's right to reject delivery), LoR, 2015 pp. 487 et seq.

3 See Kristina Maria Siig, *Private classification societies acting on behalf of the regulating authorities within the shipping industry*, Marius 482/SIMPLY 2016, p. 215 et seq.

4 *Marc Rich & Co. A.G. v Bishop Rock Marine Co. Ltd.* [1995] 3 WLR 227.

turns out – Class allows a ship to sail and the ship sinks with the cargo being lost? The Supreme Court (then House of Lords) held, by a majority, that no such duty was owed. Policy considerations played an important part: it would not be "just and reasonable" to impose such a duty on Class, given its status as a non-profit entity promoting the safety of lives at sea.[5] Whether the result would be the same under other jurisdictions is hard to predict.[6]

Furthermore, if Class were to fail, in the sense that its empirical input forming part of a contractual relation was incorrect, the ensuing problems would normally be resolved within the remedial system of the contract itself, not involving Class which is not party to the contract.[7]

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5 The result was also influenced by other policy considerations: the aggrieved party also sued the shipowner of the *Nicholas H* and that case was settled, so that the excess amount of damages, fixed at USD 500.000, then constituted the claim against Class. If this claim were to succeed, it would have the unfortunate effect of upsetting the Hague-Visby scheme of limitation of liability applicable to claims against the shipowner. In other words, a successful claim against Class would in that respect represent a windfall to the aggrieved party. The case has been criticised for unduly expanding the restrictive criteria in English tort law involving mere financial losses, to making them also apply to cases involving property losses; in the *Nicholas H* the negligent act of Class was not that of issuing a wrongful statement about the condition of the ship on which the aggrieved party relied, but that of negligently allowing the ship to sail. John Cooke, *Law of Tort*, 8 Ed., 2007, p. 43, states about the *Nicholas H*: "[It] is one of the most conservative decisions on duty of care. It was held that the four requirements necessary for a duty of care in economic loss cases were equally applicable to cases of physical damage to property. […] Any student wishing to see the disarray and disagreement among the senior judiciary on this issue should read the majority judgment of Lord Steyn and compare it with the dissenting judgment of Lord Lloyd."

6 Under Norwegian law no tort claims involving Class have been tried, but generally tort claims may succeed for mere financial losses, incurred in reliance on wrongful statements issued by someone realizing that the statement may be relied on – as in the case of wrongful statements by real estate appraisers ('takstmenn'), Rt. 2008.1078. See generally, Viggo Hagstrøm, *Obligasjonsrett* (the law of obligations), 2002, pp. 804–813. Under U.S. law tort claims against Class have succeeded, see *Otto Candies L.L.C v Nippon*, U.S. Court of Appeals for the Fifth Circuit (17 September 2003) p. 8, involving negligent misrepresentation relied on by a third party (buyer of a ship). An international overview is given by Denise Micallef, *A legal analysis of the limitation of liability of classification societies*, CMI Yearbook 2015, p. 223–241 (accessible at: comitemaritime.org).

7 To be more specific: If the party suffering contractual losses by reason of a mistake by Class is the party having engaged Class's services, a possible recourse/indemnity claim against Class would then be subject to Class standard terms and conditions, typically

To sum up: What I have sought to highlight is, first, that the role of Class brings empirical knowledge into the realm of law, and second, that the role of Class, within the legal realm, is a kind of hybrid, having characteristics not easily placed within traditional legal categories.

2 Sundby's theory of norms and its relation to empirical realms

I wish to hold on to that hybrid perspective, in dealing with the role of Class and its bringing of empirical data into the realm of law, while turning to a more abstract area, namely that of analyses of legal norms and their empirical equivalents.

The legal theorist Nils Kristian Sundby (1942–1978) was preoccupied with law and transdisciplinary matters. From a starting point of analyzing legal norm he broadened the perspective and examined the relationship between normative and empirical phenomena in general. Some of his thoughts are of interest to our topic.

First, Sundby – together with Torstein Eckhoff (1916–1993)[8] – explored whether analyses of legal norms could benefit from the insight derived from general studies of regulatory systems, such as cybernetics[9] or

containing a disclaimer and/or limitation of liability. If the party suffering contractual losses is the counterparty (not having engaged Class's services), a claim for damages against Class would have to be based on tort, with the legal uncertainties as discussed above. The *Nicholas H* involved such a constellation; Class's mistake rendered the shipowner in breach of its contractual obligation to carry the cargo which was lost, hence the shipowner was sued, together with Class.

