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Editor's preface

As with earlier issues of the Institute's Yearbook, also this issue, covering the year 2020, contains articles depicting the Institute's diverse legal areas.

Thor Falkanger's article covers questions of direct action by claimants against shipowners' P&I insurers, which in turn involves complicated questions of jurisdiction and choice of law – hence the article falls within the realm of traditional private law topics, while transgressing into key areas of insurance law and of maritime law.

My own article deals with core maritime law questions concerning exceptions from liability by the shipowner for nautical fault under the Hague-Visby Rules, and includes central methodological questions concerning the Norwegian Supreme Courts use (or lack of it) of international legal sources when construing parts of the Maritime Code which are based on the Hague-Visby Rules. The article therefore contains also comparative law aspects, and it forms part of a bigger discussion about construction of conventions aiming at harmonizing private law legislation – as did my article in SIMPLY 2019 concerning the Hague-Visby Rules and its relation to choice of law questions arising under the EU Regulation Rome 1.

Alla Pozdnakova's article gives insight into a new area of law in which the academic staff of the Institute has been extensively involved: space law and the main principles of it being covered in recent Norwegian draft legislation. Alla served as member of the expert committee, appointed by the Ministry of Trade, tasked with preparing the draft legislation, while the expert committee was chaired by another professor at the Institute; Trine-Lise Wilhelmsen.

The last article by Henrik Bjørnebye and Angus Johnston covers important areas of energy law, by circling in areas of energy law which may be subjected to fundamental rights, as taken from the European Convention on Human Rights and from the EU Charter of Fundamental rights. More specifically: it looks at areas where such fundamental rights

may provide legal argument for restricting the requirements following from EU energy market legislation. The article therefore lies at the intersection of energy law, human rights law and EU competition law. Having such a wide angle, the article is written in the spirit of the Institute's educational and scholarly ambitions.

Trond Solvang

Content overview

Direct action against liability insurer – jurisdiction and choice of law issues

Two Norwegian Supreme Court decisions related to the Lugano Convention of 2007

Thor Falkanger[1]

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Contents

1. The background for the two decisions

In December 2015 in Indonesian waters, *Thorco Cloud* and *Stolt Commitment* collided. *Thorco Cloud* sank, and six members of its crew were lost. These casualties resulted in two important Supreme Court decisions: HR-2018-869 (*Stolt I*) and HR-2020-1328 (*Stolt II*). The issue concerned jurisdiction of Norwegian courts and choice of law, caused by a direct action suit against the insurers of *Stolt Commitment* for the loss suffered, combined with a claim for damages against the insured at the same venue.[2]

The decisions are based upon the 2007 Lugano Convention, which is made part of Norwegian law.[3] The Lugano Convention of 2007 is *lex specialis* in conflict with national rules.[4] The previous convention (Lugano 1988) – also adopted as Norwegian law – was at the points of interest in our context similar to the present rules, meaning that judgments concerning Lugano 1988 are still relevant.[5]

In 2 below I provide a description of the parties and a survey of the somewhat complicated procedural history before giving a more detailed explanation of the arguments used by the judges. The questions on the direct action against the insurer are dealt with in 3 and 4. Whether there also is venue for the claim against the insured is the topic in 5. A summary of the decisions in *Stolt I* and *Stolt II* is given in 6 – with some information on the further litigation development. Finally, in 8, I venture some reflexions on the two decisions.

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2 The translations from the two decisions in this article are primarily from translations provided by the Supreme Court – annotated, "for information purposes only".

3 Cf. Civil Procedure Act of June 17 2005 No. 90 Section 48.

4 Rt. 2012 p. 1951 paragraph 33.

5 *Stolt I* paragraph 71.

2. The parties and the procedural story

Thorco Cloud was registered in Antigua & Barbado. The owners, registered in Marshall Islands, were A Line, which is a subsidiary of Thorco Shipping A/S in Denmark. At the time of the accident, the vessel was on a bare boat charter to Marship, a German company. P&I insurance was with Standard Club, England, and hull insurance with Mitsui, Japan.

The other vessel was registered in the Cayman Islands and owned by Stolt Commitment B.V in the Netherlands. The vessel was in December 2015 on a bare boat charter to Stolt Tankers in the Netherlands. The owning company and the bare boat charterer are entities in the Stolt group, which is operated from London. P&I insurance was with Gard, Arendal in Norway, and hull insurance was with Gard ME, also domiciled in Arendal, Norway.

Phase one:
The owners, the bare boat charterer and both insurers of *Thorco Cloud* instigated proceedings against the P&I insurers of *Stolt Commitment* in Norway, as well as against the Stolt companies (hereinafter Stolt) at the domicile of Gard, demanding a declaratory judgment that there was in principle liability for the loss suffered.[6]

The Gard companies objected that the chosen court had no jurisdiction according to the Lugano convention.

On the jurisdiction question, the court of first instance:

- dismissed the Thorco insurers' claim against Gard,
- accepted jurisdiction for owners'/charterers' claim (for the sake of simplicity: Thorco's claim) against Gard,
- dismissed the claim against Stolt.

[6] Indicated up to USD 120 million.

The two last issues were appealed, and the Court of Appeal:[7]

- confirmed jurisdiction for Thorco's claim against Gard,
- accepted jurisdiction for the claim against Stolt.

Both Gard and Stolt appealed to the Supreme Court (the *Stolt I*-case), which in a majority decision[8] (three factions):

- set aside the confirmation of jurisdiction for Thorco's claim against Gard,
- set aside the acceptance of jurisdiction for Thorco's claim against Stolt.

On both counts the reason was incorrect interpretation of the Lugano Convention.

Phase two:
In the rehearing, the Court of Appeal[9] held that both the claim against Gard and against Stolt were inadmissible.

On appeal to the Supreme Court (the *Stolt II*-case) we once again had a divided court (3-2). The majority found that the Convention was wrongly interpreted in the case against Gard, and as the case against Stolt was contingent on venue for the suit against Gard, both decisions of the Court of Appeal were set aside.

7 LA-2016-170365.

8 Questions on jurisdiction are decided by an "order", not a "judgment", and according to Norwegian procedural rules, the competence of the Supreme Court is then limited to questions of correct procedure and interpretation of written law including international conventions. Accordingly, the result of an appeal is in principle either a confirmation or a setting aside conclusion. See *Stolt I* paragraph 68.

9 LA-2018-82999.

3. The direct action against Gard – phase one (Stolt I)

3.1. The domestic law: the Insurance Contracts Act

In a ruling, which was not contested, the Court of Appeal had found that Thorco's action would be decided according to Norwegian law.[10] The Insurance Contracts Act (of June 16 1989 No. 69) Section 7-6 first sentence allows a direct action against the insurer:

> *"When the insurance covers the liability of the insured, the injured part may claim compensation directly from the insurer."*

This rule is mandatory, but with exceptions for, i. a., marine insurance. Gard has in its conditions an exception in the form of a "pay-to-be-paid" clause: the insured has to pay before he can turn to the insurer. However, the exception is not applicable when the liability insurer is "insolvent" (Insurance Contracts Act Section 7-8).

Section 7-6(5) states that suit against the insurance company according to this section should be instigated in Norway unless it follows otherwise from Norway's international law obligations.

As pointed out by Justice Normann, speaking for the majority in Stolt I, Section 7-6(5) was added due to the insurance companies' concern that the right to bring direct actions could lead to proceedings in countries with different legal traditions relating to actions for damages and the level of compensation.[11] The intent was to avoid such proceedings by making a direct action conditional on it being brought in Norway.

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[10] *Stolt II* paragraph 34, cf. LA-2018-82999 with a detailed discussion on the choice of law issue.

[11] Popularly called «forum shopping».

3.2. Court jurisdiction and the Lugano Convention

The general Norwegian rule on court jurisdiction is that disputes on international matters may only be brought before a Norwegian court if the facts of the case have a sufficiently strong connection to Norway (Civil Procedure Act Section 4-3). However, in practice the competence of the Norwegian court will be decided according to the Lugano Convention. [12]

3.3. Stolt I – the majority's view

The Court of Appeal[13] had in the first phase of this litigation, accepted jurisdiction, based upon Article 2(1) that reads:

> *"Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State."*

When appealed, the majority of the Supreme Court (*Stolt I*) did not agree with this conclusion.

Justice Normann said that the question was whether the Court of Appeal has interpreted the Convention correctly when concluding that Article 2(1) may also be applied in an insurance case such as the one in question. For matters relating to insurance there are comprehensive rules in Section 3 (Articles 8–14), with direct action dealt with in Article 11(2):

> *"Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted."*

The question, the judge said, is whether Section 3 provides self-contained rules on jurisdiction in insurance matters in general, and, in particular, whether Article 2(1) may supplement Article 11(2) in direct actions.

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12 See e.g. Backer, Norsk sivilprosess (2015) p. 152.

13 LA-2016-170365

The articles referred to in Article 11(2) comprise a number of possible jurisdictions, i. a. the domicile of the respondent (Article 9(1)(a)). Exercising this right is, however, subject to "where such direct actions are permitted", see above on the Insurance Contracts Act Section 7-8 and in particular the insolvency stipulation (paragraph 7-7).

The judge found that the rules in Section 3 are exhaustive and consequently that the Court of Appeal had applied Article 2 (in Section 2) incorrectly. She said that Article 2(1) indicates that other rules in the Convention may prevail as *lex specialis*, and the wording in Articles 2 and 8 indicates that Section 3 regulates jurisdiction exhaustively in insurance matters, except for the express reservations in Article 8.

She also stated:

> *"In my view, systemic concerns*[14] *suggest the same: Several of the general provisions have parallel rules in Section 3. For instance, Article 9(1) permits actions against the insurer in the courts of its domicile, and a parallel rule is found in Article 2(1). Under Article 10, concerning P&I insurance, the insurer may be sued in the courts of the place where the harmful event occurred, and a parallel rule is found in Article 5(3) on the right to sue in the courts for the place where the harmful event occurred in matters relating to tort. It is hard to understand the relevance of Section 3 if the general rules were applicable" (paragraph 78).*

Further, she found support for this conclusion in the preparatory works to the Convention and in a House of Lords decision. [15]

The Court of Appeal had referred to the ECJ's ruling of December 23 2007 in Case C-463/06 *Odenbreit* paragraph 21, where it is said that the regulation of jurisdiction in Section 3 is "additional" to the general provisions. To this she remarked that:

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[14] In Norwegian: "systembetraktninger", which means – I believe – that a rule should be interpreted so that it is in harmony with principles and rules in sectors of comparable nature.

[15] Jordan Grand Prix v. Baltic Insurance Group, of December 16 1998.

"the statement is not clear, and, under any circumstance, I cannot see that Odenbreit has such relevance as given to it by the Court of Appeal.

The Court of Appeal has also emphasised the purpose – the consideration for the weaker party, see Odenbreit paragraph 28. To this I would comment that the ECJ, in that case, referred to purpose considerations in support of an interpretation in line with the wording in Article 11(2), cf. Article 9(1)(b), which had the consequence that the injured party in addition to 'the policyholder, the insured or the beneficiary' could sue the insurance company in the courts of its domicile, see paragraph 26.

In the light of the other legal sources in our case, I cannot see that purpose considerations carry much weight. I emphasise that if the purpose were to justify the application of Article 2(1), it would entail an interpretation contrary to the wording of the Convention" (paragraphs 84–86).

3.4. Stolt I – the view of the minority

The minority (two justices) agreed with the Court of Appeal that Article 2(1) was applicable. This fraction accepted that Section 3 on jurisdiction in insurance matters is self-contained. This has been established in a number of rulings by the ECJ and by legal theory. However,

"these rules cannot be more self-contained than what they provide for themselves. When Article 11(2) states that "Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted", it is, in my view, natural to take the provision at its word: If such direct actions are not permitted, Article 8 does not apply either, which is in fact the provision stating that the provisions in Section 3 – with a couple of exceptions – are exhaustive in insurance matters. The argument that such direct claims concern insurance matters within the meaning of the Convention can thus not lead to a different result. I do not see this as a restrictive interpretation of the provision" (paragraph 120).

The minority also said that the insurer could not have been sued in courts of the claimant's domicile. Such a right can only be derived from

the separate provisions on insurance matters in Section 3, more specifically Article 9(1)(b) (paragraph 122).

In Article 2 there is a reservation: "[s]ubject to the provisions of this Convention". To this the minority remarked that the reservation "cannot give any other result as long as Article 11(2) reads as it does with respect to the application of Article 8" (paragraph 124).

The practical consequence of this is that Gard can be sued in the courts of the state of its domicile, in accordance with the basic rule in Article 2 (paragraph 121).

Regarding the insolvency requirement in the Insurance Contracts Act Section 7-6 the minority said:

> *"As emphasised by the Court of Appeal, it is also inexpedient to consider such an insolvency requirement when the court early on is to establish whether it has jurisdiction. The same may apply to any other conditions for direct action under other countries' law. The consequence of my reading of Article 11(2) is that if the action is brought in the domicile state of the P&I insurer, it is unnecessary to consider specifically the conditions for direct action as part of the review of the court's jurisdiction" (paragraph 126).*

The majority considered "purpose considerations" irrelevant, but the minority found that such considerations enforced their interpretation:

> *"The special jurisdiction rules in insurance matters are not there to protect the insurers, but their counterparties. The intent of these rules can thus not have been that an insurer cannot even be sued in the courts of its domicile, as everyone else must accept. The ECJ's judgment December 13 2007 in Case C-463/06 Odenbreit, concerning a slightly different issue relating to the interpretation of Article 11(2), demonstrates in my view that the Court takes the provision for its word – the way I believe I do in my interpretation of the reference to Article 8 in Article 11(2) – when this is in accordance with the protective intent of the provisions" (paragraph 127).*

4. The direct action against Gard – phase two (Stolt II)

4.1. The Court of Appeal decision

With the guidance given in the *Stolt I* decision, the Court of Appeal in the rehearing found (2-1) that Thorco's claim was inadmissible. Norwegian law was found applicable to the direct action. The majority held that the phrase in Article 11(2) "where such direct actions are permitted," entails that the action must be permitted *in the individual case.* In the majority's view, it had not been demonstrated that the Stolt companies were insolvent, and the action against Gard was therefore not admissible. This is in conformity with the view of the minority in *Stolt I*. The dissenting judge found that under Article 11(2) that it is sufficient that direct actions are permitted, *in general*, under the law of the chosen state. Therefore, the suit should be admitted without a preliminary consideration of whether Stolt really is insolvent.

4.2. The Supreme Court decision (Stolt II)

Thorco appealed the Court of Appeal decision,[16] and once again, the Court was divided (3-2).

For the sake of convenience, Lugano Art. 11(2) is quoted again:

> *"Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted."*

The Court stated that it is "the interpretation of this expression – the 'permitted-criterion' – that forms the heart of the matter" (paragraph 32).

[16] LA-2018-83695.

4.3. The majority's view

Justice Bergsjø, speaking for the majority, said that whether

> "*direct actions are permitted must be determined by the national law regulating the matter in dispute. Therefore, the courts must first make a choice of law and decide which state's law regulates the merits of the case. The choice of law must be made based on the choice of law rules of the chosen state, see Stolt I paragraph 90-92" (paragraph 33).*

In his more general remarks the justice says that the rules on direct action arise from a wish to strengthen the injured party's position "in practical and procedural terms", and that direct actions under Section 7-6 of the Insurance Contracts Act must be instigated in Norway.

According to the Courts of Justice Act[17] Section 36 (1), each court must assess *ex officio* whether a case falls within its jurisdiction. When making such an assessment, the court must, according to subsection 2, in most civil cases "base its deliberations on the claimant's submission, provided that it has not been demonstrated that the submission is erroneous". As a main rule, the court must rely on what the claimant or the appellant contends on matters of substance. In other respects, when deciding whether to hear the case, the court must take an individual stand on both legal and evidentiary issues, and base its ruling on the facts it considers more likely. The justice refers (in paragraph 42) to a previous decision, Rt. 2015 p. 129 (Arrow), where it is stated that the assessment under the Lugano Convention is "at least mainly" in line with what generally applies according to general Norwegian procedural law. The justice in that case added that this "does not imply that the claimant, in a case on whether or not to hear an action, must present evidence for the merits of the case"; it is sufficient that the claimant "substantiates"[18]

[17] Act of August 13 1915 No. 5.

[18] The Norwegian text is: «gjer det sannsynleg". In my translation, I would have used the word «probable» or «likely».

that the criteria for competence are met. And the court in that case "assumes"[19] that the same principle is applicable under the Convention.

Then justice Bergsjø turns to the interpretation of Article 11(2) under a number of headings: starting points and interpretive principles, the wording of the article in various languages, Norwegian case law, ECJ case law, case law from national courts, statements in reports and preparatory works, purpose and system considerations.

In his summary, the justice says that the Convention

> *"gives no clear answer to whether insolvency in [a case of direct action] must be considered in connection with the jurisdiction issue. Nonetheless, several language versions point in the direction that the courts are not to carry out an individual assessment of the right to bring a direct action in the particular case. This is the solution that, in my view, best takes into account predictability and the aim to strengthen the position of the weaker party, while it also safeguards the fundamental goal that the defendant's domicile is available. Moreover, an interpretation that implies a thorough examination of the substantive issues during the assessment of territorial jurisdiction is alien to the system. So far, I believe that it would be best to rely on the appellants' interpretation of the Article 11(2) of the Lugano Convention" (paragraph 79).*

He also remarks that the attitude in other Lugano countries varies and one cannot exclude the fact that a rule whereby it is sufficient that direct actions are permitted generally may create delimitation problems in some states. However, he finds that this cannot be decisive for the interpretation in the present case.

The conclusion is that the Convention does not imply that a direct action must be permitted in the particular case, as the Court of Appeal assumed. Consequently, the decision by the Court of Appeal must be set aside.

[19] The Norwegian text is "legg til grunn". Here I would have preferred "finds".

4.4. The minority's view

The minority agreed with the Court of Appeal majority, saying i.a.:

> *"Therefore, in my opinion, it is not sufficient that a general right to bring a direct action exists. In the case at hand, it means that Norwegian courts only have jurisdiction over the action brought by the Thorco companies against Gard, if the Thorco companies with a fair degree of probability can demonstrate that Stolt Tankers B.V. is insolvent" (paragraph 92).*

The degree of probability required is

> *"a fair chance of succeeding. The insolvency requirement will typically be met when the insured has petitioned for bankruptcy, is undergoing bankruptcy or debt proceedings or is not capable of meeting the obligations as they fall due. In other words, the criteria are as a starting point well known" (paragraph 107).*

The reasons for this opinion are summarized:

> *"The sources of law that have formed my view are primarily foreign states' case law and objective and systemic considerations" (paragraph 93).*

5. Thorco's claim against Stolt –phase one (Stolt I)

5.1. General rules on joinder of actions

Thorco's claim for jurisdiction should be seen against the background of the general rules on joinder in the Civil Procedure Act Chapter 15. Both claims must be subject to Norwegian jurisdiction. Here it is sufficient to quote Section 15-2(1)(b):

> "Multiple *parties may act as claimants or defendants in one action if:*
>
> …
>
> *b) no party objects, or the claims are so closely connected that they should be heard in the same action."*

The Lugano Convention also has rules on joinder, see Article 11(3):

> *"If the law governing such direct action provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them."*

5.2. The Supreme Court decision

As stated above, the Court of Appeal held that Gard could be sued in Norway, and found that the inclusion of the claims against Stolt was in accordance with Article 6(1) of the Convention.

When the issue was brought before the Supreme Court – *Stolt I* – the Court was divided.

For the majority the outcome was easy:

> *"The right to include the Stolt companies in the case depends on whether legal action against Gard can be brought in Norway. As I have concluded that the order in the case between Gard and the Thorco companies must be set aside, the same must apply to the court of appeal's order in the appeal case between the Stolt companies and the Thorco companies" (paragraph 107).*

The dissenting justices agreed with the Court of Appeal: when it is assumed that the action against Gard has its legal basis in Article 2, the joinder question can be answered based on Article 6(1):

> *"However, the claims must be so closely connected that it is desirable to hear them jointly to avoid the risk of irreconcilable judgments resulting from separate proceedings. The court of appeal has concluded that this condition is met" (paragraph 129).*

6. Thorco's claim against Stolt –phase two (Stolt II)

On rehearing, the Court of Appeal dismissed the case.[20] On appeal – *Stolt II* – the parties had agreed, that venue for Gard, is a condition[21] for venue for Stolt. Consequently the Supreme Court majority said:

> *"As the Court of Appeal found that Gard did not have venue in Norway, it found that the Stolt companies did not have venue either. With the Supreme Court's ruling that the Court of Appeal's order must be set aside on the part of Gard due to an incorrect interpretation of the "permitted-criterion", the refusal to hear the action against the Stolt companies must also be set aside" (paragraph 84).*

The minority agreed with the Court of Appeal's ruling that the suit against Stolt was admissible:

> *"The question whether such accumulation is possible has not been finally decided in the case. However, a completely[22] necessary and general condition for accumulation must be that the court has jurisdiction over the direct action. A certain reluctance should be exercised in accepting a direct action merely based on a general possibility of success. Depending on the fulfilment of other accumulation requirements, such an interpretation may have far-reaching consequences for the tortfeasor" (paragraph 103).*

[20] LA-2018-83695.

[21] Here I have translated "forutsetning" to "condition"; the official translation is "may also be".

[22] The Norwegian text is "helt nødvendig" I would have preferred "absolutely necessary".

7. Stolt I and Stolt II – a summary and "the thereafter"

The results of the two decisions are:

(i) Whether there is jurisdiction in Norway for the direct claim against the insurer depends upon the interpretation of Article 11(2). This article does not require that a direct action is permitted "in the particular case"; and

(ii) The Supreme Court did not clarify when there is venue for Thorco's claim against Stolt.

The litigation before the Court of Appeal has been resumed, and it has been decided that the court has competence for the direct action against Gard. The issue of hether there is also venue for the claim against Stolt has also been decided by the Court of Appeal: the court found that there is jurisdiction according to Article 6(1) and stated i.a.:

> *"The Supreme Court's majority found in Stolt Commitment II, in contrast to the minority in Stolt Commitment I, that insolvency was not a procedural requirement according to Article 11 No. 2. Against this background, systemic considerations and the relationship between the rules of the Convention imply that the insolvency requirement as a basis for the anchor suit does not include the evaluation which the court has to undertake according to Article 6 No. 1."*

The decision is appealed to the Supreme Court.

8. Stolt I and Stolt II – some reflections

The material presented to the courts in the two *Stolt* cases is vast, covering the preparatory story of the relevant legislation, the wording of the pertinent parts of the Convention in a number of countries, as well as decisions and statements from the ECJ and courts in member states. As

I cannot say that I have digested this material fully, it is with humbleness that I in the following will give some of my reflections on certain aspects of the two cases.

To my mind, the natural starting point is the contention that Thorco brought a direct action in Norway for the sole purpose of having the Stolt companies joined in the case, in order to plead the Norwegian global limitation rules in the dispute between Thorco and Stolt. The contention has not been repudiated. This gives the background for a litigation which has been enormously costly (and time consuming) – before the substantive question of liability for the collision disaster has been pleaded.

The litigation has made it quite clear that the jurisdiction for a direct action against Gard depends upon Article 11(2) of the Convention. The action is allowed when "permitted", which raises a choice of law question – here a question of either Indonesian or Norwegian law. In the second decision by the Court of Appeal – LA-2018-83695,[23] it was found that Norwegian law was applicable. This conclusion was not contested, and in *Stolt II* the majority of the Supreme Court remarked that the Court of Appeal:

> *"made a final ruling stating that the direct action brought by the Thorco companies against Gard would be decided under Norwegian law. In its order, the Court of Appeal found that the case, overall, is most strongly linked to Norway" (paragraph 34).*[24]

[23] In the first Court of Appeal decision, LA-2016-170468, the court said that the permitted criterion
"shall be understood as a reference to the law of the country where the suit is instigated, both the substantive law and the choice of law rules applicable according to international private law of the country" (my translation).
And: "It appears in clear words that Section 7-6(5) [of the Insurance Contracts Act] is s a substantive rule. The right to have a direct action is combined with the obligation to have the suit decided in Norway. The injured party has a claim against the [insurance] company only if the case is brought in Norway. The Court of Appeal cannot see it otherwise than that the rule is unambiguously based on the assumption that Norwegian law is applicable in direct suits brought in Norway, regardless of where in the world the damage occurred. The rule has to be seen as a special choice of law regulation, with priority over what might otherwise be deduced from general uncodified principles" (my translation).

[24] This is in conformity with the view of the majority of the Supreme Court in *Stolt I*, see paragraph 92.The minority said that Norwegian law followed from the Insurance Contracts Act Section 7-6(5).

The consequence is (as stated in Article 11(2)) that "Articles 8, 9 and 10 shall apply". According to Article 8 "matters relating to insurance" and jurisdiction are determined by the rules in Section 3 with two reservations: The first one, concerning jurisdiction when the defendant is not domiciled in a Convention state (Article 4), is irrelevant in our context. So is the second reservation regarding disputes arising out of the operations of a branch, agency or other establishment (Article 5(5)). Article 9 on insurer domiciled in a Convention state is, however, important. Subsection 1 gives the injured party the option to sue the insurer, either in the state where the insurer is domiciled (letter a), or in another Convention state or where the plaintiff is domiciled (letter b). Finally, Article 10 on insurance of immovable property is irrelevant.

The implication appears to be that there are no problems connected with a suit in Norway against Gard – with reservations for the solvency requirement (to which I shall revert). The minority in *Stolt I* had, however, a different view: It held that the requirement for a liability judgment against Gard, viz. the insolvency of the insured, was a condition also "for allowing the action" (paragraph 117). And this, the minority said, had consequences for the interpretation of Article 11 (2):

> *"When Article 11(2) states that 'Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted', it is, in my view, natural to take the provision at its word: If such direct actions are not permitted, Article 8 does not apply either, which is in fact the provision stating that the provisions in Section 3 – with a couple of exceptions – are exhaustive in insurance matters" (paragraph 120).*

The further consequence was, according to the minority, that allowing jurisdiction based upon Article 2(1) was correct.

Both Article 2(1) and Article 11(2) open for venue in Norway (the latter subject to the permitted issue, see below). However, the position taken by the majority opens for an alternative venue: According to Article 9(1)(b) there is venue "in another state bound by this Convention". And if the matter is seen in a broader perspective, there are a number of

jurisdiction possibilities indicated in Article 11(2) which we said were of no importance in our special case. The implications of many venues are not considered by the Court.

With the conclusion that Article 11(2) is decisive, the word "permitted" becomes crucial. As stated above, the Court of Appeal had found, with final effect that the Norwegian law was applicable, and consequently the question was whether Stolt was "insolvent". What kind of considerations has the court to take into account before accepting jurisdiction? In the litigation, two concepts have been used: a general consideration and a concrete one. The former conforms to the traditional Norwegian approach, embodied in the Courts of Justice Act Section 36 (1), stating that the court must base its decision "on the claimant's submission, provided that it has not been demonstrated that the submission is erroneous". The latter requires an evaluation of whether the insured is in fact insolvent, which may involve difficult questions both of law and facts. If, however, the jurisdiction requirement is that the insured is declared bankrupt, the difficulties are nonexistent,[25] cf. the Danish Supreme Court case Assens Havn[26] which it is referred to in *Stolt II*. With the Norwegian "insolvency" criterion, it is –in my view – a fair summing up which is given by the majority in *Stolt II*:

> *" … it would be unfortunate if the courts were compelled to consider the merits of the case before assessing its jurisdiction. This consideration suggests that one should not interpret the "permitted-criterion" the way the respondents argue. An interpretation based on the general regulation of the direct action will to a larger extent liberate the courts from the task of considering substantive conditions for the claim when determining jurisdiction" (paragraph 78).*

The weight of such general considerations and the Norwegian procedural background are confronted with the question of whether the Convention has another solution binding on a Norwegian court. The wording of

[25] This is with reservations for the rare case where it may be possible to argue that the bankruptcy declaration is invalid.

[26] Sak 15/2015.

Article 11(2) provides no clear answer. However, in accordance with the principles of autonomous interpretation, the Supreme Court majority concluded as indicated in the citations just above. See also paragraph 79 where it is stated

> *"that it would be best to rely on the appellants' interpretation of the Article 11(2) of the Lugano Convention".*

The Court's summary of the appellants' (Torco's) contention is:

> *"Insolvency is not a condition for proceedings, but a substantive condition that must be determined during the hearing on the merits. … with regard to jurisdiction … it must be sufficient to demonstrate a general right to bring direct actions under applicable national legislation" (paragraphs 21 and 22, my emphasis).*

It has been argued that this conclusion is not in harmony with the decision in HR-2019-2206 (Bring):[27] A number of European truck manufacturers had been fined by the European Commission for price fixing. The Bring companies, most of them Norwegian, had purchased a large number of trucks from these manufacturers, also from one manufacturer's Norwegian subsidiary. This subsidiary was not included in the Commission's decision. Based on the Commission's decision, Bring brought an action before the Oslo District Court against the subsidiary and the manufacturers, invoking Article 6 No. 1 of the Lugano Convention on special jurisdiction. According to this article, the manufacturers may be sued in Norway "provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". The Court referred i.a. to two previous decisions regarding Article 5 – Rt-2008-1207 regarding Article 5(1) and Rt-2015-129 (*Arrow*) regarding Article 5(3), and said:

[27] Giuditta Cordero-Moss in Nytt i privatretten No 2 2020 pp. 1517, in a critical article on the Stolt I- and Stolt II-decisions.

> *"Against this background, I conclude that when determining the international venue under Article 5 (1) of the Convention on matters relating to a contract or Article 5 (3) on matters relating to tort, the jurisdiction issue is assessed relatively thoroughly; more accurately: an assessment of whether the mentioned criteria for proceedings can be satisfied to a certain extent. Hence, allegations regarding jurisdiction are not taken into account without an assessment. Some substantiation is required also when the issue is disputed. However, this does not entail that the court is to consider whether the claim is likely to succeed. The threshold* ***will prevent that allegations are created primarily to establish jurisdiction.***
>
> *It is hard to see why the assessment of the procedural criterion that «the claims are so closely connected» as required in Article 6 (1), should derogate much from the assessment of the same under the options in Article 5" (paragraphs 71 and 72, my emphasis).*

The criticism of *Stolt II* is based on the submission that the Bring decision has implications[28] for the *Stolt* case; in other words, that the threshold should be as high as in the Bring case. In my view, it is not obvious that the requirement for including the foreign manufacturers is, or ought to be, the same as when defining "insolvency". Undoubtedly, there was jurisdiction for Bring's claim against the Norwegian subsidiary, and whether there was jurisdiction also for the foreign manufacturers is comparable to the case against *Stolt*. However, *Stolt II* concerns the primary jurisdiction, not the "annexed" litigation.

If the criticism is accepted that the Convention requires a more thorough assessment than stated in *Stolt II*, then we meet the question of how far the court is obliged to go before accepting jurisdiction. The minority used the expression "a fair chance of succeeding", while the majority said that the requirement must be "satisfied to a certain extent" and that "[s]ome substantiation is also required when the issue is disputed". Leaving aside the ex officio- and the objection- problems, to what extent do the views on probability differ? What is the difference in percent?

[28] Norwegian «overføringsverdi», Cordero-Moss p. 16.

As previously indicated, the problems evaporate if the requirement is that the insured entity is bankrupt, i.e. declared bankrupt by the court. Not surprisingly, part of the criticism is that the difficulty is purely Norwegian: the Convention has strict rules – it is said – and the way out of the predicament is to change the Insurance Contracts Act: "Insolvency" should be limited to "bankruptcy".[29]

With the law as it is today, it is necessary to decide on what degree of probability is required. Obviously, it is easier to apply the simple test of the majority (whatever percentage this implies). With the requirement advocated by the minority – with "a relatively detailed evaluation" as it was said in the Bring case – this does not preclude the court, at the end of the day, from saying that the insurer is not "insolvent", dismissing the case. However, when the matter in the first round has been argued p[e]rhaps extensively, it may be feared that the court feels a certain restriction in deviating from the preliminary decision. And it may be added: is it sensible (cost and time wise) for the issue to be debated fully more or less twice over?

[29] See Cordero-Moss op.cit.

The relationship between nautical fault and initial unseaworthiness under the Hague-Visby Rules

With critical remarks on the Norwegian Supreme Court's methodology in adjudication

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Contents

1 Introduction

In the realm of cargo carriage and shipowners' liability for cargo damage, the relationship between a shipowner's obligation to make the ship seaworthy at the commencement of the cargo voyage, and a shipowner's exemption from liability by nautical fault,[2] is potentially complex. Such complexity particularly involves the role of the master. He may in some respects be considered the servant of the shipowner for purposes of making the ship initially seaworthy, with his faults being imputed to the shipowner, while in other respects he may conduct acts of a nautical nature, with his faults not being imputed to the shipowner.[3]

The topic is at the core of the Hague/Hague-Visby Rules (HVR),[4] being ratified by Norway[5] and incorporated into the Maritime Code (MC). The HVR, aimed at international harmonization of this area of law, are of great prevalence, as they have been ratified by most maritime nations. Hence, case law from such other maritime nations is clearly of relevance when interpreting and applying the HVR, as implemented in the MC, under Norwegian law.

Despite this being so, decisions by the Norwegian Supreme Court are generally void of any reference to international legal sources. This is surprising, and stands in stark contrast to the modus operandi of the Supreme Courts of many other prominent maritime nations which have

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2 'Nautical fault' is here used as a term of convenience for the relevant fault "in the navigation or in the management of the ship", HVR art. IV 2 a) and MC s. 276. The term may be seen as slightly misleading since it was used in a narrower sense, restricted to navigation, in the Brussels Convention of 1957 on global limitation., see Borchsenius, Noen ord om uttrykket 'Feil eller forsømmelse i navigeringen eller behandlingen av skipet' i konnossementsloven § 4 nr. 2 a, AfS 2 1957 pp. 110 et seq.

3 The phenomenon of liability exception for nautical fault is in many ways an oddity, out of touch with today's legal reality – nevertheless it seems to persist. The Rotterdam Rules, which dispose of the nautical fault exception and were expected to replace the Hague/Hague-Visby Rules, seem not to be entering into force.

4 The abbreviation 'HVR' will be used as a collective term, however with the distinction between the two Conventions (the Hague-Rules and the Hague-Visby Rules) made where the context so requires.

5 That is: the Hague-Visby Rules.

ratified the HVR, such as England, Australia and New Zealand. This lack of reference by the Norwegian Supreme Court to international legal sources may have to do with the fact that when incorporated into the MC, the HVR were to a large extent re-edited and rewritten to suit the Norwegian style of legislating. Hence, where matters at the core of the HVR are under judgment, there may be a need to consult the original wording of the HVR, in line with general rules of construction of international conventions. However, the Norwegian Supreme Court's decisions are generally void also of this type of reference – again in stark contrast to the tradition of the Supreme Courts of other important maritime nations.

These methodological aspects provide grounds for reviewing a selection of Norwegian Supreme Court cases within the context of such international legal sources, i.e. by consulting the wording of the HVR and how that wording is construed and applied in relevant case law from other HVR nations. That is what this article aims at doing.[6] The relevant cases are first and foremost the *Sunna* from 2011 but also two older cases will be discusses; the *Faste Jarl* from 1993 and the *Sunny Lady* from 1975.

The essence of the article's findings is that the outcome by the Supreme Court in these cases are generally sound and in many ways compatible with views expressed internationally – however that important nuances of the HVR are overlooked or insufficiently understood.

2 The *Sunna* and the questions raised therein

2.1 The case

In January 2007 the *Sunna* grounded, close to the Orkneys, on its way from Iceland to England with a cargo of 1,900 tons of ferro-silicon. In

[6] A similar analysis is made by Mads Schølberg, Interpreting uniform laws – the Norwegian perspective, MarIus 475, 2017, pp. 147–201. Schølberg's work complements this article in that he also goes into public international law aspects of construction of the HVR and discusses Norwegian law sources in that respect.

violation of the prevailing safety rules requiring double watch keeping during night time sailing, only one person was on watch during the night of the incident. This person, the second mate, fell asleep. About one hour later the vessel grounded after having deviated from its plotted autopilot course, due to a side current. The cargo damage amounted to about NOK 280,000 for which the cargo interest claimed damages. The shipowner on the other hand claimed general average contribution from the cargo interest of about NOK 865,000 to cover the costs arising from salvage operation following the grounding.[7]

Part of the facts of the case was that a few months earlier the vessel had been subjected to sanctions by the Dutch Port State Control, i.a. due to non-compliance with the double watch-keeping rules, as revealed from inspection of the vessel's logbook. Following this sanctioning, the shipowner had taken some corrective measures, including that of arranging a meeting with the master and the second mate addressing the irregularities identified by the Port State Control. The master, however, persisted in his defiance of the rules, as evidenced by the later grounding.

Before the courts it was not in dispute that the second mate's falling asleep constituted nautical fault which, as such, would exempt the shipowner from liability. The more difficult issue was how to categorise the master's practice of non-compliance with the watch-keeping rules, considered to be the proximate cause of the grounding: had these rules been complied with, the incident would in all likelihood not have occurred, since two persons on the bridge would not both have fallen asleep.

The City Court[8] held in the favour of the cargo interest on the basis of privity on the shipowner's part: The shipowner had not demonstrated that – following the irregularities revealed by the earlier Port State Control – sufficient steps had been taken to ensure that the double watch-keeping requirement would be complied with. In other words, since there was privity on the shipowner's part, whatever the nautical

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7 Norwegian law was made applicable by reason of the claims being raised under tramp bills of lading, ref. MC s. 347.

8 Judgment of 06.06.2009 by Oslo City Court: 08-183359TVI-OTIR/04.

fault by the master which otherwise might exempt the shipowner from liability, it was overridden by such privity.

The further detail of the City Court's reasoning was that the ISM Code was formally found to have been complied with by the shipowner but that insufficient steps had been taken by the technical manager to inquire into prior incidents and to convey to the ship's officers the seriousness of the topic of non-compliance with the double watch requirements. In that respect the technical manager was considered to be part of the shipowning company's alter ego for the purpose of privity under MC s. 275 in combination with s. 276 i.f. In short: insufficient steps had been demonstrated by the shipowner to avoid an inference of privity under MC s. 275, hence there was no need by the Court to go into the question of possible exemption from liability through nautical fault. As part of this, the Court did not go into arguments by the shipowner as to what belonged to the shipowner's, as opposed to the master's, "sphere of control". The arguments by the shipowner in this respect was that the ship's technical navigational system was in order; the system contained alarms, both for the vessel being off-course and a "dead-man" device, but these were not in use, and were also not required to be in use (since there was a requirement for double lookout), and that all of this (whether or not to deploy the alarm devices) belonged to the master's "sphere of control", hence should be considered part of his nautical decision making.

The Court of Appeal[9] held in favour of the shipowner, on a combination of the following:

First, there was insufficient basis for establishing privity on the shipowner's part as the corrective measures following the shortcomings revealed by the Port State Control were considered to have been appropriate. In this respect the Court pointed to various steps having been taken by the shipowner, such as the issuing of a non-conformity notice to its officers highlighting the duty of safety rule compliance. Moreover, the entirety of the situation had to be seen within the context of it being obvious that such rules must be complied with; the master and officers onboard the ship clearly knew this, not least from being sanctioned by the Dutch Port Authorities.

[9] Judgment of 15.11.2010 by Borgarting Court of Appeal: 09-140485ASD-BORG/01.

Second, the master's failure to insist on double watch keeping during the night of the incident constituted nautical fault which as such exempted the shipowner from liability.

Third, there was no initial seaworthiness capable of overriding such exemption from liability, since when the vessel departed from load port, there was sufficient manning on the bridge (also during night time; the insufficient manning happened two nights later), with the vessel in itself being fully seaworthy and with officers and crew being sufficient in number and generally competent. In other words, the fact that the master later – on the night of the incident – decided not to comply with the double watch requirement, was considered to have an insufficient nexus back to the master's state of mind at the time of departure from load port. In other words, it did not constitute initial unseaworthiness. And even if it were to be so considered, it could easily have been remedied after departure, as evidenced by the fact that the lookout requirement was complied with the first two nights following departure from the load port.

The Supreme Court took a different approach from the lower courts. The Supreme Court found it unnecessary to go into the question of privity on the part of the shipowner. Instead, the Court found against the shipowner on the basis of initial unseaworthiness. The reasoning was that the master's non-compliant attitude towards the safety rules was a state of affairs already existing at the beginning of the voyage, as combined with the fact that at such time the vessel did not have in place a rule compliant bridge management plan for the upcoming voyage. In other words, this non-compliant bridge management plan brought about by the master, combined with the fact that there was no indication that the master intended to change his attitude and comply with the rules during the upcoming voyage, made the ship unseaworthy at the beginning of the voyage.

Moreover, although the shipowner was subject to a mere due diligence obligation to ensure that the vessel was seaworthy at the beginning of the voyage, the shipowner was in this respect vicariously liable for the acts of its employees, including the master. The master's non-compliant attitude was in this case clearly negligent (in fact wilful), hence the shipowner was

held vicariously liable for the vessel's initial unseaworthiness through the master's fault. Furthermore, based on such finding of liability for initial unseaworthiness, there was no need to go into the question of whether the conduct of the master constituted nautical fault, since the requirement for initial seaworthiness and its ensuing liability, would override any otherwise applicable nautical fault exception.

2.2 Comments to the case – methodological aspects and the international context

The Supreme Court decision makes good sense when viewed in the light of the MC and traditional Norwegian contract law principles of vicarious liability for faults committed by the servants of a contracting party. On the other hand: the questions at stake are complex, as illustrated by the different approaches taken by the different Courts, and the topic is within the core of the risk allocation system of HVR upon which the relevant provisions of the MC are based. The decision by the Supreme Court (and the lower Courts) is conspicuously void of any reference to the HVR and to the jurisprudence of other HVR states.

Moreover, reading the Supreme Court's decision, the very reference to the HVR is made in a way as to cast doubt on the Court's understanding of the background to the provisions of the Code. Other statements cast doubt on whether the Court understands essential features of the provisions, e.g. the relationship between liability exception for fire and nautical fault. This is important, since in the context of the HVR, some of the premises of the decision seem to be mistaken. That does not mean that the finding of the Supreme Court is "wrong" when seen in the wider context of the HVR. Probably it is also tenable within such a wider context. The point is rather that the Court makes it too easy for itself by merely looking at the MC and established principles of contract law (vicarious liability for servants' fault) in a Norwegian context. Moreover, the Court's finding that an event of initial unseaworthiness renders moot any question of navigational fault and its liability exception, is too simplistic.

Apart from the above methodological points, there is reason to highlight some factual points of the *Sunna* which are capable of explaining some of the differences of opinion between the three Norwegian court instances, and which at the same time may be of general interest in analysing the topic at hand within the wider context of the HVR.

First, what may appear as somewhat unclear is the nature of the master's fault in the *Sunna*. To simplify: if emphasis is placed on the master's mindset in relation to the upcoming voyage, that may point in the direction of a traditional situation of nautical fault; it could for example be the case that the master had planned to assess the forecasted weather conditions in order to decide whether to deploy single or double watch during night time. On the other hand, if emphasis is placed on a deficient bridge management system as a permanent state of affairs, the topic takes the appearance of a traditional unseaworthiness defect, on a par with other systemic failure involving ship safety, required to be in place before embarkation on the relevant voyage.

The facts of the case seem to consist of a combination of both. There was an established practice of non-compliance with the rules which at the same time meant that the master made ad-hoc decisions as to the need for deploying double night time watch keeping – as reflected in the case, in that the first night after the ship sailed from the Icelandic load port, there was in fact double watch deployed. [10]

This twofold fact seems essentially to account for the view of the Court of Appeal that the conduct of the master constituted nautical fault and that the ship was not initially unseaworthy. The Supreme Court, on the other hand, saw the dominant factor as being that of a failing bridge management system as part of the ship's characteristics, at the time of commencement of the voyage. In that sense the master's decision making on the night of the incident became of secondary importance to the Supreme Court's way of looking at it; this was a mere reflection of the failing practice already in place when the voyage commenced. The Supreme Court stated in this respect:

[10] P. 2 and 7 of the Court of Appeal's decision.

> "When it is in advance clear – due to the master's dispositioning of the crew – that the ship will generally not be seaworthy at night time, there is in my view also initial unseaworthiness. The voyage must in this respect be considered as a whole, and it becomes insignificant whether or not there was a failure in the bridge manning at the very moment the ship departed from berth. […] No evidence is adduced to the effect that it is likely that the master during the voyage would change his practice. The mere theoretical possibility that this might happen, is to me of no significance."[11]

The Supreme Court's fact-finding, and its emphasis on the inherent character of the defective bridge management system, is clearly not up for criticism. What is of interest is nevertheless to try to reconcile these different perspectives (below).