8 In the book *Rettssystemer* (legal systems), 1975.

9 As readers will know, *cybernetics* (from Greek: 'helmsman') is the term used for the study of regulatory systems of feed forward and feedback, typically in man-made devices. A simple example would be a thermostat regulating the output of a heating unit by the use of sensor input from the ambient temperature (feedback), to maintain a set temperature (feed forward). Or the system could be more complex, like ship autopilots: by the setting of a given course, sensors measure the ship's position relative to the course and, in case of departure from it, give corrective rudder input so

homeostasis.[10] This is of interest since, as we shall later see, autonomous shipping is at the core of the discipline of cybernetics. Sundby and Eckhoff's motivation for adopting such an approach was that, in their view, legal theory had up until then been too preoccupied with analyzing legal norms as if they constituted closed and/or static systems – thus failing to take into account what they saw as central feature of any legal system, namely its propensity to change, typically brought about by its dynamic input/output relation to its surroundings.[11]

Sundby and Eckhoff's attempt to adopt such theories of regulatory systems may be said to have taken on a rather rudimentary form.[12] Their

that ship is kept on course. Or it could be the more complex adaptation of the same basic principle in the Dynamic Positioning (DP) of ships in the offshore sector – or, even more complex, in today's development of algorithm-driven steering units for autonomous ships, or other robotics. This is of particular importance to Norway, since the Department of Cybernetics at NTNU (Norwegian University of Science and Technology, in Trondheim) is at the forefront of the international development, with a marked history of success involving i.a. the development of the said DP-system, through its driving force, Professor Jens Glad Balchen (1926–2009).

10 *Homeostasis* signifies the similar regulatory mechanisms aiming at obtaining various sorts of equilibrium in living organism, such as the system for maintaining constant body temperature, e.g. in humans.

11 The following passage from *Rettssystemer*, p. 12, is illustrative: "In legal theory there are several attempts at discussing such connecting factors within law and towards its surroundings. But these discussions are, by and large, characterized by something incomplete and arbitrary. The reason for this, in our view, is that philosophy of law has underestimated the particular feature of law which consists of it being a *system*, a holism marked by complicated internal processes and complicated interactions with its surroundings in the society at large. In our view it is only by taking as a starting point the systemic character of law, that it becomes possible to acquire an adequate perspective on its fundamental components. And it is only by searching for those features and processes which characterise the legal system, when considered as whole, that it becomes possible to understand how the system is constantly changing and constantly influences, and becomes influenced by, its surroundings. In traditional legal philosophy there has been too strong a tendency to present law as a *static* system. There has also, e.g. in Kelsen's "The pure theory of law", been a tendency to describe law as a *closed* system." (my translation)

12 Again, a passage may be telling, from *Rettssystemer*, p. 14: "The fact that the openness of the legal system is accentuated does not mean that we ignore those mechanisms of the system which contribute to protecting it against external influences. Here we have in mind such phenomena as the principle of independence of the courts, and the legal argumentative technique which makes it difficult for outsiders to monitor and control what happens within the system. With a perhaps far-fetched analogy – taken

main endeavours consisted of developing the required definitions, categorizations and delineations in order to establish what in their view, and for their purposes, constituted a "system": its subject matter (norms of various sorts) and its factors of influence (human activities and attitudes of various sorts). Their efforts can therefore probably be characterized more as a sketch of a system, rather than any sort of quantifiable and operative cybernetic system (which in any event would appear to be unrealistic to achieve). At any rate, Sundby and Eckhoff's ambition of placing theories of law on a par with contemporaneous transdisciplinary scientific insights, was clearly commendable. Perhaps surprisingly, no one seems to have picked up the subject from where they left it in the mid-seventies.[13]

This leads us to a s*econd* point, relating to Sundby's main work on the analyses of legal and other norms.[14] This work is again marked by his ambition to expand on the traditional understanding and analyses of norms which, in Sundby's view, had too narrowly dealt with only two categories of norms: deontic norms (duties or directives in their various forms) and norms of competence (norms facilitating the creation of new norms), as well as the interplay between the two.[15] In Sundby's view such a narrow approach failed to take into account what he considered to be an overarching type of norms which he chose to call qualification

from Luhman [Soziologische Aufklärung, 1970 p. 38] – one could say that there are features of the legal system similar to those regulatory mechanisms in organisms […] which contribute to keeping certain inner conditions (e.g. the body temperature and constituents of the blood) staying virtually constant, despite heavily changing external influences." (my translation)