Second, what is left open in the Supreme Court's decision is the question of what constitutes nautical fault within the context of the case. The Supreme Court held it unnecessary to go into this question, as already explained. However, if one changes the emphasis on the nature of the master's conduct from that of failing to have a rule-compliant bridge management system in place, to that of intending not to deploy double watch keeping during the course of the voyage, there would be a greater need to have this point clarified. Unsurprisingly, the shipowner argued along these lines by stating:

> "One and the same mistake[12] cannot both constitute nautical fault under section 276 first paragraph and lead to initial unseaworthiness. In that case there would have to be another contributing cause to the accident. It would lead to erosion of the exception for nautical fault if one and the same mistake, committed by one and the same person, should also lead to liability under the rules of initial seaworthiness."[13]

This submission that one and the same fact cannot lead to two irreconcilable legal consequences, is as such trite. However, the Supreme Court

11 Paras 48 and 49 – my translation.

12 Norwegian: 'forhold', signifying the more neutral: 'condition', 'event' or 'cicumstance'.

13 Para. 23 – my translation.

did not conduct any analysis of it, on the footing that initial unseaworthiness in any event overrode nautical fault – a topic which is worth looking further into (below).

A still further point of uncertainty concerns the aspect of the shipowner's vicarious liability for the master's mistake. This in turn has a connection to the above two points: If one were to view the master's fault as that of failing to implement a rule compliant bridge management system (as held by the Supreme Court), this would be considered a task delegated to the master on a par with other aspects of ensuring the ship's seaworthiness.[14] If, on the other hand, one takes the view that the master's mistake consisted in not intending to deploy double watch keeping during the voyage, hence the mistake (arguably) being nautical in nature, the point about vicarious liability becomes less clear.

The point in this respect would be that the ship might well be considered to be initially unseaworthy by reason of the master's non-compliant intentions, but as long as the master was – by appearance – competent, it seems questionable whether such a seaworthiness defect would be something for which the shipowner is liable. The situation could be characterised as that of "human latent defect" along the following lines: a) a decision by the master, being made at the time of the commencement of the voyage, is nautical in nature, while at the same time such decision would make the ship unseaworthy; b) the shipowner is not liable for the master's faulty nautical decisions, while at the same time being vicariously liable for its servant's mistakes in making the ship initially seaworthy; c) is the shipowner then liable for the master's mistake?

In this respect it should be noted that the overall competence of the master and crew was not in question in the *Sunna*. Moreover, and as we have seen, the shipowner argued that the shipowner would not be vicariously liable for the master's conduct even though such conduct con-

[14] See as an example the English case, the *Eurasian Dream*, Lloyd's Rep. 2002, 2, 692, involving the liability exception of fire and where the master had failed to implement prudent firefighting routines before commencement of the voyage. In that case the master was however (also) found to be incompetent due to his lack of experience with the relevant type of ship, and the shipowner was found negligent in not having procured the relevant training of and instructions to the master.

stituted a defect in the ship's seaworthiness, since the master's mistake was nautical in nature. The Supreme Court dismissed this point by holding that a shipowner's obligation of initial seaworthiness would override whatever nautical fault defences, as already explained.

The various points of facts and law here outlined give occasion for a deeper analysis of the topic.

3 Some structural points relating to the Hague-Visby Rules and their transformation into the Maritime Code

3.1 The wording and structure of the two sets of rules

A premise in common to the above stated questions concerns the relevant provisions of the MC and their relationship to those of the HVR. This area of the law – the relationship between nautical fault and initial unseaworthiness – may appear obscure, as also reflected in parts of the Supreme Court's decision in the *Sunna*. This obscurity is in turn an aspect of the MC having been detached from the original wording of the HVR.[15]

It may therefore be of value to review the above questions in a broader legislative context, by giving an account of the relationship between the HVR and the legislative product of the MC, while also giving an example of how foreign courts may approach some core elements of the topic being discussed.

[15] It does not help that the HVR themselves are partly piecemeal, not being made out in a traditional Norwegian/civil law way of drafting legislation, see also Solvang, Shipowners' vicarious liability under English and Norwegian law, MarIus 541, 2021, pp. 57–58, and Solvang, Choice of law vs. scope of application – the Rome I Regulation and the Hague-Visby Rules contrasted, MarIus/SIMPLY 535, 2020, chapter 2.3.

The structure of the HVR is straightforward. Art. III 1 sets out the shipowner's[16] obligations before and at the beginning of the voyage. This entails a due diligence obligation divided into three separate points: i) to make the ship itself seaworthy, ii) to properly man the ship, and iii) to make the ship cargoworthy.

Apart from these obligations attaching at the time of commencement of the voyage, there is a separate obligation in art. III 2 to care properly for the cargo during the various operations while in the shipowner's custody.

Art. III states:

"1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

a) Make the ship seaworthy;

b) Properly man, equip and supply the ship;

c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load [...] carry [...] and discharge the goods carried."

Art. IV then sets out the relevant exceptions from liability, the so-called Catalogue, where we shall restrict ourselves to the nautical fault exception. Article IV opens by rephrasing the shipowner's due diligence obligations under art. III, and then goes on to state the events for which the shipowner is not liable, among them the nautical fault exception.

Art. IV states in its main parts:

"1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds […] and all other parts of the ship in which goods are carried fit and safe for […] carriage […] in accordance with the provisions of paragraph 1 of Article 3 […].

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

[16] I use the term 'shipowner' while the HVR use the term 'carrier', primarily intended for liner service and carriage of general cargo, as well as under tramp bills of lading where the term 'shipowner' would normally be used.

(a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier

[…]

(p) Latent defects not discoverable by due diligence

(q) Any other cause arising without actual fault or privity of the carrier, or without default or neglect of the agents or servants of the carrier, […]."

The structure of the MC differs from that of the HVR.

Article III is reflected in MC s. 262 with the slight difference that art. III 1 and 2 when reproduced in MC s. 262 have changed places. Moreover, the point in art. III about the obligation of seaworthiness being restricted to the time of commencement of the voyage, is left out in MC s. 262 (which merely includes it as part of the shipowner's general duty of care) and instead appears in the exemption from liability in MC s. 275, by way of MC s. 276.

MC s. 262 reads:

"The carrier shall perform the carriage with due care and dispatch, take care of the goods and in other respects protect the interests of the owner from the reception and to the delivery of the goods. The carrier shall ensure that the ship used for the carriage is seaworthy, including it being properly manned and equipped and that the holds […] are in proper condition for receiving, carrying and preserving the goods. […]."

MC s. 275 sets out the basis of liability by providing the general rule that the shipowner is liable for cargo damage if caused by negligence by the shipowner or anyone for whom he is responsible, reflecting the shipowner's obligation as set out in HVR art. III 2, as mirrored by the liability scheme in art. IV 1 and 2 (q).

MC s. 276 then sets out the shipowner's exemption from liability, stating that the shipowner is not liable for nautical fault nor for fire unless caused by privity of the shipowner – as taken from HVR art. IV 2 (a) and (b). MC s. 276 then sets out the reservation of these exemptions with respect to initial unseaworthiness, for which the shipowner will be liable if caused by negligence by him or by anyone for whom he is responsible.

MC s. 276 states:

"The carrier is not liable if the carrier can show that the loss resulted from:

1) Fault or neglect in the navigation or management of the ship, on the part of the master, crew, pilot or tug or others performing work in the service of the ship, or

2) Fire, unless caused by the fault or neglect of the carrier personally.

The carrier is nevertheless liable for losses in consequence of unseaworthiness which is caused by the carrier personally[17] or a person for whom the carrier is responsible failing to take proper care to make the ship seaworthy at the commencement of the voyage.[…]"

This latter part concerning initial seaworthiness is adopted from HVR art. III 1 (as rephrased in art. IV 1) although slightly rewritten and structurally rearranged. It is rewritten in the sense that the MC reference to the liability of the shipowners' servants, is *not* similarly expressed in art. III 1 (for the significance of which, see below). It is rearranged, in that the shipowner's obligation in respect of initial seaworthiness (art. III 1), is instead put as an exemption to the shipowner's exemption from liability by reason of nautical fault or fire – while the art. III 1 obligation concerning initial seaworthiness is in a "diluted" sense reproduced in MC s. 262.

In summary: There are differences, both in the structure and in the wording of the two sets of rules. Although the MC is intended to reflect the content of the HVR, it is doubtful whether this is in fact achieved on important points of construction.

3.2 Approach to construction illustrated by the New Zealand Supreme Court case, the *Tasman Pioneer*

This type of rewriting of the HVR when implemented into the MC may have good policy reasons, which we shall not discuss here.[18] It is nevertheless worth pointing to the obvious: when e.g. the so called Catologue (of liability exceptions in art. IV) is removed from the system of the MC,

[17] I.e. privity, a term which due to its brevity in that context has led to considerable confusion, which does not arise under the HVR wording.

[18] As to the background for removal of the Catalogue, see e.g. Solvang (2021), pp. 57 and 93–94.

one loses important connecting factors to how those parts of the Rules are construed in countries where the Catalogue is retained.[19] Moreover, essential perspectives on the understanding of the HVR risk being lost in the process of such rewriting.

The New Zealand Supreme Court case, the *Tasman Pioneer*[20] from 2010, may serve as illustration of the approach taken when the HVR are left intact in domestic legislation.[21]

The case concerned the scope of the navigational fault exception in grave cases of misconduct by the master; whether the exception should be somehow censored or curtailed by general principles of disloyal conduct, something the Supreme Court answered in the negative.

The circumstances of the case were: During the voyage of a liner service ship, the master decided to alter the normal route by deviating east of an island (the Japanese island Okino Shima) to shorten the sailing distance and thus bring the ship back on time schedule. While deviating, the vessel touched bottom, which led to seawater ingress.[22] The master decided to conceal this navigational error by proceeding for about two hours until reaching a geographical point compatible with the original sailing route. From here, he called the Coast Guard and the offices of the shipowner, and gave a forged story of having struck an unidentified submerged object. He also instructed the crew to lie to the Coast Guard when later interviewed about the incident.

The water ingress stemming from the extra time taken before the master called for assistance, caused (additional) damage to the cargo,

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19 In this respect: It is not the case that judges in those countries do not realise that part of the Catalogue may be considered moot in view of the shipowner's general liability for negligence. Obviously they see this – as did Brækhus when objecting to legislating the Catalogue, see Solvang (2021) pp. 57 and 93–94. However, even if part of the Catalogue may appear "illogical", it does not detract from the value of having the same text as a basis for uniform construction. See comments by the Court of Appeal in the *Tasman Pioneer*, below.

20 Lloyd's Rep. 2010, 2, 13.

21 In the form of the New Zealand Maritime Transport Act 1994, implementing the HVR.

22 It transpired that the deviation was in itself unproblematic; the master had sailed that route before, however on the present occasion he discovered that the radar did not work properly, hence he decided to abort the deviation, and as part of this abortion (turning in a narrow straight) the ship touched bottom.

and when learning about the true facts, the cargo owners rejected the shipowner's invocation of the HVR exception for nautical fault relating to the (additional) cargo damage; that the initial grounding constituted nautical fault was not in dispute.

According to the cargo owners, the scope of the exception for nautical fault (negligent navigation) of the HVR could not reasonably encompass this type of wilful misconduct by the master. However, with differing results among the various court instances, the Supreme Court held that the nautical fault exception did apply. It is important to note that the Supreme Court emphasised the need to go to the roots of the HVR as drafted, and not let that intended risk allocation system be influenced by national law principles, e.g. concerning censoring of contractual (here: legislated) terms on the basis of principles of loyalty, etc. – as the lower Courts had held.

The Supreme Court starts its analysis by giving an account of the essence of the HVR, by looking at the relationship between HVR art. III and art. IV (and in that regard not with the wording of art. III being "hidden" as in the MC s. 262). Moreover, the Court emphasizes the relationship between the two articles by looking at what is considered to be within the "direct control" of the shipowner for purposes of initial seaworthiness, as opposed to what falls within the prerogative of master and crew as nautical fault exceptions:

> "The scheme of the Rules is clear. Carriers are responsible for loss or damage caused by matters within their direct control (sometimes called "commercial fault"), such as the seaworthiness and management of the ship at the commencement of the voyage. This allocation of risk is confirmed by article 3.2 being made subject to article 4 and by the inapplicability of article 4.2(b) and (q) exemptions in the event of "actual fault or privity" of the carrier. The allocation of responsibilities between the carrier and the ship on the one hand and the cargo interests on the other promotes certainty and provides a clear basis on which the parties can make their insurance arrangements and their insurers can set premiums."[23]

[23] Para. 8 of the decision and with reference to and approval of the approach taken by the Australian High (Supreme) Court in the *Bunga Seroja*, below.

The Court goes on, for the purpose of that case, to inquire into the history of the nautical fault exception in art. IV 2 a), aided by the preparatory works of the Hague Rules, as to why the exact wording of that provision was chosen:

> "This clause, Article IV, is the shipowners' clause. Now, Sir, I would venture to remind the Committee that we have dealt with the cargo interests clause in Article III, and we have agreed and accepted the actual words that the cargo interests have put forward imposing the obligations on the ship with regard to seaworthiness, and, what is more important, we have accepted Article III (2), which says that "The Carrier shall be bound to provide for the proper and careful handling … of the goods carried." We have not sought to weaken those or qualify those in any way. When we come to Article IV (2) our big point is the navigation point, and what we have asked is that we should have the words which from time immemorial have certainly appeared in all British bills of lading. …"[24]

The purpose of that reference to the preparatory works of the Hague Rules (preceding the HVR) was to provide a route into the further history of that wording as guidance to construction of the nautical fault exemption. As part of that inquiry the Court also looks to the understanding of the exemption as expressed in foreign case law, e.g under English, German, French and Dutch law (the latter three belonging to the civil law tradition).[25]

Likewise, it may be of interest to look at the methodological approach taken by the Court of Appeal in the *Tasman Pioneer*.[26] After having discussed the nature of the HVR liability exceptions in art. IV,[27] the Court states:

[24] Para. 23 with quotes from Sturley (editor), The legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoires of the Hague Rules, Colorado 1990.

[25] Paras. 23 and 26.

[26] Lloyd's Rep. 2009, 2, 308.

[27] Realising, by quoting the Australian High Court in the *Bunga Seroja* (p. 326), that art. IV litras d, e, f, g, h, j, k, l, m, n, and p, would have little effect apart from the shipowner's general liability for negligence. This shows that also in modern times this Catalogue can be dealt with sensibly, and that it would not need to be stricken out of legislation as "illogical", as has been the position of the Norwegian legislature, see Solvang (2021) pp. 57 and 94–95.

> "However the antidote may be that the carrier does have a duty 'to properly man … the ship' pursuant to Art III, r 1 (b) and by doing that should be regarded as having fulfilled its obligation in that regard to the shipper. Subpara (a) fits naturally into the reality, at that time, that the master at sea, being in command […] has to make decisions in the navigation and management of the ship all the time. Mr. Gray [for the shipowner] is right to caution the court against taking into account the modern day constant contact between owner or charterer or their agents on shore and the bridge of the ship. The Conference could have adopted a policy that the ship owner was going to be liable for the consequences of such decisions by the master. It decided to the contrary."[28]

This illustrates both the oddity of the nautical fault exception in modern times, and the need for a conscious attitude towards how to apply it, by looking into the text and history of the HVR. Although this example of the methodological approach is taken from New Zealand law, similar examples can be taken from other HVR nations, such as the Australian High Court (below) or from English courts, as in the Commercial Court decision of the *Eurasian Dream*,[29] which provides a synthesis of principles governing the application of HVR art. III 1 and 2 and their interaction with art. IV.

3.3 Approach to construction illustrated by the Australian High Court case, the *Bunga Seroja*

A further example which illustrates important methodological aspects when construing the HVR can be taken from the Australian High Court[30] in the *Bunga Seroja*[31] from 1999.

In his leading speech, Lord Gaudron stated:

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28 P. 236.

29 Lloyd's Rep. 2002, 1, 719.

30 The Australian High Court in effect means the Supreme (federal) Court. The case concerned an appeal from the Supreme Court of New South Wales.

31 Lloyd's Rep. 1999, 1, 512.

> "In understanding the operation of the Hague Rules,[32] there are three important considerations. The rules must be read as a whole, they must be read in the light of the history behind them, and they must be read as a set of rules devised by international agreement for use in contracts that could be governed by any of several different, sometimes radically different, legal systems. It is convenient to begin by touching upon some matters of history."[33]

Elsewhere, Lord Gaudron stated: "Because the Hague Rules are intended to apply widely in international trade, it is self evidently desirable to strive for uniform construction of them."[34]

That case concerned the concept of perils of the sea, which is of no direct relevant to our *Sunna*-related topics.[35] But it is worth noting that after reviewing the historical part of the Rules, the Court dealt, under separate headings, with first, "The Hague Rules as an international agreement", second, "Reading the Hague Rules as a whole", and third, "Uniform construction".

Under this last point the Court reviewed American, Canadian, English, German and French case law.[36] That is noteworthy, since one could expect that the Court confined its review to (other) common law systems. That was not the case. German and French law belong to the civil law tradition. This point about legal traditions was expressly addressed (by Lord Kirby):

> "[The need for uniform harmony] is the reason why it would be a mistake to interpret the Hague Rules as a mere supplement to the operation of Australian law governing contracts of bailment. That law, derived from the common law of England, may not be reflected

32 Which in our context makes no difference from the HVR.

33 Para. 9.

34 Para. 38.

35 Perils of the sea belong to the so called Catalogue; HVR art. IV a)-q), see for a background to why this part was taken out in the Norwegian (and Nordic) legislation, Solvang (2021) pp. 57–58 and 93 (in small print). See for a broader account of the legislative policy behind the MC and its relation to the HVR (and the Hamburg Rules), Solvang (2020) p. 158 et seq, at pp. 167–174.

36 Paras. 43–48.

> in, or identical to, the equivalent law governing carriers' liability in civil law and other jurisdictions. The Hague Rules must operate in all jurisdictions, whatever their legal tradition."[37]

Moreover, caution was raised against letting construction of the Rules become influenced by domestic law principles. Lord Kirby stated:

> "Reflecting on the history and purpose of the Hague Rules, the Court should strive, so far as possible, to adopt for Australian cases an interpretation which conforms to any uniform understanding of the rules found in the decisions of the Courts of other trading countries. It would be deplorable if the hard won advantages, *secured by the rules*, were undone by serious disagreement between different national Courts."[38]

It seems clear that this statement of intended harmony "secured by the rules", envisages the rules themselves being essential, structurally and otherwise, as the respective nations' adoption of the HVR, a point which is entirely lost in the Norwegian Supreme Court's approach to the *Sunna*.

Moreover, these methodological statements made in the *Bunga Seroja* were referred to with approval by the New Zealand Supreme Court in the *Tasman Pioneer* (above). English cases concerning construction of the HVR contain similar statements of approach involving foreign law.[39]

3.4 Illustration of inadequate approach of construction taken by the Norwegian Supreme Court in the *Sunna*

In contrast to these foreign law elaborate considerations on the construction of the HVR, we may look at some examples of considerations of construction adopted by the Norwegian Supreme Court in the *Sunna*

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37 Para. 138.

38 Para. 137 – my emphasis.

39 See e.g. the *Jordan II,* 2005, 1, WLR 1363, and the *Libra* (below).

– with sole reference to the provisions of the MC, detached from their roots in the HVR.

One example concerns the Supreme Court's discussion of the privity reservation of the fire exception and its pendant to the nautical fault exception in MC s. 276. In that respect the Court states:

> "The exceptions in section 276 first paragraph only concerns nautical fault and fire *which are not attributable to the carrier's privity*. In the provision for fire this follows from the wording itself, cf. also Rt-1976-1002 (Høegh Heron). The same must also apply to nautical fault, cf. Thor Falkanger and Hans Jacob Bull: Sjørett (7th edition) page 262, 267 and 270 and Fredrik Sejersted: Haagreglene (the bill of lading convention) (3rd edition) page 64."[40]

Clearly that is right as a matter of law, but the mere fact of putting the question this way reveals a surprising lack of understanding, both as to the nature of a navigational fault exception and the scheme of the HVR. To say that "the same [a reservation of privity] must apply also to nautical fault", misses the point: nautical matters are within the prerogative of master and crew, hence outside of the owner's "direct control", as that phrase was used in the *Tasman Pioneer*.

It would therefore be a contradiction in terms to have the nautical fault exception supplemented with an express reservation of privity, as opposed to events of fire, since fire is not an "act" (of navigation or similar). It is simply what it is: fire. And clearly there is here a need for a reservation with respect to shipowners' privity, since otherwise the shipowner would (at least prima facie) be exempt from liability in all cases of fire, which clearly would not make sense.[41]

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[40] Para. 36 – my emphasis.

[41] A separate matter is that privity in this context must mean privity (proper) under English law, i.e. fault at the alter-ego level of the shipowning company, not fault by whoever servants or agents, such as the master, crew or ship personnel, see e.g. Cooke et al, Voyage Charters, 2007, p. 1027. Still a separate matter is that the general requirement that fire must not be attributable to negligence on the shipowner's part (or his servants) in making the ship initially seaworthy, applies also here.

This confusion concerning the concept of privity has ramifications. The City Court in the *Sunna* put up as a main question for discussion whether the superintendent of the shipowner belonged to the company's managerial (alter-ego) level for the purposes of asking whether the superintendent had taken sufficient steps to ensure that the master understood the seriousness of the situation, i.e. the importance of complying with the safety rules. The City Court found that the superintendent did belong to the managerial level of the company and that he had not taken such sufficient steps.[42]

One could then ask: if the City Court had found that the superintendent had *not* belonged to the managerial level but he still had not taken the required steps, should this mean that there was no basis for holding the shipowner liable, through negligence by its servant, i.e. the superintendent? As far as I can see, the shipowner would be so vicariously liable, as there is no basis in the HVR for operating with "privity" in this respect. The confusion seems to stem from the drafting technique behind MC s. 276.

The Supreme Court in the *Sunna* takes the same misconceived approach when stating: "Since the carrier must be vicariously responsible for the master's mistake, there is no need to go into whether the shipowning company itself [i.e. through privity] has committed a wrong, leading to liability."[43]

This premise does not make sense, since there would here be no need to prove privity.