13 It is of interest to look up Wikipedia on cybernetics, including second-order cybernetics (the study of the studying of regulatory systems; cybernetics applied to itself), where a number of scientific areas are mentioned as having been influenced (biology, psychology, sociology, anthropology, medicine, linguistics, architecture, organizational theory) but with no mention of law and legal theory – although Sundby and Eckhoff were, within the confines of the Nordic academic community, alert to it.

14 Sundby *Om normer* (on norms), 1973. I will here be using the second edition from 1978.

15 See Sundby (1978) e.g. pp. 3, 9, 50–63, 110–117, 393–396. The interplay mentioned here is marked by the idea that all norms of competence can indirectly be derived from (conditional) deontic norms, as was the view taken by the Danish scholar Alf Ross, Ibid p. 393–396.

norms;[16] norms giving the criteria for – thus "qualifying" – what will "count as" something in a given normative context. This may appear elusive but for example: there are norms making something qualify as a "goal" in football, or as a "valid" move in chess. Similarly, there are numerous examples within law: the norms establishing the criteria for (valid) legislation, a (valid) administrative decision, the criteria for acquiring of ownership to property, etc.[17]

As Sundby saw it, this type of norms – qualification norms – were not signified by any deontic nature,[18] nor were they confined by the typical criteria of norms of competence. They were instead norms of an overarching nature, establishing the criteria for the identification of any normative phenomenon, while at the same time they could take on a concrete form, as in the examples mentioned above.

There is no room here for further exploration of this theory of norms, other than to point out that Sundby's work has been influential, both in legal philosophy and in the more doctrinal area of law.[19] Moreover,

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16 In Norwegian: 'kvalifikasjonsnormer', which could also be translated as 'eligibility norms' – see, generally, Sundby (1978) p. 3 and pp. 77 et seq. – see also *Rettssystemer* pp. 84–107. The term seems to have been introduced originally by the Swedish scholar Tore Strömberg in his article *Lathund för lagläsare* (simplified guidance for readers of legislative acts) published in *Logik, Rätt och moral* (logic, law and morals), 1969, pp. 191–205, and adopted by the Swedish scholar Karl Olivecrona in *Rättsordningen* (the system of law), 1966.

17 Those acquainted with Nordic legal theory will note the relationship between such qualification norms (or fragments of norms) and the notion that certain legal key terms (e.g. 'ownership') serve no independent semantic function but are mere structural connecting terms ('koplingsord') for more comprehensive legal phenomena. In the context of maritime law, it is worth noticing Sjur Brækhus' interest in this area, see: *Juridisk begrepsdannelse. Et bidrag til den aktive rettskildelære* (creation of legal concepts – a contribution to the active legal argumentative technique), in *Sjørett, voldgift og lovvalg* (maritime law, arbitration and choice of law), 1998, p. 379 et seq. – where he viewed e.g. ships' 'nationality' as mere 'koplingsord' (p. 394).

18 Although they are marked by the means of *facilitating* various type of conduct, within the scope of what is the subject matter of the qualification, Ibid, p. 99.

19 First, Sundby's analyses of qualification norms in *Om normer*, is by and large directly transferred (but in a compressed form) into *Rettssystemer*, including his main idea that norms of competence constitute a sub-category of qualification norms, which makes good sense in Sundby's system: norms of competence establish the criteria for the creation of new (valid) norms and therefore necessarily constitute an important example of qualification norms – see *Rettssystemer* pp. 84–108.

the topic is of interest since the task of Class to a large extent involves qualification norms in the Sundbyan sense: will a ship qualify as being "seaworthy" under such-and-such conditions, according to the requirements (criteria) as expressed in a given legal instrument? And by taking this perspective, all aspects of standardization come into play, not only the typically quality-oriented licensing and approval performed by Class, but also the more quantitative standards of measurement or calibration of various sorts, such as those provided by ISO[20] or similar agencies. These are of great practical importance, and increasingly so,[21] but have attracted little legal attention, other than in Sundby's work.[22]