Admittedly there may occasionally be questions of negligence on the the shipowner's part (through land based servants) being intermingled with nautical decision making by those on board, as illustrated in the Icelandic Supreme Court decision the *Vikartindur* from 2000.[44] The situation was that the master considered whether or not to accept tug boat assistance in a situation of distress caused by engine blackout. While in this situation of distress and while considering whether or not to accept the offer of assistance, he stayed in radio contact with the shipowner's office ashore. He ended up not accepting the offer of assistance as he believed the crew would succeed in restarting the engine

42 Or that the shipowner had not fulfilled its burden of proof in that respect, pp. 12–17 of the City Court's decision.

43 Para. 53.

44 ND 2009.91.

in time to avoid grounding. This did not happen; the ship grounded and the cargo was damaged. The decision not to accept assistance was clearly nautical in nature. The question was whether this decision was solely master's own or whether it was influenced by the shipowner's personnel ashore . The Court found that the decision was solely that of the master, based on his nautical considerations.

Even if such a decision were to be considered to have been (sufficiently) caused by shore side personnel, this would, as stated, not necessarily involve "privity" on the shipowner's side; those in the shore side office may not necessarily possess a position as the alter-ego of the shipowning company. However, in order not to dilute the navigation fault exception, it would require an unusual set of facts to end up in a situation where the master "surrenders" his prerogative of decision making to the shore side – see also comments to this effect in the above quote from the Court of Appeal in the *Tasman Pioneer*.

A separate point is that in the future world of remote controlled ships, navigational functions may be transposed to shore.[45] In that sense the navigational exception may become "shore based" and, if so, it may be that the delineation of navigational functions will be more intertwined than today with what is considered to be within a shipowner's "direct control". In other words, it may be that (today's) navigational functions will have a seamless transmission into other technical-strategic functions not naturally called navigation belonging to the sphere of "acts of seamanship".

The point in this respect is however that there is a double type of misconception on the part of the Supreme Court in the *Sunna:* a) that to ask, as the Court does, for a privity reservation in situations of nautical fault, makes limited sense, b) that if such a reservation were to be inserted, it would be a different kind of "privity" from that related to the liability exception for fire; it would be negligence, rather than "privity".

Another example of the Supreme Court's reasoning in the *Sunna* concerns the delineation between the shipowner's initial seaworthiness obligation and the nautical fault exemption. The Supreme Court found no reason to go into this as the case was decided on the basis that there was initial unseaworthiness held to override whatever nautical fault exception, but the Court still stated as a general point of construction:

[45] See e.g. Collin, Unmanned ships and fault as the basis of shipowner's liability, Autonomous Ships and the Law, (edited by Ringbom, Røsæg, Solvang), Routledge, 2021, p. 85 et seq.

> "According to section 276 second paragraph the carrier is nevertheless liable for losses resulting from unseaworthiness at the commencement of the voyage. The scope of this provision may appear somewhat uncertain. But it is in any event clear that it constitutes 'an exception from the exception' in that the carrier will be liable for initial unseaworthiness even if there is nautical fault falling within section 276 first paragraph."[46]

As a general statement, it is far from obvious that this is so. Also this concerns what is addressed by the New Zealand Supreme Court in the *Tasman Pioneer*: what is within the prerogative of the master in terms of navigation, is at the same time considered to be outside of the shipowner's "direct control". Therefore, there may well be situations of navigational decision making by the master which may occur (also) before departure from load port.

This pertains to a difficult dividing line to which we shall later return. The point in the present respect is that such a categorical statement as that set out by the Supreme Court, is not occasioned by the wording of the HVR in the way it (perhaps) is by MC s. 276. In the context of the HVR, there is a question of breach of art. III 1 as an "overriding obligation" which does not allow for application of the nautical fault exception. However, art. III 1 does not answer the point in any particular way, hence the editing of MC s. 276 may appear misleading. Put differently, art. III 1 sets out the obligation of the shipowner i.a. to properly man the ship, but this does not answer the question of the role of the master and the time aspect of his navigational decision making. Therefore, from the wording of the HVR and its general scheme (as e.g. expressed in the *Tasman Pioneer*), it is far from clear that a nautical fault cannot extend into matters which may be viewed as constituting initial unseaworthiness.

Another point of a similar nature goes to the Norwegian Supreme Court's making use of legal arguments taken from the MC but which do not form part of the HVR. The Court's line of arguments in the *Sunna*, ending up with liability for initial unseaworthiness, and the analysis of

[46] Para. 37.

the master's role in that respect, takes as a starting point that the master is subject to a duty, under MC s. 131, to ensure that the ship is seaworthy before embarking on a voyage.[47] This legislative duty forms no part of the HVR, as the governing scheme for deciding questions of liability for cargo damage. That is not to say that it would be "illegitimate" to take supporting arguments from other provisions of the MC than those implementing the HVR. However, an abnormality which may ensue is that MC s. 131 imposes a duty on the master also to retain the ship in a seaworthy state during the voyage, while here the nautical fault exception of the HVR and the MC clearly applies, thus rendering MC s. 131 nugatory for the purpose of the risk allocation system of the HVR, as implemented in MC s. 262, 275 and 276.

This type of argument therefore may lend a false premise to the role of the master as seen within the risk allocation system of the HVR.

Furthermore, the Supreme Court makes one reference only to the HVR, in connection with the background of the nautical fault exception in MC s. 276. Part of what is stated therein is simply not correct. The Supreme Court states:

> "[Section 276] is aligned to[48] [sic] the international bill of lading convention of 1924 as amended by protocol of 1968, the so called Hague-Visby-rules. The main rule in section 275 establishes an ordinary negligence and vicarious type of liability but with reversed burden of proof. The exemptions from liability[49] are peculiar to international sea carriage. They arose as compensation for the fact that the carriers during the negotiations for the Hague-Visby-rules had to accept the burden of proof rules in section 275, see Norsk Lovkommentar[50] – the maritime code, footnote 500."[51]

47 Para. 48, where it is stated that the duty under MC s. 131 also applies during the voyage.

48 Norwegian: 'er tilpasset', a term which is symptomatic of the Court's lack of reference to the HVR, although as a matter of fact Norway has ratified those rules, thus undertaking to be bound by them – 'alignment' is therefore not the appropriate legal term.

49 In Norwegian: 'ansvarsbegrensningen', which literally means 'the limitation of liability' but which is a separate matter from 'exemption from liability' ('ansvarsunntak').

50 Norwegian Statutory Commentary (to the MC Chapter 13).

51 Para. 34 – my translation.

This latter sentence simply does not make sense. The nautical fault and fire exceptions are left unamended from the inception of the Hague rules of 1924, and their insertion at that time came about as a compromise between the cargo merchants and the carriers – as stated above by the New Zealand Supreme Court, and as set out in numerous other sources, including Norwegian textbooks.[52]

These were some remarks on the structure and the manner of implementation of the HVR, which are of general importance to the below closer review of the *Sunna* case as analysed within such a wider context of the HVR and relevant international sources.

4 The nature of nautical fault and its relationship to initial seaworthiness

4.1 The problem

Returning again to the *Sunna*, the Supreme Court there held that there was no need to go into the nature and scope of nautical fault exceptions since there was in any event initial unseaworthiness for which the shipowner was liable – through the mistakes made by the master.

These topics are potentially complex and will be reviewed in the following. It is worth setting out the essence of the Court's reasoning on this point.

> "A prudent shipowner would not – had been aware of the subject matter [that a rule compliant bridge management system had not been implemented] – have allowed the ship to commence the voyage with a system of watch keeping which exposes the cargo to a significantly increased risk."[53]

[52] Falkanger/Bull, Sjørett, 2016, pp. 278–280.

[53] Para. 48 – my translation.

This involves the test of seaworthiness and the due diligence obligation imposed on the shipowner. The Court then goes on to state:

> "It is obvious that the master has not exercised due diligence in ensuring seaworthiness of the vessel. [The shipowner] is in this respect vicariously responsible for its captain so that his mistake is considered the mistake of the shipowner [reference to legal commentary and also Rt. 1993.965 *Faste Jarl*]. When a disposition by the master has led to unseaworthiness of the vessel at the beginning of the voyage it is, as stated, of no relevance whether his mistake also might be seen as a nautical fault covered by section 276 first paragraph. Accordingly it seems clear to me that the shipowner cannot relieve itself of liability on that basis. Since the shipowner is vicariously responsible for the mistakes of the master, it is not necessary for me to render a decision on whether or not there is privity on the shipowner's part."[54]

These statements are at the core of what will be discussed below. For the purpose of such discussion it is of interest to look at how the shipowner argued its case, contrary to the Court's finding as quoted above. The shipowner's arguments are summarised by the Court as follows:

> "Both the direct mistake leading to the grounding – the falling asleep of the second mate – and the master's decision not to keep double watch during night time sailing, are nautical faults for which the shipowner is not liable […]. Even if the master should have decided not to comply with the regulation about double watch keeping already before the vessel departed, it still constitutes part of his nautical management of the vessel which falls outside the scope of commercial fault for which the shipowner is responsible. The provision in section 276 second paragraph of the Maritime Code which imposes liability on the shipowner for unseaworthiness at the beginning of the voyage, is not applicable. The same condition cannot constitute both a nautical fault […] and entail initial unseaworthiness. If so, there will have to be a different, contributory [medvirkende] cause to the incident. It would lead to erosion of the exception for nautical fault if one and the same

[54] Paras 52–53 – my translation.

> mistake, committed by one and the same person, could also lead to liability under the provision for initial unseaworthiness."[55]

These remarks are interesting. They comprise the essence of the potential complexity of the matter when seen in the context of what may be called international sources related to the HVR, although, surprisingly, the views of the shipowner seem not to have been substantiated by such international sources.

As part of the above position taken by the shipowner it may be worth recalling that the City Court did seemingly not consider the master to be the shipowner's servant for purposes of making the ship seaworthy. If it had done so, it would be unnecessary to find privity[56] on the shipowner's part in not sufficiently ensuring that the master complied with the safety rules. It would have sufficed merely to refer to the master's mistake, just as the Supreme Court found it unnecessary to form a view on the question of privity.

Moreover, it is worth recalling the still differing view taken by the Court of Appeal; that the master was as such competent; that there was in place on board a manual, easily accessible, containing the safety rules; that the shipowner's inspectors had every reason to believe that the master knew about the rules – and that whatever happened during the voyage was a matter to be assessed by the nautical fault exception which the Court of Appeal found applicable.

For the purpose of our discussion the problem can therefore be summarized: What is nautical fault? What is the relationship between it and the shipowner's obligation of initial unseaworthiness? What are the duties delegable to the master as part of the shipowner's obligation of initial seaworthiness? In this latter respect, the problem in the *Sunna* was in a sense that the master himself was the cause of the unseaworthiness, and in that respect: can the master be the shipowner's delegate for the purpose of "rectifying himself" as a seaworthiness deficiency?

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55 Paras 22 and 23.

56 A separate point is that the use of the term privity is misconceived, as earlier explained.

4.2 The nature and scope of nautical fault

As a starting point it is worth highlighting the twofold nature of the fault in question. To simplify: if emphasis is placed on the master's mindset in relation to the upcoming voyage, that may point in the direction of a traditional situation of nautical fault. An isolated instance of not deploying double watch during the course of a voyage, would typically be categorized as a nautical fault, as it would be the result of the master prerogative and decision making. On the other hand, if emphasis is placed on a deficient bridge management system as a permanent state of affairs, the topic takes on the appearance of a traditional unseaworthiness defect, on a par with other systemic failures, which would typically be categorized as initial seaworthiness defects lying within the shipowner's "direct control" (as the point was formulated by the New Zealand Supreme Court). The facts of the *Sunna* seem to consist of a combination of both (above).

From this brief account of the complex nature of the factual aspects of the relevant fault, we turn to some central aspects of how the nautical fault exception is regulated in the HVR.

The system of the HVR may be recalled whereby under art. III the shipowner is, first, obliged to exercise due diligence to provide a seaworthy ship and, second, to properly care for the cargo while in his custody during the voyage – and with the basis of, and exceptions from, liability set out in art. IV, including that of the nautical fault exception, in terms of "act, neglect or default […] in the navigation or in the management of the ship."

It is worth noticing that this combination of setting out the obligations of the shipowner (in art. III) and immunities and exceptions from liability (in art. IV) does not explicitly regulate situations of overlap; e.g. whether nautical faults could be said to exist already at a time before the ship departs from load port.

Moreover, under the HVR, one delineation to be made has to do with whether the relevant fault primarily concerned management of the ship (for which liability is excepted in art. IV), or instead management of the cargo (constituting breach of art. III 2 with no exceptions applicable).

This delineation is of no direct concern for the present inquiry but it is worth noticing that on this point Norwegian and English case law seems to be well aligned.[57]

Another delineation concerns the nature of navigational fault itself. Under English law there is a fair number of cases dealing with this topic while under Norwegian law there seems to be none. Essentially, the point under English law is that in order to qualify as a navigational fault, the fault has to deal with seafaring aspects in a fairly narrow sense; it must involve matters of "seamanship". This kind of narrow construction should be seen in the light of general rules of construction pertaining to contractual exclusion clauses, which have their parallel under Norwegian law.

Moreover, these cases concerning the nature of navigational fault under English law, involve a different delineation from the one above concerning nautical mismanagement of the ship, as opposed to mismanagement of the cargo. If a fault is not sufficiently "seamanship-like" to qualify as a navigational fault, the shipowner is rendered liable by virtue of the fact that there is no exception from liability applicable to an act of negligence committed by the shipowner or his servants. It is, therefore, not so much that a non-qualifying navigational fault necessarily means that the fault relates to (mismanagement of) the cargo. The point is rather that within the context of the HVR, there will be liability if such non-qualifying navigational fault leads to damage or delay to cargo.

Not all the English cases of relevance in this respect deal with cargo damage. They may instead deal with claims for mere financial losses under charterparties incorporating the HVR through paramount clauses, or otherwise containing similarly worded liability exceptions for nautical fault as that of the HVR. These cases are however generally viewed as

[57] The English Commercial Court decision, the *Hector,* Lloyd's Rep. 1995, 2, 218 (pp. 234–235), concerned failure to properly tighten wedges for the purpose of holding the hatch covers in place. Such failure was found to constitute nautical fault as it primarily concerned safety of the ship. The case has its direct parallel in the Norwegian Court of Appeal decision, the *Ulla Dorte*, ND 1987.229.

being of relevance to the navigational fault exception also within the context of cargo damage and the HVR proper.[58]

The House of Lords case, the *Keifuku Maru*[59] from 1925, illustrates the point that the concept of navigational fault may have a narrower meaning than encompassing any decision making by the master while sailing en-route. In that case the master did not keep the required speed, due to failing to feed the machinery with sufficient bunkers coal. This failure was held to be of a general managerial nature, not sufficiently seamanship-like to qualify as an exception for navigational fault, hence the shipowner was held liable for the extra time spent under a time charter.[60] In that case terminology was used by the Court to the effect that the master's failure amounted to "general slackness" and did not relate to "acts of seamanship".

Another example is the *Renee Bayffil*[61] from 1916, holding that a master's decision to remain in port for a few extra days for no apparent reason relating to weather conditions or similar, did not qualify as a navigational fault, hence the shipowner was held liable for breach of a due dispatch provision of a voyage charter.

Still another example is the *Knutsfjord v. Tilmans*[62] from 1908, where the master misconstrued the way the destination port was formulated in the charter, thereby causing delay by sailing in the wrong direction. This type of fault was, understandably, not held to be of a navigational nature, hence the shipowner was held liable for the delay.

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58 See e.g. Cooke et al (2007) pp. 1022–1024: It is a fact that the HVR is essentially based on such contract provisions predating the H/HVR. Hence, a separate point of construction of the HVR concerns whether case law relating to such pre-dated clauses, should be considered (binding) authority also when construing the HVR. That is a question we shall not go into. The point is merely to illustrate the scope of nautical fault through case law shedding light on it.

59 *Suzuki & Co. v. T. Beynon & Co.,* Lloyd's Rep. 1926 Vol. 24, 29.

60 The case concerned appeal of an arbitration award and the facts as to the specific nature of the master's fault is somewhat obscure from that award. This led Justice Viscount Dunedin to the fairly harsh statement that the arbitration award was "couched in language which has all the appearance of stultification of expression resulting from confusion of thought."

61 1916 32 T.L.R 660.

62 1908, A.C. 406.

The most prominent and authoritative case dealing with the topic, is the House of Lords case the *Hill Harmony*[63] from 2001.

This concerned the HVR (art. IV, including the nautical fault exception) as incorporated as a rider clause in a time charter. The question concerned the relationship between the time charterer's right to give orders as to employment of the ship, and the master's prerogative of navigational decision making. In disregard of the charterer's sailing orders, the master took the longer route in crossing the Pacific from Canada to Japan. The charterer claimed damages for the extra time taken and bunkers consumed, alleging breach of contract in that the master had failed to prosecute the voyage with due dispatch. The shipowner put up as a defence that whatever the breach, it was covered by the HVR exception from liability for navigational fault.[64]

The House of Lords however disagreed. In order for a master's decision to be covered by the exception for nautical fault, it would have to involve some kind of seamanship aspects. A general decision, made before the commencement of the voyage, to take a longer route – not related to concrete safety considerations etc. – did not meet that requirement. The Court stated i.a.:

> "What is clear is that to use the word 'navigation' in this context as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful. As Lord Summer pointed out, 'where seamanship is in question, choices as to speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart. But it is erroneous to reason […] that what route to follow are questions of navigation.'"[65]

The *Hill Harmony* did not directly involve the question of nautical fault and its relationship to the HVR obligation of initial unseaworthiness. It may in that respect be said that there are different considerations in play:

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63 Lloyd's Rep. 2001, 1, 147.

64 I use that term here rather than 'nautical fault' since the master's conduct in that case related to navigation proper, not the alternative of management of the ship.

65 P. 159–160 of the decision.

the scope vis-à-vis a time charterer having to pay extra hire and bunkers consumed by reason of the master's conduct, and the delineation relating to cargo damage and obligations of seaworthiness under the HVR. Nevertheless, the finding in the *Hill Harmony* has in legal literature been held also to provide an answer to the scope of navigational fault under English law relating to the HVR as incorporated into the English COGSA,[66] and the case is referred to as authority to that effect by the New Zealand Supreme Court in the *Tasman Pioneer* (above) relating to the HVR as incorporated into the New Zealand Maritime Transport Act 1994.

If these considerations are applied to the *Sunna*, there is reason to go back to the previous analysis of the twofold nature of the relevant fault. Since, as emphasised by the Supreme Court, there was a general failure to have in place a prudent bridge management plan due to the rule-defying attitude of the master, such failure would, under the English law way of thinking, clearly not be of a navigational nature. There is little difference from the *Hill Harmony* where the master generally ignored the time charterer's orders as to sailing routes, and a similar general attitude of ignoring night time safety regulations. Such conduct would not involve "acts of seamanship".

If, on the other hand, we take the approach as adopted by the Court of Appeal, and look to the master's decision making on the night of the incident, this would probably be nautical in nature in the above sense. There was a concrete evaluation, taking into account the weather and the assessment of the crew's need for rest, etc., hence such considerations would probably involve "acts of seamanship". However, that approach taken by the Court of Appeal seems to miss the complicating factor, that had a prudent bridge management plan been in place, there would have been no room for such ad-hoc decision making.

[66] Cooke et al (2007) pp. 1022–1024.

4.3 The interrelation between nautical fault (navigational fault) and initial unseaworthiness

As already mentioned, in the *Sunna* the Supreme Court makes the general statement that whatever the nautical fault, it would be overridden by the shipowner's liability for initial unseaworthiness. In other words: if whatever nautical fault occurred before the ship's departure from load port, that nautical fault would at the same time constitute initial unseaworthiness, and the "exception to the exception" in MC s. 276 second paragraph, would apply. The shipowner in the *Sunna*, on the other hand, argued that one and the same fault (if assumed to be nautical in nature) cannot both be exempted from liability and also lead to liability (by reason of initial unseaworthiness).

Furthermore, and as matter of policy considerations, if one takes a functional view on the risk allocation embedded in the HVR, as e.g. expressed by the New Zealand Supreme Court in the *Tasman Pioneer*, the statement by the Norwegian Supreme Court becomes problematic. If one accepts as a premise for the risk allocation of the HVR that decision making involving navigation (in its narrow sense, as held above) forms part of the master's prerogative and thus falls outside of the shipowner's "direct control", it does not make good sense to let a mere temporal demarcation line decide whether or not the shipowner becomes liable. A functional approach, which as such is well recognized in Norwegian law, should instead lead to the nature of the fault being considered decisive.

This topic seems not to be addressed in either Norwegian legal literature or in case law, but it is addressed in English case law. In an earlier line of cases, English law took the view as expressed by the Norwegian Supreme Court in the *Sunna*, but that line of cases was criticized and overturned by the English House of Lords in the *Hill Harmony* (above).

In the *Hill Harmony*, the decision by the master to take the longer sailing route was made before departure, and the charterer in that case argued, supported by the earlier line of cases, that in order to qualify as a navigational fault exception, the relevant decision would have to

be made after the ship had embarked on its voyage. On this point, the House of Lords stated:

> "The character of the [navigational] decision cannot be determined by where the decision is made. A master, while his vessel is still at the berth, may, on the one hand, decide whether he needs the assistance of a tug to manæuvre while leaving or whether the vessel's draft will permit safe departure on a certain state of the tide and, on the other hand, what ocean route is consistent with his owners' obligation to execute the coming voyage with the utmost dispatch. The former come within the exception; the latter does not."[67]

Elsewhere the example is given that the nautical act of plotting of a course is navigational in nature, regardless of whether it is made before or after the time of departure.

It may be objected that these remarks are made in the context of what constitutes navigational fault, rather than whether such fault (being made before departure) curtails the shipowner's liability for initial unseaworthiness under the HVR, which was not up for decision in the *Hill Harmony*. Nevertheless, and as stated in the previous chapter, the statements by the House of Lords are submitted in legal literature as also forming the governing law in the context of the HVR and the shipowner's liability for initial unseaworthiness.[68] Such a position also makes good sense from a functional perspective: it would be inconvenient to operate with different concepts for the liability exclusion for navigational fault, depending on whether one deals with the HVR in the context of paramount clauses in charterparties, or in the context of the HVR applied "directly" under bills of lading.

Moreover, such a functional view accords with the general risk allocation of the HVR, whereby navigational decisions are viewed as falling within the master's prerogative and are as such considered to lie outside of the shipowner's "direct control".[69] Viewed in that way, such navigational

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67 P. 159 of the decision.

68 Cooke et al (2007) p. 1023.

69 As expressed by the New Zealand Supreme Court in the *Tasman Pioneer*, above

decisions will not really form part of the shipowner's obligation to procure a seaworthy ship under HVR art. III 1 – see, however, the recent English case the *Libra* (below).