Third, and as an extension of the foregoing, Sundby explored ways of bridging the understanding of empirical and normative tasks or sciences, by pointing to how "qualifications", in their various forms, would play a role in both.[23] For example: the process required to have something obtain the status of – and thus qualify as being – "valid" legislation, would clearly be normative in nature. Conversely, the process required to

Second, the term "qualification norms" is also introduced in doctrinal textbooks, see Eivind Smith/Torstein Eckhoff, *Forvaltningsrett* (public administrative law), 2009, p. 49 but, surprisingly, with the norms of competence and qualification norms being presented on the same hierarchical level, and with no explanation as to the origin of qualification norms, as presented by Sundby in *Om normer* and by Sundby/Eckhoff in *Rettssystemer*.

Third, the term is adopted in Svein Eng, *Rettsfilosofi* (legal philosophy), 2007, but there again with – in my view – no fair representation of Sundby's original idea behind the term, see *Rettsfilosofi* p. 108–109 and footnote 38 on p. 109, describing Sundby's thinking on the origin of the concept as "lacking in clarity" ('dunkel').

20 International Organization for Standardization, located in Geneva, Switzerland, having 164 national standardization agencies as members.

21 In the environmental sector there is an increasing emphasis on third party certification of environmental declarations, as that performed by EPD-Norge (EPD=Environmental Product Declaration), and which is used to compare the environmental profile of goods and services, e.g. in respect of bidders in public procurement processes.

22 Sundby (1978) p. 81–83, discussing in particular technical standards used in construction works (building sites) and how these can be viewed from various normative perspectives – see also *Rettssystemer* p. 87.

23 "Qualifications" – whether used in the normative or empirical realm – derive from linguistic propositions ('språklige utsagn') which by and of themselves may not be determinative as to where they "belong" – that depends on the perspective taken as to what shall constitute the one realm or the other; the empirical or the normative, Ibid, e.g. p. 100.

achieve a successful outcome of a practical task (for example a diagnosis in medicine), would typically be empirical in nature. Such practical tasks may also be "qualified" in various ways, but that would not involve qualification *norms* in the Sundbyan sense.[24] Sundby therefore distinguished between what he called strategic considerations in the empirical realm, and normative constituents in the normative realm – while realising that there may not always be clear distinctions between the two.[25]

Also this is of interest to us. We have already seen that Class takes on a type of hybrid role, operating in the empirical realm (establishing ship safety standards etc.) while transcending into the legal realm by applying those standards in a typical normative/legal context. We shall soon see how this dual role may also play a part in autonomous shipping; here, a typical normative instrument – the COLREG rules – can be used as an empirical-strategic means of achieving the goal of ship collision avoidance.[26]

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[24] Ibid, p. 102: "Both applied research and what are often called technical sciences (engineering, medicine) aim at resolving practical, purpose-oriented tasks. Linguistic propositions ('utsagn') within these realms may be seen as prescriptions on how one can reach certain goals (secure bridges, health care) through the most efficient means. These are indicatives [empirical propositions], information on how one should proceed to achieve certain effects. These propositions "qualify" certain procedures as suitable means and are sometimes expressed by the use of 'should-sentences'. Nothing in that transforms them into norms in my terminology, the technical 'should' with which we are here confronted, is indicative not normative." (my translation)

[25] A curious example is given, Ibid p. 103: Compliance with bakery recipes would typically not be considered to involve a normative aspect; if one fails to comply and the end product turns out to be unsuccessful, one would typically not form a judgement on whether the product meets the (normative) criteria of e.g. the recipe for the Christmas cake 'fattigmann' – the product has simply failed as a strategic empirical endeavour. On the other hand, a narrowly defined product, such as the ingredients required to constitute Coca Cola, may perhaps transcend into the normative realm; a failure here would lead to the product not "qualifying" (not being eligible) as Coca Cola.

[26] Another example of what may be seen as transcending from empirical to normative realms, is the ongoing work within IMO (International Maritime Organization) to categorize and define various degrees and constellations of automation of ships to provide a framework for possible later legislation. A critical analysis of the ongoing work is given by Henrik Ringbom, *Regulating Autonomous Ships – Concepts, Challenges and Precedents*, Ocean Development & International Law, 50:2–3, 141–169, DOI: 10.1080/00908320.2019.1582593.