If these considerations are applied to the *Sunna*, it follows that they would not affect the result but they would affect part of the reasoning by the Supreme Court. If the facts are changed to the effect that the master made detailed planning as to whether to deploy single or double watch keeping during the upcoming nights, depending on the weather forecast, etc., it might well be that the shipowner's argument would be meritorious. Such evaluations might be considered as sufficient "acts of seamanship" to qualify as nautical fault, and as argued by the shipowner: one and the same fault committed by one and the same person cannot both constitute a nautical fault, not being imputed to the shipowner, and constitute initial unseaworthiness, being imputed to the shipowner.

4.4 The interrelation between nautical fault (mismanagement of the ship) and initial seaworthiness

It is important to note that the said functional approach to the question of navigational fault has no similar bearing on the nautical fault alternative of "act, neglect or default […] in the management of the ship."[70]

Here a temporal dividing line would have to be drawn as to whether or not the ship has commenced the voyage, since these acts do not belong to the master's prerogative, as do the acts of navigation. Put differently, there is here no similar basis for adopting a functional approach to the act of mismanagement of the ship. The shipowner's obligation to make the ship seaworthy before departure under the HVR art. III 1 a) is non-delegable, in the sense that these acts may well be (and often are) delegated e.g. to the master and crew, but the due diligence obligation itself is non-delegable. In other words, these acts of making the ship seaworthy are considered to be within the shipowner's "direct control",[71] while (at the same) acts

[70] As expressed in MC s. 276 i.f. and in HVR art. IV 2 a).

[71] As expressed by the New Zealand Supreme Court in the *Tasman Pioneer*, above.

concerning management of the ship made by the master or crew after embarking on the voyage, are not. Therefore, a temporal dividing line is needed here.

This type of question seems, again, not to have been up for judgment under Norwegian law, but the English case the *Maurienne*[72] from 1969 may serve as illustration. After completion of loading but before the ship set sail, some scupper pipes were found to be frozen and were negligently defrosted by a crewmember by the use of an acetylene torch, which set fire to the insulation of the pipes. The fire spread to the rest of the ship, causing her to sink. The shipowner tried to argue that the due diligence obligation under HVR art. III 1 only arose at the beginning of loading and at the beginning of the voyage, not during the stage inbetween.[73] Not surprisingly, the Court disagreed; the duty of due diligence to make the ship seaworthy was found to last from at least the beginning of the loading until the ship starts on her voyage, and in this case the voyage had not begun.

Applying these considerations to the *Sunna* may also be of interest. Since we concluded above that the master's conduct in failing to have in place a prudent bridge management plan, probably was not nautical in nature, that means that the task of ensuring such a plan would be of a kind which lay within the sphere of the shipowner's "direct control" (as put by the New Zealand Supreme Court). In that sense the master would be the shipowner's delegate, for the purpose of procuring this type of characteristic of the vessel to be in order at the time of departure. This kind of task would, according to this line of thinking, be open for the shipowner to have anyone perform on its behalf. It would not lie within the prerogative of the master as a navigational task. Hence, this angle to the topic seems to strengthen the correctness of the Supreme Court's finding of initial unseaworthiness through the fault of the master, although via a slightly different route than taken by the Court.

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[72] *Maxine Footwear Co. v. Canadian Governant Merchant Marine* [1959] A.C. 589.

[73] As a semblance of the English doctrine of stages, which is set aside by the adoption of the HVR in the English COGSA and which we do not go further into here.

This, at the same time, illustrates that the approach taken by the City Court in the *Sunna* was slightly misconceived. The City Court found that the shipowner had not sufficiently demonstrated that, through its superintendent, sufficient steps had been taken to ensure that the master would comply with the safety rules. Hence the shipowner was found liable on the basis of privity with reference to MC s. 275. A contrario, this seems to imply that if sufficient evidence had been adduced to that effect, but the master had still not complied with the safety rules, then there would be no basis on which to hold the shipowner liable, as the shipowner would have fulfilled its due diligence obligation under s. 275. That would however not have been right, since it overlooks the role of the master as a delegate of the shipowner under MC s. 275. In other words, the approach by the City Court seems, on the one hand, to misconceive the concept of privity ('egenfeil')[74] and, on the other hand, to misconceive who are delegates of the shipowner for the purpose of ensuring the ship's seaworthiness.

Aa stated earler, it seems that the way these points are structured in the MC, by having s. 275 as a kind of base rule with s. 276 as an "add-on", leads to this kind of confusion – more so than by reading HVR art. III 1 in conjunction with art. IV. Notably, HVR art. III 1 does not operate with any concept of "privity".[75]

[74] See pp. 12 and 13 of the City Court's decision, also with unfortunate considerations about burdens of proof (p. 17) which, on this kind of matter, with the evidence so informative as to what happened, seems to be a way of "dodging" the determinative legal questions. As to such "dodging" of legal questions by hiding behind burden of proof rules, see examples in Solvang (2021) pp. 90–94.

[75] See Solvang (2021) on the discussion of the English case the *Muncaster Castle* in relation to identifying the class of delegates of the shipowner "back in time" (from long before the relevant cargo voyage commenced). Also in that respect English law, naturally, starts out from the wording of HVR. art. III, and also in that respect Norwegian law through the MC has "hidden" the relevant part of the Rules – Solvang (2021) pp. 38–39 and 65–67.

4.5 Is the topic resolved through the English Court of Appeal case, the *Libra*?

The above illustration of the relationship between nautical fault and initial unseaworthiness is based on general considerations relating to the system of risk allocation of the HVR. There is however a specific case which deserves mentioning in that respect, namely the English Court of Appeal case, the *Libra*.[76] That case, from 2020, appeared long after the *Sunna* but the factual and legal questions bear semblance. The *Libra* is interesting because the outcome is very much in line with that of the *Sunna*, although the reasoning is, unsurprisingly, quite different. The English Court takes arguments from the wording of the HVR (as implemented into the English COGSA) and from a selection of English law authorities in the periphery of the topic at hand.

The case concerned the shipowner's claim for general average contribution following the ship's grounding after departure from the Chinese port, Xiamen. The grounding itself was held to have been caused by negligent navigation by the master in that he departed from the marked fairway and into shallow waters, which turned out not to have sufficient depth for the ship's draft.

Such negligent navigation would have exempted the shipowner from liability under the HVR art. IV 2 a) (nautical fault). The crucial point was however the following: The captain's passage plan and working chart was held to be insufficiently prepared, and negligently so, by failing to show in a conspicuous way recent information contained in a Notice to Mariners, according to which depths marked on the official chart, outside of the stipulated fairway, were incorrect; the area was much shallower than what appeared from the official chart. Furthermore, the Court held that if the passage plan and working chart had been prudently updated with this information, the grounding would most likely have been avoided, since the master would then, in the decisive moment of navigational decision making, have been reminded that the route he was about to select was not a safe one.

[76] [2020] EWCA Civ. 293.

Hence, there was a question of initially unseaworthiness through the passage plan and working chart not being in an adequate working order, thus increasing the risk of something going wrong during the voyage. In other words, it was, as in the *Sunna*, a question of a mistake, made by the master, which could be seen as having a dual aspect; the direct cause of the incident was a nautical fault but the underlying cause stemmed from a failure in existence at the time of departure, i.e. initial unseaworthiness.

The Court of Appeal upheld the lower Court's decision by holding that the shipowner was not exempted from liability for the incident, and therefore not entitled to general average contribution. The reasoning was essentially that the shipowner's due diligence obligation to make the ship initially seaworthy pursuant to HVR art. III 1 overrode whatever nautical fault exception otherwise in existence, and that the master was the shipowner's servant for the purpose of fulfilling the obligation to make the ship initially seaworthy – all of which accords well with the Norwegian Supreme Court's findings in the *Sunna*.

On a methodological score, which forms the primary interest in this article, various aspects are however of interest.

First, the Court found as a matter of construction of the wording of the HVR that art. III 1, unlike art. III 2, made no express reservation for the liability exceptions in art. IV 2 a), hence there was, according to the Court, no basis for introducing any argument about nautical fault exceptions being applicable in respect of a shipowner's obligation to make the ship initially seaworthy.

Second, this line of argument was coupled with the test of initial unseaworthiness under English law, which entailed the question: would a prudent shipowner have let the ship sail with knowledge of the relevant facts (that the passage plan and working chart were inadequate), something which was answered in the negative.

Third, the question then arose whether the master was the shipowner's servant for the purpose of the shipowner's due diligence obligation to make the ship seaworthy. This was answered in the affirmative, with added remarks that in this respect it did not matter whether the task by the master (which failed, thus making the ship unseaworthy) belonged

to the master's nautical sphere of expertise. According to the Court, it followed from the English House of Lords case the *Muncaster Castle*,[77] that such a due diligence obligation was non-delegable, hence it did not matter by whom, on the shipowner's behalf, the negligent mistake causing initial unseaworthiness was made.

This line of reasoning shows how complex, and diverse, these topics are – and it invites criticism, from a non-English perspective.

As to the first point above concerning literal interpretation of the HVR: It is, of course, true that art. III 2, unlike art. III 1, contains reference to the liability exceptions in art. IV. But to impute such significance to this detail in drafting appears, at least to the writer, not to be persuasive. If that lack of reference in art. III 1 shall be given such significance, it would be natural to ask: would not such an important point have been expressed in clearer terms by the drafters of the Rules?

Moreover, this detail in wording is not in a similar way picked up e.g. by the New Zealand Supreme Court in its fairly extensive review of the legislative history of the HVR in the *Tasman Pioneer*. Likewise, it is telling that the reference in art. III 2 to art. IV does not form part of the wording of the US COGSA, which essentially implements the Hague Rules verbatim. Hence, the English law argument is on this point not available under U.S. law,[78] which is also capable of explaining the reservation about the US law position in the *Libra* (below).

As to the second point above, one reflection is that the fact English law authorities establishing the test of what shall constitute initial unseaworthiness under English law (and under the HVR), does not in itself answer the more complex question at hand: shall, despite such definition of unseaworthiness, nautical faults occurring before departure constitute exceptions to the (otherwise) liability for unseaworthiness, e.g. along the lines of a functional approach as set out in chapter 4.3 above?

In other words, it appears formalistic to say that the test of unseaworthiness (that a prudent shipowner would not have let the ship sail with knowledge of the relevant facts) automatically resolves the question of

[77] Lloyd's Rep. 1961, 1, 57.

[78] Cooke et al (2007) p. 976, see also fn. 187.

liability for such unseaworthiness, if/when the failing task of a navigational nature constitutes the unseaworthiness.

This has a side to the third point above concerning the Court's reference to the *Muncaster Castle*. That reference seems to be an English law peculiarity for the reason that the *Muncaster Castle* deals with delimitation as to who is the shipowner's servant back in time, involving ship repair situations, and similar. Although the *Muncaster Castle* contains general statements as to non-delegable duties on the shipowner's part to exercise diligence to make the ship seaworthy, this does not, in the writer's view, answer the question at hand. Put differently, there is no basis in the wording of the HVR to say that a shipowner is responsible for servants back in time – or where such line is to be drawn. Hence, that type of arguments (including the English authorities on the point) cannot as a matter of analysis be said to resolve the interrelation and grey zones concerning the master's potential dual roles in connection with the vessel's unseaworthiness before departure. Put still differently, no one would doubt that the master is generally speaking a servant of the shipowner; he is a servant also during the voyage, but the question concerns the exception from liability for nautical faults, and *that* is a question clearly not applicable to the situation being decided in the *Muncaster Castle*, namely a shipowner's vicarious liability for the fault of a ship repair worker; a ship repair worker is not capable of committing a nautical fault.

The English approach is therefore marked with an idiosyncratic narrow type of construction, not looking at the (clashing) policy considerations in play under the HVR. And it is to be noted that the *Libra* is a Court of Appeal decision, with the English Supreme Court often taking a different, and wider, approach to central HVR questions, as was amply illustrated in the *Muncaster Castle* itself.[79]

The reference in the *Libra* to the *Muncaster Castle* is an English law peculiarity also for the reason that under Norwegian (and Nordic) law it is questionable indeed whether the *Muncaster Castle* would be followed.[80] Hence, this argument under English law would likely not be available

[79] Solvang (2021) chapter 2.2.

[80] Which is discussed in some detail in Solvang (2021).

under Norwegian law, as, tellingly, it was not even raised in the similar discussion in the *Sunna*.

The *Libra* contains also some other points worth observing. The Court discusses foreign law sources including considerations about what can be derived from the New Zealand Supreme Court's review of the risk allocation system of the HVR in the *Tasman Pioneer*,[81] and of the U.S. law position, which seems to take a different approach to that taken by the Court in the *Libra*. The U.S. law position is therefore of interest.

The U.S. case referred to is the *Jalavihar*.[82] The circumstances were that the court of the first instance had held cargo damage to be caused by nautical fault, in that the master of the *Jalavihar* had failed to properly communicate with the pilot. This miscommunication, constituting negligence, was held to be the proximate cause of the incident. The cargo side had argued before the court of the first instance that the master should have made the relevant communication with the pilot already before departure, the failure of which constituted initial unseaworthiness for which the shipowner would be vicariously liable. On this point, the court of the first instance made obiter remarks to the effect that the fault would, even if made before departure, still be navigational in nature, hence not lead to liability for the shipowner. Upon appeal the Appeals Court upheld the finding by the court of the first instance on causation, and did not express any view on the question whether a nautical fault committed before departure, thus constituting initial unseaworthiness, would lead to liability.

The question seems therefore not to be authoritatively decided under U.S. law, but – as the Court in the *Libra* stated – even if it had been, and it had gone in a different direction than that of the *Libra*, "it would be inconsistence with English law".[83]

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81 Paras 55–58 of the decision with, in the writer's view, a fairly narrow discussion of what can be inferred from the statement by Wilson J, quoted in chapter 3.2 above.

82 Court of Appeals for the Fifth Circuit, [1997] USCA5 1466; 118 F.3d 328 – discussed at paras 68–70 in the *Libra*.

83 Para 70.

4.6 Shipowners' vicarious liability for master's fault – "latent human defect" and unseaworthiness

4.6.1 General considerations

Once more returning to the *Sunna*, the Supreme Court there held, in connection with the shipowner's due diligence obligation to make the ship seaworthy, that the shipowner was vicariously liable for the master's wrong in having established a practice of disregarding the night time sailing rules. This topic of a shipowner's vicarious liability for the master's conduct in respect of the requirement of initial seaworthiness deserves a separate analysis. Admittedly, that question would become moot if the reasoning of the English Court of Appeal in the *Libra* were to control, but as discussed in the previous chapter, the reasoning of the Court – including the significance given to the English case, the *Muncaster Castle* – is in the writer's view not persuasive, at least not under Norwegian law.

The Supreme Court in the *Sunna* first set out the due diligence obligation of the shipowner as applied to the facts, by stating:

> "A prudent shipowner would not – had he been aware of the subject matter – have allowed the ship to commence the voyage with a system of watch keeping which exposes the cargo to a significantly increased risk."[84]

The Court found it unnecessary to decide whether or not the shipowner, through privity,[85] had knowledge of the relevant facts, since the master was to be deemed a servant of the shipowner for the purpose of ensuring the vessel's seaworthiness. The Court stated:

> "It is obvious that the master has not exercised due diligence in ensuring seaworthiness of the vessel. [The shipowner] is in this respect vicariously responsible for its captain so that his mistake is

[84] Para. 48 – my translation.

[85] Although the use of this term seems misconceived, see above.

> considered the mistake of the shipowner [reference to legal commentary and also Rt. 1993.965 Faste Jarl]. When a disposition by the master has led to unseaworthiness of the vessel at the beginning of the voyage it is, as stated, of no relevance whether his mistake also might be seen as a nautical fault covered by section 276 first paragraph. Accordingly, it seems clear to me that the shipowner cannot relieve itself of liability on that basis. Since the shipowner is vicariously responsible for the mistakes of the master, it is not necessary for me to render a decision on whether or not there is privity[86] on the shipowner's part."[87]

This statement of the law seems unproblematic on the facts as found by the Court: to have in place a proper bridge management system would go to the root of seaworthiness of ship and crew, hence it would be considered to lie within the shipowner's "direct control", in the parlance of the New Zealand Supreme Court in the *Tasman Pioneer*.

However, the statement by the Supreme Court seems overly broad. If we slightly shift emphasis on the relevant facts, in the direction of the master's intentions concerning how to deploy the crew during the upcoming voyage, the statement becomes less clear.

This gives occasion to discussing another point of relevance concerning the division of risks embedded in the HVR and how that division is, or may have been, distorted through the legislators' rewriting of the HVR when implemented into the MC. This point concerns what could be called "human latent defects" of the master or crew.

The factual premise for the discussion is that we assume that a master by outward appearance is considered competent (his papers being in order, there being no record of prior mishaps, etc.) but that he has a mindset, concealed from observers, of being rule defiant. Would this characteristic of "human latent defect" be something for which a shipowner would be vicariously liable?

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86 Norwegian: 'egenfeil', which is a dubious term, since it could both mean privity in the proper sense (decision making at the alter-ego level of the company) or fault through the negligence of servants being someone else than the master, see chapter 3.4.

87 Paras 52 and 53 – my translation.

The example may appear artificial but is not too far from the facts of the *Sunna*, and it is essentially in line with how the shipowner argued its case.[88] For the purpose of analysis, the facts may be slightly twisted: a master has a mindset of not complying with safety rules requiring double watch during night time sailing (but rather relies on ad-hoc decision making as to whether a double watch is needed), hence the ship is unseaworthy due to the ensuing increased risk of something going wrong. This mindset is however not made known to anyone, and cannot be inferred from any deficient bridge management plan at the time of departure. Would then the shipowner be vicariously liable for such (wilful) rule defying intentions by the master?

When looking at the scheme of the MC, the answer may appear to be clear. MC s. 276 states that the shipowner is liable for the consequences of unseaworthiness if "caused by the carrier personally or by someone for whom the carrier is responsible [failing] to take proper care to make the ship seaworthy at the commencement of the voyage." In this sense, it seems natural to say in our example that the master fails to take "proper care" to ensure seaworthiness, i.e. to ensure that he does not have the intention of defying the safety rules.

If, on the other hand, we look to the scheme of HVR, the answer becomes less obvious. The instrumental provision in art. III 1 sets out the shipowner's *obligations* in terms of exercising due diligence to: a) make the ship seaworthy; b) properly man and equip the ship; c) make it cargoworthy. This instrumental part concerning the shipowner's obligations, is diluted when transformed into the MC, being inconspicuously placed in a general provision obliging the shipowner to care for the cargo in MC s. 262.

With the scheme of the HVR art. III 1, separating the shipowner's obligations relating to the ship and the crew, general questions concerning "latent defects" in both respects, spring to mind.

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[88] The shipowner argued that a nautical mistake cannot be something for which the shipowner becomes vicariously liable, even though the mistake may constitute unseaworthiness, see chapter 4.1.

With respect to the provision of a seaworthy ship, the position would be that if the ship suffers a structural defect which is not reasonably discoverable at the time of commencement of the voyage, the ship would be considered unseaworthy, but there would be no breach of the due diligence obligation by the shipowner. Moreover, the legal test concerning whether or not the shipowner has exercised due diligence would clearly extend to its servants, including the master and crew,[89] but on the premise that the defect is not reasonably discoverable by the shipowner (including its servants), there would be no basis for liability.[90]

With respect to the shipowner's obligation to properly man the ship, the position may be different. HVR art. III 1 b) could here be rewritten, by setting out its essence:

> "The shipowner shall exercise due diligence in providing a competent master at the time of commencement of the voyage".

If then the master is competent by all external characteristics, is the shipowner liable if the master has some concealed intention of doing a wrong during the voyage? It would seem unnatural to consider the master the servant of the shipowner in relation to the duty of the shipowner to provide a competent master.[91] Put differently, is the subject matter of the obligation of performance by a shipowner (a competent master) at the same time the servant of the shipowner for the purposes of fulfilling that obligation?

The answer seems to be no. Perhaps such an answer may seem absurd, in the context of contract law: why should not a shipowner be responsible for a master with (wilful) damage creating potential? However, in

[89] Who often play an important part in ensuring the seaworthiness of the ship, including that of checking its condition before departure. In this respect the Supreme Court's reference in the *Sunna* to MC s. 131 concerning the master's seaworthiness duties, is apposite, but not within the risk allocation system of the HVR, see chapter 3.3.

[90] For a review of the concept of latent defect of the ship within the context of initial seaworthiness and the HVR, see Solvang (2021) pp. 20–22 and 52.

[91] See the *Eurasian Dream*, Lloyd's Rep. 2002, 2, 692, as an example where the master was found, due to being inexperienced in the relevant trade, to be incompetent, and that this should have been detected and rectified by the shipowner.

most instances such "absurdity" would not materialize, since normally the shipowner, as principal, would be liable for the negligent or wilful fault caused by its servant at the time when such fault materializes. The point only arises when there is, as in the HVR, this kind of formulated obligation directed towards a specific time of performance (making the vessel seaworthy at the commencement of the voyage), combined with exceptions from liability for specific faults thereafter (nautical faults during the voyage).[92]

Similar formulations can be found in modern standard charterparties, such as Shelltime 4. Here the specific obligation of the shipowner is split up between the obligations during the currency of the charter, and at the time of tendering of the ship. The seaworthiness obligation at the time of tendering of the ship is separated into various headings, dealing with the ship as such (clause 1) and the officers and crew (clause 2). With respect to the officers and crew, the obligation is formulated as that of providing a competent crew with specified characteristics given in the clause. Whatever "hidden" defect of an officer or crew member, would in this case be of no particular relevance, since if/when such "hidden" defect materializes into a wrongful act during subsequent performance, the shipowner would at that stage normally be liable for the wrong committed by his servant. The stated "absurdity" would terefore again only arise if there is an exception from liability – for example under a paramount clause – for such later committed wrong. There is often such a paramount clause, as illustrated by the English case, the *Hill Harmony* (above).

In such time charter cases it would however be unusual to have constellations where such nautical fault committed during the currency of the charter, would be linked back to the shipowner's obligations at the time of tendering of the ship. In other words, it would be unusual to have facts fit the situation where the subsequent fault can be linked back to the state of mind of the relevant crew member at the time of tendering of the ship, and crew. The time charter example is nonetheless capable of illustrating the point relating to the HVR. In respect of the HVR, the link in time between a fault committed during the upcoming voyage and the master's state of mind at the time of commencement of the voyage (i.e. when the shipowner's due diligence seaworthiness obligation attaches), would normally be closer than in a time charter situation.

[92] The fact that such nautical faults may be intertwined with the concept of initial unseaworthiness is immaterial for the present purposes.

The point is not to conduct any in depth research on this point of liability for "latent human defect", but to point to the fact that there is no necessary parallel to ordinary Norwegian principles of vicarious liability in contract law, hence the risk allocation system must be analysed within the parameters of the HVR – as highlighted e.g. by the Australian and the New Zealand Supreme Courts (above).

It is, moreover, worth underscoring that the question being discussed here has a connecting factor to those previously discussed. It makes sense to say that what is within the shipowner's "direct control" would be the ensuring that a competent master is employed, as reflected in HVR art. III 1 b). The mindset of the master relating to nautical matters is considered to be outside of such control and within the nautical sphere of the master's expertise. Therefore, in order to have a functional approach relating to his nautical decision making (chapter 4.3), this requires a link to what we have addressed here concerning "latent human defects". In the context of a shipowner's vicarious liability, the master is, as a starting point and liability-wise, not a servant of the shipowner with respect to seaworthiness aspects which relate to his role and functions in nautical decision making. On the other hand, blatant disregard for rules or orders would probably not be considered nautical in nature, since this concept requires some kind of concrete evaluations ("acts of seamanship").

Our question is, therefore: provided the intention of the master is of a nautical nature and provided it is concealed from observers, would the shipowner be vicariously responsible for it as part of its initial seaworthiness obligation?

In the *Sunna* this was not considered in its pure form, since the master did not have in place a prudent bridge management plan at the time of commencement of the voyage. This fact was not "hidden", and the first officer was even privy to it. Hence, this task was probably something within the shipowner's "direct control", and could thus be seen as having been delegated to the master. Put differently, this failing task could have been detected by some (other) representative of the shipowner, and was in that sense "patent" rather than "latent".

There is, therefore, probably no reason to criticize the Supreme Court's finding in this respect. However, the case involved nuances of facts, and the shipowner argued essentially along the lines as discussed here. In response to such arguments, the Supreme Court's general statement that the master is the servant of the shipowner for the purposes of all matters relating to initial seaworthiness, appears overly broad.

4.6.2 The Norwegian Supreme Court case, the *Faste Jarl*

The above discussion about "latent human defects" has relevance to another Norwegian Supreme Court case, the *Faste Jarl*[93] from 1993. Also in that case the Supreme Court seems to be missing central legal points concerning the HVR and its risk allocation system.

The ship grounded shortly after departure from the load port due to the first mate, who was alone on the bridge, being intoxicated. The cargo was not damaged, but the shipowner's claimed general average contribution for the costs of having the vessel salvaged. The cargo refused to contribute in general average, alleging breach of the shipowner's obligation for initial seaworthiness under the HVR, as implemented into the then MC. The shipowner, on the other hand, claimed that the grounding was due to a nautical fault, which absolved them from liability and made them entitled to general average contribution. We deal with the issue of cargo liability only. [94]

Since the first mate, who was alone on the bridge, had already been drinking before departure (and fell asleep, after having set the ship on autopilot), the Court held that the incident was not to be considered a nautical fault but rather a situation of initial unseaworthiness.

The shipowner argued that the intoxication formed part of the first mate's conduct in his nautical capacity and should therefore be separated from his role as the shipowner's delegate for the purpose of making the

[93] ND 1993.162.

[94] The primary question was that of entitlement to set off losses resulting from breach of initial unseaworthiness, against general average contribution claims, as here: cargo would not have had any claim for contribution against it, if the vessel had not been unseaworthy and grounded. The Court held that such set-off right existed.

ship initially seaworthy. Such an argument was dismissed by the Court in a few words (see below). There was also a factual question whether the master, who went to rest at his cabin when the first mate took over the watch on the bridge, should have detected the mate's incapacitation. This the Court found unnecessary to decide, on the basis that the shipowner would in any event be vicariously liable for the first mate's fault of intoxicating himself.

The arguments submitted by the parties are only briefly referred to in the decision. The reasoning by the Court is also very brief. We shall set it out.

The shipowner referred to the, at the time, relevant provision of the MC, which incorporated the HVR Catalogue, including art. IV 2 a), and argued that:

> "the shipowner is not liable for navigational fault even if that is attributable to intoxication. That does not apply if the intoxication existed at the commencement of the voyage. There is however no reason to believe that the first mate was incapable of operating the ship already at that time. According to [the MC corresponding to HVR art. IV 2 q)] there is an additional requirement that someone for whom the shipowner is responsible, is to blame for the unseaworthiness. No one can be blamed for possible unseaworthiness by reason of the first mate's intoxication. This person's own knowledge that he was intoxicated, will have to be disregarded."[95]

Although, as we have seen, Norwegian argumentation is conspicuously void of any reference to HVR art. III (as this is "hidden" in the provisions of the Code), what is here argued is in essence that the shipowner's obligation, according to art. III 1, consists in providing a ship with a competent crew, and that if the characteristic of a crew member is "latent" (as it possibly was), then no one is to blame for it other than the crewmember himself, and that the crewmember is not the shipowner's servant for the purpose of being (himself) a competent crewmember.

The cargo side, on the other hand, argued:

[95] P. 968 – my translation.

> "In this case the first mate was intoxicated already upon the ship's departure from Oslo. Consequently, the ship was unseaworthy. Since the first mate was also aware of his condition, and the shipowner obviously is vicariously responsible for the first mate's fault, the shipowner is liable pursuant to [the then MC s. 118 corresponding to HVR art. IV 2 q)]. Apart from this, the shipowner has not demonstrated that the master should not have understood that the first mate was intoxicated […]."[96]

In other words, the cargo side argued along the lines of ordinary Norwegian law conceptions of a principal's vicarious liability for the fault of his servants, i.e. that the first mate was the shipowner's servant for fulfilling the shipowner's due diligence obligation to make the ship seaworthy.

The Court stated:

> "According to [MC s. 118 corresponding to HVR art. IV 2 a)] the shipowner is not liable for damage caused by navigational fault on the part of the crew, provided that that fault is not attributable to unseaworthiness at the commencement of the voyage, and that the shipowner or someone for whom he is responsible is to blame for this. The requirement of seaworthiness according to MC 118 means i.a. that the ship shall be sufficiently manned. […] The crew must be able to perform the voyage without the ship and/or cargo being exposed to greater danger than must be expected in the carriage of goods by sea. Also sickness or intoxication may, depending on the circumstances, lead to the ship being unseaworthy. […] Since the first mate was the only officer on the bridge, there existed already at the time of departure a considerable risk for damage. The ship was therefore not seaworthy. That the first mate 'has not exercised due diligence to ensure that the ship was seaworthy', is obvious."[97]

These remarks are as such straightforward. The Court then discussed the shipowner's arguments:

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96 Ibid – my translation.

97 P. 969 – my translation.

> "The appellant has claimed that the shipowner is not responsible for the first mate getting intoxicated during service. This concerns a criminal offence, in contradiction of the employer's interests, which has no reasonable connection to the first mate's working tasks, and which for that reason are unforeseeable. I do not agree. In my view, the fact that a crewmember is intoxicated during service, with its ensuing dangers, is a not an unforeseeable risk in connection with ship operation, a risk it must be assumed that shipowners are generally aware of. The appellant has also submitted that the shipowner is not responsible because, in the assessment of whether the unseaworthiness was caused by negligence, one must disregard the first mate's own knowledge that he was intoxicated. I cannot see that this submission has any merit to it."[98]

Some reflections can be made on this brief review of the case, in line with the overall ambition of this article.

First, it is telling that the argumentation revolves around Norwegian sources of law and ways of thinking, such as the shipowner's argument that it should be acquitted on the basis of notions of the first mate having acted beyond the scope of his employment. This is taken from Norwegian tort law relating to a principal's (an employer's) vicarious liability,[99] but has little, if any, relevance in the context of risk allocation embedded in the HVR. It is worth reiterating the comments by both the Australian and New Zealand Supreme Courts in their cautioning of construing the HVR in a national law context.

Second, it is telling that the important aspect of HVR art. III is totally lost in the discussion. This provision, together with art. IV, forms the essence of the HVR risk allocation system and of important international law sources on the topic, but is virtually absent in Norwegian law discussion. Hence, the Supreme Court dismisses in one sentence an argument by the shipowner to the effect that the shipowner cannot be held vicariously liable for the first mate's fault in incapacitating himself

[98] P. 970 – my translation. The last sentence reads in Norwegian: 'jeg kan ikke se at denne anførselen har noe for seg', which is the only reasoning given by the Court on this point.

[99] Concerning this tort law topic on a comparative law basis, see Solvang (2021) pp. 76 et seq.

through intoxication. That argument, according to the Court, "has no merits to it".

It is, furthermore, telling that in the *Sunna* an important part of the Supreme Court's reasoning consisted of referring back to the *Faste Jarl* decision on a similar point of construction.[100] In that way the lack of reasoning in the *Faste Jarl* multiplied itself by becoming part of the reasoning in the *Sunna*.

The argument which the Supreme Court in the *Faste Jarl* found "has no merits to it" lies, ironically, at the core of the complexity of the HVR. Here we shall review that very question in light of some of the main findings based on the international sources, as earlier discussed. This could be approached from different angles.

It might be convenient to start with the simple: if the condition of intoxication of the first mate was patent at the time of the ship's departure, hence reasonably discoverable by other crewmembers, then a failure to take action by such other crewmembers would clearly be imputed to the shipowner. However, officers and crewmembers are generally not required to "check one another" for possible signs of incapacitation, hence to establish negligence in this respect would necessarily be fact specific.[101]

The more difficult question arises if, in such circumstances, the patent incapacitation was not discovered by anyone, and the circumstances were such that no one onboard could be blamed for not discovering it (as seems to have been the position in the *Faste Jarl*). On the one hand, we are within the general notion of it being within the shipowner's "direct control" to detect such patent deficiencies before departure. However, a complicating factor is that the very crewmember intoxicating himself, would seemingly not be deemed the shipowner's servant for the purpose of not intoxicating himself, as discussed in the previous chapter relating to HVR art. III 1 b), and as seems to have been the rationale for the shipowner's argument in the *Faste Jarl*.

[100] Paras 52–53 of the *Sunna*.

[101] In the *Faste Jarl* it was up for discussion whether the master should have detected the first mate's intoxication. However, as a general observation; he would probably not have gone to his cabin to rest if he had suspicion that the first mate was in a state which would bring him (and the other crewmembers and the ship) into danger.

The question would in this respect be whether general notions of the shipowner's "direct control" relating to seaworthiness matters before the ship's departure, would lead to an inference of liability on the shipowner's part, based on constructive knowledge, along the lines that there could have been people on the bridge checking the seaworthiness of the ship (i.e. the first mate's condition) on behalf of the shipowner, and the fact that there were none, should not work in the shipowner's favour. However, such a principle of constructive knowledge is not easily compatible with negligence in the stricter sense.[102]

The above conundrum should however be seen in conjunction with some further examples. If one assumes that the master had decided to start drinking shortly after departure (e.g. because there were others on the bridge upon departure while he would later be alone), and that the rest of the facts were as in the *Faste Jarl*, how should that be considered? Since the master's intention in this example was in existence already upon departure, the ship would be unseaworthy; there was an increased risk of something going wrong just as much as if the drinking had already started – and a prudent shipowner would not, with knowledge of the facts, have allowed the ship to sail.

This brings up another aspect. In the *Faste Jarl*, the shipowner argued that the first mate's intoxication was related to his navigational capacity, hence should be seen within the parameters of what later happened; navigational fault and the ship's grounding. That seems not to be the right way of looking at it. Clearly, the act of making oneself intoxicated is not "navigational" and cannot in that respect be linked to what the intoxication may later lead to. Rather, the argument should be taken from HVR art. III and possible (human) latent defects, as discussed above.[103]

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[102] Liability based on constructive knowledge would be more compatible with what is known under Norwegian law as "control liability" (kontrollansvar) as found e.g in sale of goods law. Or it might fall within notions of cumulative fault or other doctrines of inferred negligence, as in the English doctrine of res ipsa loquitor, see Solvang (2021) pp. 90–93.

[103] On this point the approach in the *Libra* of adopting the principle of non-delegable duties, taken from the *Muncaster Castle*, would dispose of the question – but that way of approaching it is not persuasive, as earlier set out.

4.7 Summarising remarks – with a look to the Norwegian Supreme Court case, the *Vågland*

As has been illustrated, the question of the relationship between nautical fault and initial unseaworthiness is potentially complex, and with no clear-cut solution either in the original drafting of the HVR, or through international legal sources. Various perspectives may be adopted, and the following may serve as summary.

If the relevant fault in existence at the time of departure, making the ship unseaworthy, is not of a nautical nature proper, i.e. not "seamanship-like", then there would be no grounds for liability exemption under the HVR. A question in such situations may still be whether, depending on the circumstances, the relevant defect is "hidden" to the shipowner, as discussed in relation to the *Faste Jarl*.

If the relevant fault in existence at the time of departure, making the ship unseaworthy, is of a nautical nature proper, then further questions arise. One could here take a functional approach, to the effect that the due diligence obligation of the shipowner to make the ship initially seaworthy, is somehow "eclipsed": rather than an arbitrary dividing line based on the exact time when the relevant nautical fault were to occur, the decisive criterion would be the nature of the relevant fault itself. Such an approach, giving effect to the nature of the fault, seems to be reflected in the U.S decision the *Jalavihar* (albeit obiter remarks in the first instance court). It seems, moreover, to be envisaged by the New Zealand Supreme Court in the *Tasman Pioneer*, with the notion of a shipowner's "direct control", which seemingly would not encompass nautical faults belonging to the nautical expertise and prerogative of the master and officers. Likewise, it seems to be reflected in the English House of Lords decision in the *Hill Harmony* (although that decision did not involve the HVR question of initial unseaworthiness).

Such a functional approach does in turn open for additional questions: would it be compatible with a shipowner's obligation under HVR art. III 1 to make the ship seaworthy, that certain faults (nautical faults proper) committed by certain servants, are not to be imputed to the shipowner?

These questions were addressed by the English Court of Appeal in the *Libra*, holding against the shipowner, essentially along the following line of arguments: a) literal construction of the HVR art. III 1 and 2 points towards not allowing art. III 1 to be eclipsed by art. IV exceptions; b) English law authorities on the test of unseaworthiness encompass also nautical faults proper; c) the English law authority of the *Muncaster Castle* establishes that a shipowner's duty of due diligence to make the ship initially seaworthy, is non-delegable, which means that also nautical faults proper are covered by such non-delegable duties.

For reasons earlier explained, that English law position is not necessarily apposite under Norwegian law. This in turn means that the issue is as a matter of international legal sources fairly "open", hence capable of being resolved in more than one direction. This fact is perhaps not surprising in view of the history of the Rules, which comprised a compromise between opposing interests and with no coherent drafting style to merge these opposing interests. Rather, the drafting was marked by a peculiar composition of textual pieces representing the respective interests.[104] That being so, one could perhaps say that the Norwegian Supreme Court's decisions in both the *Sunna* and the *Faste Jarl* are practically and legally sound, and should therefore be immune to criticism. However, the point remains that a legal discussion should be rooted in legal sources of relevance, regardless in what direction they may turn out to go. It is in that respect that the two decisions are unsatisfactory – and the same applies to the *Sunny Lady* (next chapter).

This methodological aspect involves what generally may be seen as a strength of Norwegian Supreme Court adjudication; that of adopting a fairly open (and pragmatic) policy consideration of the matter at hand. But also that aspect seems here to be missing. Put differently: also such policy considerations require that the considerations to be weighed are derived from the legal instrument governing the legal subject matter, i.e. the HVR. When that part is missing, what might have been good policy considerations becomes stultified.

[104] See the review of the *Tasman Pioneer*, above.

With respect to such policy considerations, it is worth looking at another Supreme Court decision, the *Vågland* from 1954.[105] That case did not deal with exception from liability under the HVR but a similar question of a shipowner's limitation rights in case of nautical fault, and it concerned the peculiar questions which might arise in relation to single-person shipowning companies (Norwegian: skipper-reder). Here, one and the same person fulfills the dual role of being the navigator and the person preparing the ship for sea.[106] Hence, a functional approach to questions of navigation becomes, as it were, distilled, and for that reason illustrative of policy considerations.

The facts of the case were that the ship *Vågland* was to blame in a ship collision. The immediate cause of the collision was navigational fault on the part of the master, while the underlying cause was intoxication on his part, in existence already before departure. The relevant rules concerned limitation of liability, which had no specific provision regulating the stage of initial unseaworthiness, but granted limitation of liability for nautical fault in master-owner constellations.

In the relevant consideration of causation, the Supreme Court found the intoxication to be the proximate cause of the incident, which meant that limitation rights were not granted. The Supreme Court's reasoning is succinct:

> "[NN's] grave violation of the COLREG[107] has in my view […] its cause in his voluntary intoxication, and could – as I see it – hardly have been committed by an experienced master in a sober condition. Under the influence of alcohol he set to sea with his ship with himself at the helm, and under the influence of alcohol he retained command and was on the bridge when the collision happened. What […] led to the collision was – as mentioned – [NN's] intoxication, and for this fault he must be held personally responsible.

[105] ND 1954.65.

[106] As Falkanger points out, these constellations could arise in situations of genuine one-persons companies or in corporations where the main shareholder of the company is the master, which in the context of HVR related transport probably would be more realistic – Falkanger/Bull (2016) p. 175.

[107] Norwegian: sjøveisreglene – which incorporate the COLREG.

> […] That being the case, he cannot be absolved from liability by the fact that the intoxication led to faulty navigation which in itself is a nautical fault."[108]

That case led to discussion among legal scholars. The Norwegian lawyer Alex Rein disagreed with the outcome of the case, arguing that the shipowner's protection by nautical fault thereby risked being eroded, and compared the situation of being intoxicated to the situation of being overly tired, which would have led to ensuing nautical fault giving rise to limitation rights. Mr. Rein stated:

> "For a master-owner's protection to be effective pursuant to the preparatory works, one cannot deny him limitation of liability in all instances where he qua owner would have had a duty to prevent a nautical fault qua master. It cannot therefore in itself constitute a basis for liability that the master-owner's owner-ego did not grasp his master-ego by the neck."[109]

That view elicited reactions. The Danish nautical expert Rud. Nilsson strongly disagreed and stated i.a.:

> "When it is stated [by Mr. Rein]: 'It cannot be disputed that the intoxication was an error in the nautical service', that may in my opinion be correct only in relation to the master-owner in his capacity as master, not in his capacity as owner. As owner his mistake consisted in the fact that he drank the master (in casu himself) under the table,[110] despite knowing that the master was going out sailing. If there had been a question of two persons involved, and the master had shown up drunk at the owner's offices to say goodbye, then the owner would have had a duty to stop him. The situation would have been even worse if the owner had sat down and started drinking heavily with the master before he was going

[108] P. 67–68 – my translation.

[109] Alex Rein, Skipper-rederens rett til ansvarsbegrensning for nautisk feil – Noen bemerkninger til en høyesterettsdom, AfS Bind I 1954 p. 560–563 (561) – my translation.

[110] Danish: 'drak skipperen på pelsen' – which is hard to translate.

> out sailing, and that is actually what has happened here where the master and the owner is one and the same person."[111]

It is to be noted that this view is very much in line with the reasoning by the Supreme Court in the *Faste Jarl*, in that intoxication by the navigator having occurred before commencement of the voyage, could not be seen as navigational in nature, and therefor belonged to the shipowner's sphere of responsibility – as was the essence of the reasoning also in the *Vågland* decision.

Alex Rein gave a further reply where he disagreed with Rud. Nilsson's view, stating i.a.:

> "I am sorry to note that in my previous article I expressed myself so unclearly that even senior officer Rud. Nilsson was not able to follow me. On the other hand, I believe Mr. Nilsson too quickly draws the conclusion that my argumentation for that reason is untenable.[112] Rather than repeating my argumentation in more elaborate terms, I think it will be helpful to take another route and demonstrate where Mr. Nilsson goes wrong in his argumentation."[113]

Alex Rein then gave another analysis of the various constellations in, and consequences of, the master-ego's and the owner-ego's possible prevention of each other's mistakes, and maintained his earlier view that the master-ego's nautical fault should on the facts of the *Vågland* have been decisive, leading to limitation rights being granted.

Mr. Rud. Nilsson again responded, maintaining his earlier view, and stating in response to Mr. Rein's example of tiredness being tantamount to intoxication:

> "Tiredness would be accumulated during performance of the master's duties; if he had been dead-tired before the ship's departure, it might have been reasonable to compare these two situations,

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111 Rud. Nilsson, Diskusjonsinnlegg, AfS Bind 2 1955 p. 163 – my translation.

112 Which is a twisted type of logic: that a person too quickly draws a conclusion *because* he is unable to follow the logic of his antagonist.

113 Ibid. P. 166 – my translation.

> but I would like to see that master who would go to bed when the ship enters dire straights, even if he has already had a strenuous day. It is probable that I do not view these questions sufficiently legally,[114] but as a practitioner I cannot accept viewing these situations on an equal footing. […] The ship is not seaworthy when under command of an intoxicated master, and it is on this point that the owner must take the full responsibility for not having let his alter-ego stay on shore and sleep it off."[115]

As part of this Norwegian-Danish debate, also the Swedish scholar Tage Zetterlöf expressed his views, essentially agreeing with Rud. Nilsson. Mr. Zetterlöf discussed various policy considerations involved in the *Vågland,* e.g. on the one hand that a master-owner's owner-ego may be said to be disadvantaged vis-à-vis a regular owner, who would be entitled to invoke limitation rights in case of nautical fault committed by its master – but on the other hand that a master-owner's master-ego would be unduly favourably treated compared to his nautical colleagues, who would not be protected by limitation rights in a situation such as the present one.[116]

As stated, the discussion concerned the limitation rules as applicable at the time,[117] not the HVR. However, the discussion revolving around the phenomenon of dual tasks performed by one and the same person in master-owner constellations, is of general interest.

First, the phenomenon has an intriguing theoretical side: Should one – in the spirit of Mr. Rein's idea – split the two egos in the sense that the test of due diligence by the master-ego starts only after that ego has been intoxicated by the owner-ego? This way of putting the question goes to the core of fundamental principles found in other legal areas, such as in criminal law, where in case of voluntary intoxication a person's

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114 Which clearly is mockery of Mr. Rein's formalistic argumentation.

115 Ibid p. 168 – my translation.

116 Ibid p. 165 – however, and as Mr. Zetterlöf pointed out, with possible protection through the rules of abatement according to MC s. 151 second paragraph.