3 Autonomous ships – an intersection of empirical and normative realms

From these overriding – and somewhat abstract – observations concerning legal norms and the role of Class, we turn to a topic of more direct relevance, namely that of autonomous shipping and the significance of cross-disciplinary approaches.

In simple terms: Algorithm-driven software combined with multi layered sensor systems and telecommunicated data flow, is the means by which ships operate on their own; become "autonomous". This is, first of all, a prime example of cybernetics: a system of feed forward and feedback nurturing on a required sensor input in order to operate as programmed – within the parameters and capabilities of the system.

An autonomous ship, depending on one's perspective, is capable of conduct – if measured against a manually operated ship. For autonomous ships to behave "properly", the natural starting point may be to look to the rules for collision avoidance: the COLREG.[27] These are the "Rules of the Road", designed to guide human conduct in the command of ships in order to avoid collision and ensuing damage.[28] They may therefore be considered suitable as a template for translation into algorithm-based machine learning and thus "prudent" machine conduct.

Machine learning is, however, not equivalent to human understanding. Even though computer software designers may have come a long way in quantifying and categorizing machine choices by the use of COLREG, this type of pre-determined "conduct" is not the same as prudent conduct in the human sense. Prudent conduct in the human sense involves the

[27] *Convention on the international regulations for preventing collisions at sea*, 1972, which forms part of Norwegian law as well as that of most shipping nations. Admittedly, ships are also prone to cause damage outside the area of ship collision, but (prudent) naval conduct deriving from sources other than the COLREG has attracted little interest in the context of autonomous shipping – see the below examples taken from Norwegian court cases on the general concept of culpa.

[28] See as illustration Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *Scandinavian maritime law. The Norwegian perspective*, 2010, p. 234–237.

overriding concept of culpa (negligence), which in turn is based on the human faculty of understanding; typically an after-the-event assessment of whether an instance of damage – a collision – could and *should* have been avoided by those involved. In that respect, compliance or non-compliance with the COLREG may serve as guidance, but often as nothing more than that.[29] In other words, an after the event assessment of what should have been done and by whom to avoid a collision, is not the same as saying what kind of conduct would realistically be programmable to constitute prudent human conduct.

In the realm of law, each case tends to be too facts specific to warrant such translation of programmable conduct. Furthermore, court cases may illustrate important differences of opinion on key aspects of relevance to such pre-programming. This may involve disagreement on how the COLREG are to be correctly construed and applied in any given situation, or it may involve disagreement on what – all matters considered – did constitute prudent conduct by those involved, or it may involve assessment of the respective party's degree of fault, if having failed to act prudently.

It will suffice to look into some of the collision court cases to gather an understanding. A few exmples:

First, the Supreme Court case, *Ingerfire* (ND 1967.157): Ingerfire, being deeply loaded, sailed into a narrow strait with restricted depth conditions. She kept to her port-side, which was *prima facie* in violation of the COLREG[30] but was occasioned by her deep draft and therefore, possibly, justifiable. Gloria entered the strait from the opposite direction and held to her starboard-side, *prima facie* in compliance with the COLREG, relying on the Ingerfire to change her course to starboard as

[29] A parallel may be taken from the "Rules of the Road" for roads ('veitrafikkreglene'), which essentially set out quantifiable rules of conduct for road traffic (following traffic signs on speed limits, etc.) but where, quite independently from compliance or non-compliance with such rules, there is the overriding duty to act with due care, violation of which is subject to criminal liability, see Veitrafikkloven (the Road Traffic Act) 1965, Section 3 cf. Section 31. Similarly, the COLREG Rule 2 (a) contains an overriding duty to act with due seamanship, a duty which could be seen as containing the general concept of culpa. For the purpose of this essay, we do not go into that type of detailed analysis of the COLREG rules.

[30] At the time the COLREG-convention had not been enacted and the applicable rules were an earlier Norwegian version of the 'sjøveisregler'. For the present purpose that distinction is immaterial.

required by the COLREG, which Ingerfire did not and could not. Ingerfire gave sound signals to the effect that she would stick to her port-side course, but these were not heard by Gloria (and in any event they were held not to be in compliance with the COLREG, although the different court instances disagreed on this point).[31] Gloria eventually backed up but the ships were already on colliding course, and collided. Blame was apportioned 50/50 (but 25/75 in the Court of Appeal, by a majority). Ingerfire was blamed for having created the dangerous situation by sailing to her port-side (despite her having a local pilot onboard advising that local custom overrode the COLREG, entitling her to follow that course). Gloria was blamed for not having noticed Ingerfire's sound signals (although these were possibly not in compliance with COLREG but would in any event have had an alerting effect) and not otherwise having realized Ingerfire's intentions, which were discernable from her deep draft combined with the depth restrictions discernable from the map.[32]

It is not easy to see how this type of situation, involving the construction of COLREG and the reading of the other ship's intentions, would be readily transferrable to machine learning.[33]

Second, the Bergen City Court case, *Fyksesund* (ND 1955.148): Fyksesund had a defective port-side navigational light when at night time encountering Ketty in a narrow strait. Ketty, seeing only Fyksesund's starboard light, believed Fyksesund was coming from a port-side cross angle and Ketty therefore steered to port to go what she believed would be behind Fyksesund, while Fyksesund in reality came from a direction straight ahead, and they collided. Also here blame was apportioned:

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31 The essence was that the COLREG required a ship giving these signals to make a marked turn to starboard, which Ingerfire did not do. However, if construing the COLREG within the context of the situation, the signals given made sense: the intention was to convey that Ingerfire would stick to her starboard, which in the circumstances meant continuing her current course. The COLREG seems not to have had any signal which better conveyed her intentions than the signal used.

32 It belongs to the story that Gloria had no draft restriction (sailing in ballast) so that it would have been unproblematic for the ships to pass starboard-to-starboard (as Ingerfire intended), although the COLREG provides for passing port-to-port. The case is a prime example of collision caused by human error, but is not the same as saying that there is an obvious answer to who failed at what time in doing what.

33 From a cross-disciplinary perspective it is worth mentioning that the communication system embedded in the COLREG may be of interest to illustrate interfaces between linguistics (semiotics) and legal norms. In the Ingerfire the Supreme Court makes the point that by using COLREG signal systems, the ship giving signals is only entitled to represent its own intentions, not to impose duties on the other ship. That may, however, be a question of perspective, since the other ship will clearly have to take signals given (and received) into account when deciding how to act. The topic therefore involves potentially complex topics of the relationship between deontic norms and norms of competence, and their interrelation with semiotics.

25% on Fyksesund for having created the dangerous situation, and 75% on Ketty for not having slowed down to assess the situation; from the map it would appear unlikely that a ship would come from the direction Ketty believed Fyksesund was coming.

Here it is also not easy to see how this overall situation, complicated by a defective signal system, would be readily transferrable to machine learning. Admittedly, with today's technical devices – radar (including ARPA[34]), AIS and GPS chart plotters – it is unlikely that this type of situation would occur, but problems caused by a defective signal system would in principle remain, creating challenges in both machine-machine ship encounters and machine-human ship encounters.

Despite this skepticism, it is probably the case that the COLREG will and should form the natural starting point when endeavouring to program "prudent" machine conduct. At the same time, it does seem that the interdisciplinary exchange between computer engineers and lawyers would be a key factor in acquiring the required insight into this interplay between the COLREG and the legal concept of culpa – as part of the process of determining machine conduct and of realising its boundaries.

From these practical considerations we move on to a more abstract topic, reintroducing Sundby's conception of qualification norms and their possible relevance to machine learning and autonomous ships.

In law, the norm of culpa is traditionally seen in the deontic sense of establishing a duty of conduct; a duty which, if breached, forms the basis for a claim for damages by the aggrieved party. By the same token, the norm of culpa may provide guidance as to what interests are protected by the norm. The English concept concerning the issue of to whom a duty of care is owed, gives an example of this.[35] Equally, under the Norwegian doctrine, similar notions are raised as to the type of interests being protected ('rettslig vernet') by the norm.[36] The nature of the duty

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[34] Automatic Radar Plotting Aid – a system, being an example of cybernetics, which calculates the speed and course of radar-detected objects, thus predicting the risk of collision.

[35] As in the previously mentioned case, *The Nicholas H*.

[36] See e.g. Erling Hjelmeng, *Revisors erstatningsansvar* (auditor's liability in damages), 2006, p. 23, with reference to Sundby, *Om normer*, pp. 65 et seq.

and the question of whom the duty is designed to protect, are two sides of the same coin.