117 For a further discussion on the subsequent development in this area of law, including the current MC chapter 9 based on the 1976 Convention, see Solvang, Rederiorganisering og ansvar – rettslige utviklingstrekk, MarIus 484, 2018, pp. 35–37.

acts are assessed as if he/she was not intoxicated. Conceptually, it seems close to impossible (even in master-owner constellations) to envisage an "input-threshold" of intoxication which is to be taken into account so that a nautical fault occasioned by intoxication is not to be deemed negligent because such "input-threshold" is not to be imputed to the nautical master-ego (solely to the owner-ego) and therefore shall not form part of the overall assessment of negligence, including the assessment of exceptions from liability for negligence. That type of logical (and psycho-logical) delimitation, bordering to absurdity, is hardly tenable within legal reality.

Second, this conception of an "acting-ego" in a master-owner constellation, has some relevance to "normal" constellations of dual functions to be performed, e.g. in the context of the HVR.

The *Vågland* bears resemblance to the *Faste Jarl*. If the shipowner in the *Faste Jarl* had been a one-person master-owner, the reasoning in the *Vågland* would have governed.[118] Fundamental ideas of contract law lead to the same result: if a corporation engages employees to undertake the relevant tasks, i.e. both preparing the ship for sea and navigating the ship, there should in principle be no difference from a one-person company. The basic idea is that a party subject to certain duties by undertaking certain functions, shall not be allowed to escape liability by engaging someone else – and correspondingly if the failure of performance of certain functions is exempt from liability.

In other words, when intoxication before departure was not seen as (the preceding stage of) a nautical fault in a master-owner situation in the *Vågland*, that consideration should turn out no differently if servants are engaged in doing the relevant task – as in the *Faste Jarl*. Conversely, if the task is of nautical nature proper, whether the failure in performing it is committed before or after commencement of the voyage, should according to this line of reasoning make no difference. This essentially points towards what we have called a functional approach in the context

[118] I do in that respect not follow the view by Falkanger/Bull that the outcome in the *Vågland* has been set aside by subsequent remarks in the preparatory works to the later enacted limitation rules, Solvang, Ibid p. 36.

of the HVR, to the effect that a nautical fault proper committed before departure would lead to liability exemption for nautical fault – as illustrated by the examples given in the *Hill Harmony* and the *Jalavihar* (above).

This, moreover, means that the *Faste Jarl* and S*unna* were soundly decided in the sense that in those cases there was no question of an initial seaworthiness defect being of a nautical nature proper. But it also means that the reasoning in both cases was unsatisfactory in not touching upon the complicated aspects of the interlink between HVR art. III and art. IV.

5 The concept of seaworthiness and Norwegian courts' use of foreign law definitions – the *Sunny Lady*

In the *Sunna*, the Supreme Court did not attempt to formulate any definition of unseaworthiness – and in the writer's view, rightly so.[119] Rather the essential point was put in terms of whether a prudent shipowner would have allowed the ship to sail with knowledge of the relevant deficiency – something which, on the relevant facts, was answered in the negative.

The Court of Appeal took a different approach to this question of assessing the foreseeable risk during the upcoming voyage, i.a. by adopting the approach taken by the Supreme Court in the *Sunny Lady* from 1975.[120] What in the *Sunna* may be seen as a prima facie deficiency of seaworthiness in terms of the master's lack of implementation of a proper bridge management system, could, according the Court of Appeal, have been rectified during the course of the voyage, in the same way that a prima

[119] The seaworthiness test is complex, in many ways reflecting that of a general test of negligence, and one finds – understandably – no attempts by the Supreme Court to "define" the concept of negligence.

[120] ND 1975.85=Rt. 1975.61. See the extensive quote from the *Sunny Lady* on p. 11 of the Court of Appeal's decision.

facie deficiency in the *Sunny Lady* could have been rectified.[121] Hence, the requirement for seaworthiness was, according to the Court of Appeal with reference to the *Sunny Lady*, "not perfection, but reasonable fitness".[122]

This phrase – that the requirement for seaworthiness is "not perfection, but reasonable fitness" – as used by the Supreme Court in the *Sunny Lady* was, in turn, taken by the Supreme Court from the U.S. Supreme Court's decision in the *Racer*.[123] We shall return to the *Racer* but first set out the essential facts of *Sunny Lady*.

The facts were that during an intermediate call of port a crew member intended to replenish domestic water to the ship but mistook the gauging pipes intended to be used, and instead filled water into the pipe for the cargo hold, damaging part of the cargo. The flanges of the respective pipes were overpainted as part of maintenance of the ship, so that the correct pipes were hard to identify. However, there were drawings on board showing their identity, and there were other crewmembers than the one making the mistake (who was new on the ship) that could have instructed him if asked to. The Supreme Court found the ship not to have been initially unseaworthy and the shipowner was held entitled to invoke the nautical fault exception through error in management of the ship during the voyage, HVR art. IV 2 a).

As part of its reasoning relating to the seaworthiness test, the Supreme Court put the question of "whether at the beginning of the voyage it could be seen as highly likely that the defect which here existed would be remedied or neutralised during the voyage by the means available on board the vessel."[124] On the facts of the case, the Court answered this in the affirmative: there was reason to believe that that during the course of the voyage the new crewmember would acquaint himself with the piping system, or at least ask someone before filling water. Moreover,

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121 After the quote from the *Sunny Lady*, the Court of Appeal in the *Sunna* states (ibid): "Transferred to our case, it must be considered as a fact ['legges til grunn'] that the master could have easily provided for outlook while sailing in the dark by utilizing the crew as envisaged in the plan for manning." (my translation)

122 As quoted from the *Sunny Lady*, ibid.

123 *Mitchell vs. Trawler Racer Inc.,* 1960 A.M.C. 1503.

124 Page 92–93 of the decision – my translation.

the Supreme Court adopted the phrase from the *Racer* in relation to the initial deficiency of the flanges being painted over: seaworthiness "is not perfection, but reasonable fitness".[125]

As mentioned, the Court of Appeal in the *Sunna* adopted that very phrase from the *Sunny Lady* in support for its finding that the *Sunna* was not initially unseaworthy. This type of reasoning and use of legal sources by the Court of Appeal, invites criticism.

A first point concerns the Court's adaptation of the considerations in the *Sunny Lady,* which is hardly appropriate to cover the situation in the *Sunna*. In the *Sunny Lady* there was a question of fairly minor shortcomings (overpainted flanges of gauging pipes) combined with a crew expected to learn about this characteristic during the upcoming voyage – while in the *Sunna* a deficiency in terms of lack of implementation of safety rules, could hardly be considered minor; it was no lack of "perfection" as this phrase was put in the *Sunny Lady*.

A second point, which will be addressed in some detail, concerns the very use of phrases (or definitions) like the one used by the Supreme Court in the *Sunny Lady* – that the test of seaworthiness is "not perfection, but reasonable fitness" – as taken from U.S. law and the *Racer*.

This taking of singular quotes from foreign law decisions is unfortunate because it is wholly inapt as a stand-alone quote. Looking to e.g. U.S. or English courts' use of previous cases (precedents), one hardly ever finds this type of stand-alone quote, lacking any reference to the facts of the case from which the quotes are taken, hence also lacking any discussion as to whether such facts – combined with statements of the law – may be used as guidance to the case at hand.[126] Nor is it generally in line with Norwegian methodology to use such stand-alone quotes; one hardly sees the Norwegian Supreme Court using quotes from its own prior decisions in such a way, with no guidance as to the factual context

[125] Rt. 1975.61 (p. 65).

[126] See the *Racer* decision itself, containing extensive discussion of prior cases, and no stand-alone quotes.

in which the quoted passage is made.[127] It is in respect worth noticing that the stand-alone quote – that the standard of seaworthiness "is not perfection, but reasonable fitness" – has found its way into standard volumes of Norwegian maritime law.[128]

Moreover, such use of singular quotes is unfortunate because when looking at the context of the *Racer*, it becomes apparent that the quote is hardly adequate to the context of the *Sunny Lady* (and even less so of the *Sunna*). The *Racer* did not concern a due diligence obligation to make the ship seaworthy as in the *Sunny Lady*. It concerned the U.S. common law strict seaworthiness obligation in relation to personal injury suffered by crewmembers. Likewise, the *Racer* did not concern questions of initial unseaworthiness – as in the *Sunny Lady* – but instances of subsequent unseaworthiness arising during the course of a voyage, which in the *Racer* concerned the task of landing a catch of fish from a fishing vessel. This discussion has in that sense no parallel to Norwegian law, nor to the HVR, but must be seen as a peculiar feature of U.S. law.

It is in that respect worth noticing that in the *Racer* the ship was found to be initially *seaworthy* and that the incident leading to the personal injury was considered an unavoidable consequence of the normal use of a ship being in itself seaworthy.

The injury happened in the following way: As part of ordinary discharge of a catch of fish, slime and spawn had dripped and accumulated onto the ship's rail. After having taken part in the discharge, the claimant changed clothes to go ashore. "He made his way to the side of the vessel which abutted the dock, and in accord with recognized custom stepped

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127 One may find it as a mere guidance to certain legal topics, such as that of gross negligence: "a marked departure from what is considered prudent", as quoted by the Supreme Court in the *Nordland* case, ND 1995.238, from their earlier case in Rt. 1989.1318, see Falkanger/Bull (2016) p. 155.

128 The English version of the volume, Falkanger/Bull, Scandinavian maritime law, 2017, p. 350 states: "An American decision regarding the duty of seaworthiness stated: 'the standard of seaworthiness is not perfection, but reasonable fitness.' This *principle* has been adopted by the Norwegian Supreme Court, see ND 1975.85 SUNNY LADY […]." (my emphasis of 'principle'). As an aside: it is remarkable how often students at the Institute of Maritime Law adopt this very phrase when resolving case-based exams involving unseaworthiness.

onto the ship's rail in order to reach a ladder attached to the pier. He was injured when his foot slipped off the rail as he grasped the ladder."[129]

Hence, there was nothing to criticize the shipowner for not having removed the spawn and slime from the rail when the incident happened, and there was nothing untoward about the condition of the ship or the way the catch had been handled during discharge. The question of the case concerned the extent of a shipowner's absolute and continuous obligation of seaworthiness at common law, relating to personal injury suffered by seamen.

This leads to a further point, namely that the quote itself – that the seaworthiness test is "not perfection, but reasonable fitness" – is made by the majority of the U.S. Supreme Court in defence to criticism of their view by dissenting opinions. The point by the minority was essentially that a state of law imposing a continuous and absolute obligation of seaworthiness would serve no deterring purposes, as illustrated by the facts of the *Racer*, and that such an absolute obligation was scarcely supported by prior case law. Hence, the minority disagreed that liability should ensue in the present case, and pointed to:

> "the unfairness of holding the vessel accountable for losses resulting from damage, detectible or otherwise, caused, without fault of the vessel, by perils of the sea; the likelihood that those whose safety depends on the vessel […] in any event use every reasonable precaution to preserve it, and that in the circumstances of operation of the vessel no additional care could be exacted by the imposition of absolute liability; and determination that to impose absolute liability for injuries caused by defects arising without fault in the complex operation of a vessel would be, in all the circumstances, unduly burdensome."[130]

Moreover, the minority pointed to the difference between this type of unreasonable application of strict liability rules in respect of unseaworthiness, and the more sensible due diligence obligation of seaworthiness

[129] P. 1504 of the decision.

[130] Page 527.

in the context of carriage of goods by sea, including the Hague Rules as adopted in U.S. law. The minority stated in this respect:

> "As to the cases decided, however, we are told that even though there is no claim that the vessel should have made different provisions for the unloading of its catch or the debarking of its crew, the shipowner is liable for an injury caused by a temporary unsafe condition and arising from the normal operation of the vessel, not the result of fault or mismanagement of anyone onboard, and which no one had a reasonable opportunity to remedy. Had there been negligence, either in permitting the spawn to accumulate or in failing to remove it, the admiralty principles developed in the cargo cases, and taken over into personal injury cases, would warrant an imposition of liability, although as to cargo damage the Harter Act and the Carriage of Goods by Sea Act [i.e. the Hague Rules], of course, bar recovery."[131]

In other words, the minority highlighted the more sensible approach of due diligence obligation of seaworthiness in the cargo carriage regimes, while pointing to the fact that nautical fault during the course of the voyage under such regimes would exempt the shipowner from such liability.

As an answer to this criticism by the minority, the majority toned down in general terms the requirement for seaworthiness. What the majority stated in this respect was more extensive than the stand-alone quote used by the Norwegian Supreme Court in the *Sunny Lady* (and with unfortunate knock-on effects by the Court of Appeal in the *Sunna*). The entire statement by the majority starts by giving an account of the U.S. common law position:

> "There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this court over the last 15 years, we can find no room for argument as to what the law is. *What has evolved is a*

[131] Page 529.

> *complete divorcement of unseaworthiness liability from concepts of negligence*. To hold otherwise now would be to erase more than just a page of history."[132]

From these general remarks – emphasizing the separation of the common law position from concepts of negligence – the majority then continuous with the following passage from which the quote in the *Sunny Lady* is taken:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a ship and impertinences reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."[133]

That is the context of the quote from the *Racer*. The reservation made that the ship may not withstand "every *conceivable* storm or withstand every *imaginable* peril of the sea", is hardly apt in relation to the facts of the *Sunny Lady*, and even less so in relation to the facts of the *Sunna* (as the quote was used by the Court of Appeal in that case).

This leads to still another point concerning the unfortunate use by the Norwegian Supreme Court (with a knock-on effect to the Court of Appeal in the *Sunna* – and in standard volumes on maritime law)[134] of such stand-alone quotes from foreign law. It must be seen as questionable indeed whether the U.S. Supreme Court would hold that the facts of the *Sunny Lady* would not lead to a finding of unseaworthiness – if in the U.S. context such deficiencies would, hypothetically, lead to personal injury by crewmembers. Rather, based on the facts of the *Racer*, the matter of unseaworthiness would be close to "perfection": there was nothing wrong with the ship as such, and the accumulation of spawn and slime on its rail

[132] Page 512 – my emphasis.

[133] Page 512–513

[134] See the reference to Falkanger/Bull, above.

was part of ordinary cargo handling. When despite this fact that there was nothing wrong with the ship as such, the vessel was still found to be unseaworthy, how should the *Sunny Lady* (with its overpainted flanges of gauging pipes and inexperienced crew) survive such a test?[135]

To the writer it is therefore close to a mystery why and how a quote from the U.S. *Racer* found its way into the Norwegian Supreme Court's reasoning in the *Sunny Lady*. The *Racer* is, for natural reasons, not referred to in any U.S. (or English) authorities on the concept of seaworthiness in the context of carriage of goods, so why should the Norwegian Supreme Court find reasons to refer to it? Clearly, formulations of the seaworthiness concept within the context of carriage of goods and the HVR, can be found, both under U.S. and English law, in plenty of cases much more apposite than the *Racer* – if one sees a need for a "definition" of unseaworthiness.

Furthermore, this uninformed use of foreign law in the *Sunny Lady* is accompanied by an unfortunate statement by the Supreme Court, as follows:

> "I add that the United States of America have not ratified the Hague Rules but it is clear that the country has in place corresponding legislation."[136]

That is incorrect, since the U.S. had ratified the Hague Rules long before the *Sunny Lady* case. The Hague Rules were incorporated into the U.S. COGSA of 1936. This incorrect statement yields a kind of double irony – first, that since the U.S. had ratified the Hague Rules, reference to U.S. cases under these Rules would be of relevance to Norwegian law, rather than reference to the common law position relating to personal injury to seamen, being a peculiarity of U.S law – second, that the U.S. Supreme Court stated in the *Racer* that this seaworthiness obligation

[135] This is not to say that the Supreme Court meant to deduce that kind of findings from the stand-alone quote. Rather the Supreme Court referred to other U.S. law cases in support for its concrete finding, but, again, with no reference to the context of such other cases, see Rt. 1975.61 (pp. 66–67).

[136] Rt. 1976.61 (p. 65) – my translation.

at common law was *entirely detached* from the negligence-based seaworthiness obligation in the U.S. COGSA, corresponding to the HVR-implementation into the Norwegian MC.

The new Norwegian space law: work in progress

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Contents

1 Introduction

This article will present the ongoing work on the reform of the Norwegian space law, as well as some central legal issues discussed by the expert committee appointed to prepare a draft space law.[2] The Norwegian law which is currently in force is one of the oldest – arguably, *the* oldest[3] – piece of space legislation in the world. The law entitled "Law on launching of objects from Norwegian territory etc. into outer space"[4] was adopted in 1969, shortly after Norway ratified the Outer Space Treaty.[5]

The Norwegian space sector has grown and evolved considerably over recent decades.[6] At the present time, a very significant expansion in Norwegian space activities is planned for the Andøya Space Centre, which will start launching small satellites into polar and sun-synchronous orbits.[7] This important sectoral development should be seen within the

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2 This article is based on the presentation by the author at the European Interparliamentary Space Conference (EISC) 2021, 10th May 2021. The author was a member of the expert committee appointed by the Ministry of Trade and tasked to prepare a proposed legal text. The Chair of the committee was law professor Trine-Lise Wilhelmsen (Scandinavian Institute of Maritime Law). Other members were: Terje Wahl/Bo Andersen (Norwegian space agency), Hege Susann Aalstad (Civil Aviation Authority), Frode Målen (Norwegian Communications Authority). The secretary of the committee was Simon Torp. The committee was advised by Prof. Steven Freeland (University of Western Sydney) on some of the issues. The committee worked on the law proposal for one year, in 2019, and in early 2020 the proposed text and the explanatory report called Right into Orbit (cited in fn. 13) was delivered to the Ministry.

3 Frans G. von der Dunk, Atle Nicolaisen, «Vikings first in National Space Law: Other Europeans to Follow», (2001) Space, Cyber, and Telecommunications Law Program Faculty Publications. 39, available at: Digital Commons@University of Nebraska-Lincoln.

4 Law # 38 adopted on 13th June 1969, in force as of 13th June 1969. In Norwegian: Lov om oppskyting av gjenstander fra norsk territorium m.m. ut i verdensrommet.

5 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other celestial bodies*, 610 UNTS 205. Norway signed the Treaty on 10th October 1967, ratified on 6th June 1969.

6 See Norwegian Space Strategy [Høytflyvende satellitter – jordnære formål: En strategi for norsk romvirksomhet], Meld. St. 10 (2019 –2020), available in Norwegian at regjeringen.no.

7 www.andoyaspace.no.

broader perspective of Norway's membership of the UN Committee on the Peaceful Uses of Outer Space (COPUOS)[8], as well as Norway's participation in the European Space Agency projects and the EU space programs. The Norwegian Space Strategy[9] (hereinafter the Strategy) underlines the significance of the space sector for both Norway, its co-operation partners and for various sectors, including maritime transport and offshore, which benefit from space-based services. The Strategy also highlights the relevance and importance of the legal framework for safe and sustainable space activities both in Norway and also globally.

Due to the active participation of commercial actors in today's space sector, appropriate laws and regulations at national level are indispensable for ensuring the responsible conduct of such actors in conformity with States' international obligations and national concerns. Although different countries have chosen somewhat different solutions to their domestic space legislation, [10] their experiences – especially those of Denmark, Finland, France and some others – have been very useful in the committee's work.[11]

Norwegian space law reform aims at meeting the requirements of the contemporary space sector, which is dynamic, international and increasingly dominated by commercial actors and inter-State cooperation. The space law currently in force contains only three articles, which prohibit launching of objects into outer space without permission from competent authorities. The law applies to launches from Norway's territory, including Svalbard, Jan Mayen and Norwegian dependencies, both from Norwegian vessels and aircrafts, as well as from areas beyond national sovereignty, if launching is undertaken by a Norwegian citizen or person domiciled

8 Established by UNGA Res. 1348 (XIII), 'Question of the Peaceful Use of Outer Space', 13 December 1948. Norway has been a member since 2017.

9 Cited in fn. 6 above.

10 A. Froehlich, V. Seffinga (eds.), National Space Legislation, Studies in Space Policy 15, Springer International Publishing AG 2018, https://doi.org/10.1007/978-3-319-70431-9_3

11 The committee also consulted UN Recommendations on National Space legislation as well as the Sofia guidelines for a Model Law on National Space Legislation, adopted by the International Law Association (ILA) Resolution 6/2012, available at www.unoosa.org.

in Norway. The law envisages that the authorities may attach certain conditions for launches and lay down provisions on control of launching activities included in the law. All in all, the current law does not meet the requirements of the international space law and is no longer adequate for the needs of today's space sector.

The work on the new law commenced in 2019, with a view to providing a contemporary and up-to-date legislative solution for the space sector. It should be pointed out that this article discusses the proposed legal text and the work of the expert committee as handed over to the responsible ministry. At the time of writing, it is not known whether the responsible ministry or the Parliament will follow the proposal or will choose to adjust the proposed draft. In this work, the committee also proposed alternative solutions to some of the issues, where deemed feasible. Ultimately, the legislator will have to choose the best solution by weighing economic, political, strategic or other interests. The final law text may obviously be different from the proposed legal text.

The committee considered several objectives when working out the proposal for a new law. To begin with, the law has to ensure compliance with the international obligations of Norway to authorize and supervise private space activities, and to ensure that space activities under Norwegian jurisdiction or control are safe and sustainable. The international space law leaves it to the States to detail out these obligations, while at the same time it is silent or unclear (or even outdated) on some essential questions. One of the significant issues is what activities should be encompassed by the new law, and what kind of provisions, obligations and requirements the new space law should include. It is also necessary to consider objectives, which may sometimes conflict with each other. For example, the law needs to be industry-friendly and encourage commercial space activities with a strong international dimension, meaning that it is important to ensure legal certainty for actors, many of whom come from foreign jurisdictions, and not to raise excessively high regulatory barriers. At the same time, it is crucial to determine the adequate level of safety, the acceptable level of risk and sufficiently stringent requirements for granting the permit, such as financial capacity of the operator, liability

and insurance. In addition, the technologically dynamic character of the space sector means that the conditions and *modus operandi* of space actors may change relatively quickly, requiring the law to be adaptable and flexible enough to adjust to new challenges. Although the envisaged space law is generally aimed at commercial space activities, state security aspects are also inevitably relevant for both for law-makers and for the competent space authorities, due to the dual-use character of the space sector and the critical importance space infrastructure has for the society.

Norway also has to tackle the novel challenges related to launching satellites into orbit from within Norway's territory. This is also a very significant expansion of Norwegian space activities in the legal context, with significant implications for international responsibility and liability, and clearly requires a legislative action. Among the EU/EEA States, Norway will be the only country to launch small satellites into orbit from a launch site located in Europe.[12] Norway will become an important launch site services provider for European and overseas partners, including private actors, and needs legislation which meets the interests of international space market.