To see the culpa norm in terms of qualification norms is less common. However, Sundby did briefly introduce such a perspective.[37] Apart from a norm of duty, the culpa norm may be seen as establishing the criteria for what will "count as" prudent conduct.

Such a perspective may be of interest when trying to transform the culpa norm into programmable machine conduct. Here, there is no question of duty, in the legal deontic sense. It is a question of adopting an empirically based strategy, in order to achieve the goal of collision avoidance. This empirical strategy does not – at least not primarily – entail the imminent character of a normative instrument triggering a claim for damages if the programmed conduct were to go "wrong" – as would be the typical legal way of looking at it. Computer engineers may – in the Sundbyan sense – "qualify" programmable machine conduct, but without such machine conduct belonging to the legal realm of duties and rights.[38]

This may in turn assist in divesting some legally oriented minds of the misconception that programmed machines making "mistakes",[39] and

[37] Sundby, *Om normer*, pp. 112–113, where he discusses various forms of (unsanctioned) deontic norms within the perspective of qualification norms. Svein Eng, *Rettsfilosofi* (philosophy of law), 2007, p. 108–109 takes the view that to look at deontic norms from the perspective of qualification norms, is without interest, as it does not add to the understanding of a given deontic norm – a view which seems to ignore the overarching insight Sundby tried to convey when introducing the concept of qualification norms.

[38] This example may be illustrative of Sundby's attempt, discussed above, to test out borderlines between mere qualifications in the empirical sense and qualification norms.

[39] The term is put in quotation marks since the concept of "mistake" is here misplaced; regardless of whether a machine acts in a way wished for or unwished for (causing damage), it acts as predetermined. It seems that the language here lacks proper terms, being tainted with the notion of juxtapositioning human conduct with that of machines designed to imitate human conduct. Perhaps the term "defective" machine conduct would be better, but that also begs the question: what is really "defective" within the parameters of technically determined machine conduct? In contract law, the answer to such questions may be readily provided by the requirements of the contract – and similarly in tort legislation, providing for strict product liability. However, in tort liability based on culpa, there is no similar ground for attaching liability to mere "machine failure", which is the prime reason for the development of strict tort liability in this area, e.g. under the Norwegian case law based doctrine of 'ulovfestet objektivt ansvar' (unlegislated strict liability).

thus causing damage, can then be held liable for "culpable" conduct.[40] Moreover, this type of perspective may help in seeing more clearly that those doing the machine programming are not, so to speak, legally placed at the scene where their programmed conduct may go wrong. The "fault" of an autonomous ship is clearly not tantamount to that of the programmer, who may (or may not) have failed to realize that such a fault might occur. The legal standard for the conduct of programmers is in that sense detached, temporally and spatially: the standard is that of prudent programming behaviour, attaching at the time the relevant programming was made. In other words, the normative question involving culpa would here be whether the relevant person exercised reasonable care in the process of programming; that is, whether the type of mishap which eventually ensued was reasonably foreseeable as part of the overall information a prudent programmer would and *should* have at hand – to prevent such a mishap.[41]

One further observation is that the licensing and standardization of such machine programmed autonomous systems may become the task of Class, thus creating a typical qualification norm in that respect – on a par with other standards established and applied by Class, such as that of seaworthiness or other safety aspects, which in turn involves important aspects of trust on a societal level, as mentioned earlier.

Therefore, in the modernized world, the tendency may be towards more empirically based standards forming part of the legal realm, and in the theoretical sphere of norms, that of qualification norms taking up an ever larger part of traditional deontic norms, in line with what was

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40 See e.g. Lawrence B. Solum, *Legal Personhood for Artificial Intelligence*, North Carolina Law Review, Vol. 70, 1992, p. 1231 – who approaches matters from just such a backwards direction, by discussing i.a. whether robots, at some time in the future, may have properties entitling them to protection of constitutional rights to freedom of speech.

41 This is not to infer that computer designers or programmers would be the prime targets in legal suits for damages for such mishaps. Typically they would not. The point is to illustrate that in tort liability based on culpa, *someone* would have to have acted negligently in order for such a suit to succeed, e.g. within the system of a shipowner's vicarious liability for servants acting negligently "in the service of the ship", see the Maritime Code 1994, Section 151.

heralded by Sundby. This in turn seems to go hand in hand with strict liability in the realm of tort law, replacing liability based on culpa – but that is a separate topic not to be further explored here.

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