It should be kept in mind that the proposed legal text is written in the Norwegian legal tradition, which is a part of the Nordic legal tradition. This means among other things that the law itself is a more general, framework law, which sets out the main provisions and requirements. The committee deemed such an approach to be both adequate and necessary to ensure that the law is future oriented, adaptable and flexible enough to adjust to new knowledge, new technological capabilities, and future international legal developments. The need for legal clarity also determined the choice of what obligations should be included in the text law, and in what detail, and what can be addressed instead through governmental regulations.

Of course, the actual 'living' space law is shaped not only by the space act to be enacted by the Parliament, but also – importantly – by

[12] In the EU/EEA mainland territory. The nearest European launch site is located in Plesetsk, Russia. See Thomas G. Roberts, 'Spaceports of the World' < https://aerospace.csis.org/data/spaceports-of-the-world/> accessed 14 July 2021.

governmental regulations, conditions in the individual licences, principles of good administration, and self-regulation and contracts. The relevant legal considerations are clarified and expanded upon in the explanatory report 'Right into orbit',[13] which is one of traveaux preparatoire for the forthcoming space law and will be relevant for the interpretation of this law.

The further discussion is as follows. First, the international legal framework is briefly presented in section 2. The scope of the proposed space law and central definitions are discussed in section 3. The requirements and conditions attached to the permit for space activities are examined in section 4. Last but not the least, section 5 contains an overview of the proposal concerning operator's liability and the duty to obtain insurance. Section 6 concludes.

The proposed legal text also contains chapters on supervision, enforcement, investigation, and transition provisions, which are not discussed in this article.

2 The international legal framework governing space sector

The current international space law has been developed under the auspices of the UN COPUOS and consists of the international customary law, five global space treaties,[14] a number of UN Resolutions laying down

[13] Rett i bane: Utredning fra utvalg oppnevnt av Nærings- og fiskeridepartementet til å foreslå ny lov om aktivitet i verdensrommet, available at regjeringen.no.

[14] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other celestial bodies* (Outer Space Treaty), 610 UNTS 205; Convention on International Liability for Damage Caused by Space Objects, 961 UNTS 187; Convention on the Registration of Objects Launched into Outer Space, 1023 UNTS 15; The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 672 UNTS 119, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (The Moon Treaty), 1363 UNTS 3.

Principles for outer space activities, and non-binding Guidelines.[15] These sources have been central for the work on the proposal for a new Norwegian space law.[16] This article does not discuss the Moon Treaty and the Agreement on Rescue of Astronauts, as these have not been directly relevant for the work on the legal text.[17]

The international governance of outer space takes place at several levels. The global space governance institution, COPUOS, has contributed significantly to the development of the policy on the long-term sustainability of outer space and has adopted guidelines on the mitigation of space debris.[18] Many of the practical space sector issues are not clearly regulated at the global level and need to be addressed through bilateral or multilateral treaties, and inter-governmental arrangements. Thus, other international organisations have played an increasingly significant role in the making and governance of space law. Importantly, the European Space Agency (ESA)[19] contributes to the formation of space law: it develops its own internal procedures, negotiates international agreements in the space sector and implements international space practices.[20] At the same time, there is a growing tendency for the unilateral regulation of space activities at the State level and by space actors not negotiated through the UN system, such as NASA's Artemis Accords.[21]

The cornerstone of international space law is the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other celestial bodies* (Outer Space Treaty) of 1967.[22] Its provisions are developed further and supplemented in four

15 UN has adopted several Resolutions on space law topics and COPUOS adopted other instruments such as the Space Debris Mitigation Guidelines and Long-Term Space Sustainability Guidelines.

16 The Moon Treaty is not ratified by Norway.

17 However, they are briefly described in the report.

18 See fn. 15 above.

19 Multilateral Convention for the Establishment of a European Space Agency, done in Paris on 30 May 1975, 1297 UNTS I-21524.

20 Francis Lyall and Paul B. Larsen, *Space Law: A Treatise*, 2nd edition, 2018, Routledge, p. 21.

21 Available at www.nasa.gov/specials/artemis-accords/index.html.

22 610 UNTS 205.

other space conventions.[23] Three provisions in the Outer Space Treaty require particular attention for the purposes of the further discussion.

Firstly, Article VI of the Outer Space Treaty provides that State Parties shall bear international responsibility for governmental and non-governmental national activities in outer space, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. This provision arguably establishes a *lex specialis* provision on the international responsibility of States for space activities, whereby the State of nationality is directly responsible for State and non-State actors alike.[24] Article VI also says that the activities of non-governmental entities in outer space shall require authorization and continuing supervision by the appropriate State Party to the Treaty.

Secondly, Article VII of the Outer Space Treaty provides that States (Parties) that launch or procure the launching of objects into space from their territory or facility are internationally liable for damage to another State Party and its natural and legal persons on the Earth, in airspace or outer space.[25] Importantly, the launching from a State's 'facility' located outside the State's territory is included in the notion of the liability, alongside the 'territory'.[26]

Thirdly, Article VIII (first sentence) provides that "A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body." This provision establishes an important rule that there must always be a State, which exercises effective jurisdiction over space objects, and should be

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23 See fn. 14 above.

24 Bin Cheng 'Article VI of the 1967 Space Treaty revisited: "international responsibility", "national activities" and "the appropriate state" (1998) 26 Journal of Space Law 7, 15. See also Pablo Mendes de Leon and Hanneke Van Traa 'Space Law' in André Nollkaemper and Ilias Plakokefalos (eds) The Practice of Shared Responsibility in International Law (Cambridge University Press 2017) 453–78.

25 See Liability Convention cited in fn. 14.

26 The details liability regime are presented in the Liability Convention (fn. 14). The term 'space object' is used in this article in the same meaning as laid down in the space treaties, i.e. as man-made objects such as space rockets and their parts, satellites and other space crafts.

seen in light of Article VI above and the provisions of the Registration Convention discussed further below.

Regrettably, the Outer Space Treaty is vague or silent on a number of central issues. Thus, the notion of "the appropriate State" in Article VI of the Outer Space Treaty is not defined in the Treaty or elsewhere in the space law instruments. In scholarly writings, it is generally construed as a State holding effective jurisdiction over space activities.[27] The Treaty also does not define a "space object" or "outer space", or what constitutes a "facility" within the meaning of Article VII. It is, in any case, generally agreed that the Treaty's obligations also apply to some of the 'space activities' conducted on Earth and air space.[28] However, it is left to the discretion of States to define the terms and the scope of application in their national laws.

The Outer Space Treaty lays down general duties of States to prevent harmful contamination of the Earth and outer space, as well as to avoid harmful interference with the activities of other States in outer space.[29] However, it does not detail out obligations of States with regard to safety, environment and other aspects of space activities. Regrettably, it also does not provide for more specific regulations on space debris. More specific obligations and principles on some of these issues have been developed through non-binding instruments. These instruments have been consulted by the expert committee in its work on the law draft proposal and examined accordingly in the report.[30]

The provisions of the Outer Space Treaty on liability of the launching State and registration of space objects are detailed out in, respectively, the Convention on International Liability for Damage Caused by Space Objects (hereinafter the Liability Convention) and the Convention on

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27 See, e.g., Bing Cheng (fn. 24 above).

28 This is confirmed by the overall context of the Treaty and the UN Resolution 'Recommendations on national legislation relevant to the peaceful exploration and use of outer space' 68/74 (2013) A/RES/68/74 at 2. See also Cheng (fn. 24) 19.

29 Article IX.

30 See Steven Freeland, Note to Norwegian Space Law Committee on Space Debris, appendix 3 to Right into Orbit (fn. 13), p. 165.

the Registration of Objects Launched into Outer Space (hereinafter the Registration Convention).

The Liability Convention provides greater details on the Outer Space Treaty's provisions on liability for damages. It recognizes in its preamble "the need to elaborate effective international rules and procedures concerning liability for damage caused by space objects and to ensure, in particular, the prompt payment under the terms of this Convention of a full and equitable measure of compensation to victims of such damage". The Liability Convention Article I contains a short list of relevant definitions, followed by provisions spelling out the liability of States for damage caused by space objects.

The Liability Convention defines the concept of "damage" as "loss of life, personal injury or other impairment of health; or loss or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organisations" (Article I.1.a). The concept of a 'launching State' means a "State which launches or procures the launching of a space object" and (or) a "State from whose territory or facility a space object is launched".[31] As in the Outer Space Treaty, the facility is not defined in this Convention (Article I(c), see also Article V.3).[32] Further, the Liability Convention clarifies that the "term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof." (Article I(d)).

The Liability Convention provides for more detailed rules on the international States' liability for damage caused by space objects. Firstly, it provides that a launching State "shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight" (no-fault or strict liability).[33] The Liability Convention's provision on no-fault liability goes further than the general provisions of international law on State liability. Secondly, the fault-based

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31 See also the UN Resolution on the application of the concept of the "launching State" adopted on 10 December 2004.

32 On the notion of 'facility' and launches from vessels at sea see Alla Pozdnakova, Oceans as Spaceports: State jurisdiction and Responsibility (2020) 26 JIML.

33 Article II.

regime is envisaged for damage being caused "elsewhere than on the surface of the Earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State".[34]

The Convention also provides for the joint and several liability of launching States, which jointly cause damage to a third State.[35]

Importantly, the Liability Convention also envisages that its provisions will not apply to damage caused by a space object of a launching State to two categories of nationals.[36] Firstly, it does not apply to damage caused to nationals of the launching State itself. Secondly, it does not apply to damage caused to foreign nationals when they participate in the operation of that space object from the time of its launching or at any stage thereafter until its descent, or when they are in the immediate vicinity of a planned launching or recovery area upon an invitation by that launching State.

An unclear issue is whether the liability regime set up by the Liability Convention also extends to cases where the State of nationality of private (non-governmental) actors launching space objects from abroad is considered as being the 'launching State' for the purposes of the Convention. The wording of the Convention appears to include only State launches from abroad, whereas in this author's view a broader logic of the Convention and other international space law instruments may suggest otherwise.[37]

The Registration Convention[38] follows up provisions of the Outer Space Treaty and the Liability Convention on the international liability of States for their national activities in outer space. Article I of the Registration Convention contains a list of definitions identical to that of the Liability Convention (apart from the term "damage", which is not

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34 Article III.

35 Articles III, IV and IV. Article VI provides for an exception to liability in cases where damage was caused by gross negligence or intentionally by the claimant State or its natural or juridical persons.

36 Article VII.

37 However, the scholarly literature is not quite consistent on this issue. The committee discussed this issue but did not draw a conclusion.

38 Cited in fn. 14 above.

defined in the Registration Convention). The "space object" is accordingly defined in the same brief terms as including the component parts of the space object, as well as its launch vehicle and parts thereof" (Article I(b)).

Importantly, the Registration Convention requires that launching States register the space object under a number of conditions. Article II provides that "[w]hen a space object is launched into Earth orbit or beyond, the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain. Each launching State shall inform the Secretary-General of the United Nations of the establishment of such a registry." Furthermore, if there is more than one launching State for a space object – not unusual in the contemporary space sector – the Convention requires that these States jointly determine which one of them shall register the object. This decision is "without prejudice to appropriate agreements concluded or to be concluded among the launching States on jurisdiction and control over the space object and over any personnel thereof."

An important requirement of this Registration Convention relates to the obligation of launching States to establish a national registry of space objects "launched into orbit or beyond." States may themselves determine the information to be submitted to their national registry of space objects, but Article IV of the Convention lists the information to be sent to the UN Secretary-General.[39]

The Liability Convention and the Registration Convention do not adequately take into account the present realities of the contemporary space sector dominated by non-State, commercial actors. They also do not regulate situations where the jurisdiction and control over the space object in orbit is transferred to a third (not launching) State or to private

[39] Each State of registry shall furnish to the Secretary-General of the United Nations, as soon as practicable, the following information concerning each space object carried on its registry: (a) Name of launching State or States; (b) An appropriate designator of the space object or its registration number; (c) Date and territory or location of launch; (d) Basic orbital parameters, including: (i) Nodal period; (ii) Inclination; (iii) Apogee; (iv) Perigee; (e) General function of the space object.

actors of a third State.[40] These Conventions' approach to launching States can be basically summed up as 'once the launching State, always the launching State'. The State from whose territory a foreign space object was launched may still be internationally liable for the space object, which is not carried on its registry and which it does not effectively control. As clarified further, the proposed legal text also attempted to tackle these issues through certain national provisions.

3 Scope of the proposed space law

An important part of the work on the new law was to determine the structure and scope of the law, as well as to elaborate on the relevant definitions to be applied in the law. The proposed legal text is considerably longer than the Norwegian space law currently in force, because it has a broader reach, both in substantive and geographic terms.[41] The law is proposed to regulate space activities.[42] Importantly, the proposed legal text also defines *space activities*: these are activities related to launch, operation and return of space objects, and activities "substantially related to" launch, operation and return. Thus, the proposed legal text is generally aimed at tackling all activities related to a satellite's or other space object's lifetime, from launch to the ending of the operation. A generally formulated definition is, in the committee's view, necessary, because it may be difficult to draw a precise borderline and regulations need to adjust to current realities in the very dynamic space sector.[43] Thus, as

[40] A satellite in orbit may be sold on to new owners, or other operators may take over the control and operation of the satellite.

[41] The proposed legal text contains eight chapters with 38 paragraphs in total.

[42] Article 1 of the proposed legal text: the Norwegian text is available in Right into Orbit (fn. 13), p. 136.

[43] In any case, the proposed legal text does not seek to include into the notion of 'space activities' issues such as the regulation or recognition of property rights to natural resources in outer space, human spaceflight, downloading of data from satellites, remote sensing and other activities not related to the launch, operation and return of space objects.

with some other issues regulated by the law, it is important to leave some room for discretion to the competent authorities.

The committee decided not to propose a definition of 'outer space' or delimitation of 'outer space' in the national law. While the Outer Space Treaty indirectly defines outer space as 'including the Moon and other celestial bodies' (and the void between them), the international law is silent on the issue of the borderline between air and outer space. Most States have chosen to adopt a functional approach to the delimitation of air and outer space.[44] Indeed, it seems unnecessary to adopt a legal provision determining where outer space starts for the purposes of national law, before more progress is made on this definition at the international level.

The focus of this work was on the need to establish a system of permits to which certain conditions and obligations are attached, to be supplemented by the internal safety routines of companies and their supervision and enforcement by the state. The proposed legal text requires the operator to obtain a permit for space activities conducted from "the Norwegian territory, from Norwegian vessels and aircrafts and by Norwegian nationals abroad".[45] Thus, the proposed text does not just focus on space object launches from Andøya, but also regulates Norwegian companies and individuals engaged in space activities abroad.[46] This includes, importantly, space activities conducted from another State's territory and is primarily intended to meet the requirements of Article VI of the Outer Space Treaty. The proposed legal text also includes space activities from Norwegian vessels and aircrafts, thereby ensuring that Norway regulates all national activities outside its territory. It is also important to include vessels and aircrafts in order to reflect the provisions on launching a State's 'facility' in conformity with Article VII of the Outer Space Treaty and the Liability Convention. The proposed legal text also envisages that, within the limits of international law, the responsible

44 Denmark has enacted a 100-km limit in their national space laws. A recent launch by Sir Richard Branson and his team (Virgin Galactic) illustrated that also an altitude of 86 km could be sufficiently high, at least for 'space tourists'. See also Peter Lødrup, Luftrett og romrett [air law and space law], Tidsskrift for rettsvitenskap, 1961, s. 561.

45 Article 2 of the proposed legal text, Right into Orbit (fn. 13), p. 136.

46 Telenor's satellites; also Norsat etc.

ministry may extend the application of this Act to foreign vessels or facilities outside of Norwegian territory.[47]

The proposed legal text includes a definition of a 'space object', which largely corresponds to treaty definitions: any object or part of an object used in space activities.[48] Activities involving a space object are regulated in a number of the proposed legal text's provisions. With regard to the requirements on transferring a space object to another operator abroad, this requires consent by the competent ministry and may also require the conclusion of an agreement with the relevant State.[49] Chapter 3 of the proposal envisages registration of an object launched into outer space in line with the requirements of the Registration Convention. Importantly, the damage caused by a space object is subject to liability provisions of the proposed law, as discussed further in section 5.

A central notion used throughout the legal text is 'operator': it is a subject of rights and obligations in the law and is defined as "anyone who carries out space activities".[50] The 'operator' may be the permit-holder under the law, but regardless of whether or not the permit-holder, anyone who actually conducts space activities must comply with the requirements and obligations set out in the law.[51] By contrast to a 'space object', which is defined (or, rather, described) in the international space law, the notion of 'operator' is not laid down in the treaties. Danish and Finnish space laws also use corresponding notions in relation to "operator", which appear to be generally used in practice. The notion of the 'operator' does raise a number of important concerns and ambiguities which deserve further attention.

It should be noted that the proposed draft does not expressly envisage exceptions from permit requirements for some sectors or types of operators directly in the proposed law (for example, for the Military & Defence sector or for the Education and Research sector). If exceptions

47 See Pozdnakova (fn. 32) for the discussion of this issue.

48 Article 3 of the proposed legal text.

49 Article 8 of the proposed legal text.

50 Art. 3 of the proposed legal text.

51 Comments to the proposed legal text, Right into orbit (fn. 13), p. 136.

are deemed necessary, the committee proposed that they can be laid down in regulations as deemed adequate.

4 The requirement to obtain a permit and the obligations of the operator

The space law currently in force[52] laconically provides that launching of objects into outer space is prohibited without a permit, and that the competent authorities may attach conditions to this permit. The law itself does not specify which requirements or criteria must be met to acquire the permit. Generally, this is within the authorities' room for discretion when deciding to grant or reject an application for permit.

The proposed legal text also requires that operators must obtain a permit to be allowed to carry out space activities, but it is considerably more specific with regard to the requirements to be met.[53] Both the law in force and the proposed legal text implement the requirements of Article VI of the Outer Space Treaty, which provides that the 'appropriate State' must authorize (and continuously supervise) national non-governmental space activities. Conducting space activities covered by the law without a permit may result in criminal liability.[54] However, by contrast with the space law in force, the proposed legal text contains provisions detailing out the requirements and conditions, which must be met by the person seeking the authorization. Although the responsible authority will retain a significant degree of discretion under the new law (including the right to reject an application, which meets the necessary requirements), it must comply with principles of good administration and, as the case may be, EEA law prohibition of discrimination and internal market rules.

To obtain a permit, the operator must meet certain requirements and accept conditions, which the competent authority deems necessary to

52 Cited in fn. 4 above.

53 Article 4 of the proposed legal text.

54 Norwegian Criminal Law, Section 167.

attach to the permit. The goal of such requirements and conditions is to prevent accidents and damage arising from lack of safety precautions, and minimize the risks associated with inherently ultra-hazardous space activities. It is outside the ambition of this article to provide a detailed overview of the proposed legal text and the committee's position, but the requirements may be summed up as follows:

Firstly, the operator itself – i.e. the person or entity involved with space activities – must meet certain requirements relating to its competence and resources to conduct space activities in a reasonable and safe manner. Article 5 of the proposed legal text entitled 'Conditions for licence' envisages that the responsible ministry: "may grant a licence to conduct space activities if the operator meets the following requirements: (a) The operator has the necessary expertise to operate space activities in a responsible manner, has necessary financial resources to conduct space activities, and the activity is insured in accordance with [A.P. this law – discussed in section 5 below]."[55]

As space activities vary greatly in terms of their characteristics, the hazards they represent, and the competences, which are required, the requirements will be construed differently depending on the peculiarities of the space activity in question.

Secondly, the proposed legal text places requirements on the manner in which the space activity is conducted. Article 5 (b) provides that "the space activity is carried out in a responsible manner, without unnecessary or disproportionate consequences to the environment on earth or in outer space." The obligations of the operator with regard to responsible and safe space activities and the prevention of space debris are set out in detail in chapter 4 of the proposed legal text. The operator must document that these requirements are met when applying for the permit. One of the very pressing global concerns with regard to the launch of space objects is space debris. It is, therefore, crucial that the space law contributes to the minimization of space debris, if zero debris is not yet technologically possible. With regard to space debris prevention, the committee proposed a best practices approach in light of international guidelines and

[55] Author's translation.

standards.[56] The proposed legal text seeks a flexible approach allowing applicable requirements to evolve in line with technological developments.

Thirdly, the draft space law requires that provisions of other relevant legislative acts are also met by the operator.[57] Importantly, the operator must comply with rules on export control,[58] as well as with the International Telecommunications Union (ITU) rules on allocation of frequencies. With regard to the latter, a frequency is indispensable for communications with the satellite or another space object, and must be obtained by the operator through the Norwegian or foreign communications authority which grants frequencies in line with ITU rules.[59]

Last but not the least, the space activity may not run counter to Norway's security or foreign policy interests.[60]

It should be noted that Article 6 of the proposed legal text provides that the competent ministry can also impose conditions on the permit that go beyond the requirements of the law. This approach is generally in line with general Norwegian public law on licences and permits and is subject to principles of good administration and prohibition on the authorities to abuse power.

The draft only envisages one – general – type of permit, which includes all types of space activities regulated by the law. The committee deemed it feasible to detail out the types of permits (licenses) in the governmental regulations, rather than include a law provision with different types of licenses, as is done by some countries.[61]

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56 Right into orbit (fn. 13 above).

57 Article 5(c) of proposed legal text.

58 Act relating to Control of the Export of Strategic Goods, Services, Technology, etc (eksportkontrolloven) # 93 adopted on 18 December 1987.

59 In Norway, this is the Norwegian Communications Authority (Nkom).

60 Article 5(d) of the proposed legal text.

61 Some States have enacted laws specifying different types of licences and, correspondingly, different requirements applicable to such licences.

5 Liability and insurance

A central aspect of the proposed legal text is the Chapter (5) on liability and insurance.[62] These are the two requirements which show the tension between the 'industry friendly' objective of the space law reform and the risk and safety considerations. As the ultra-hazardous nature of space activities suggests, the primary task of the legislator is to establish a legal framework, which *prevents* accidents from happening, through the requirements described earlier. Generally, the probability of damage being caused by an accident related to the launch of a space object (assuming the safety is adequately assured) is relatively low; however, the consequences could be disastrous if it happens.[63] The international legal framework described earlier places liability for damage on the launching State (or States), which will be internationally liable for damage caused by the space object on the Earth's surface, atmosphere and(or) in outer space. The concern is especially serious with regard to forthcoming launches of small satellites into orbit from Andøya: indeed, as explained earlier, Norway is internationally liable for damage caused by space objects launched by the governmental and private (Norwegian or foreign) operators from its territory.

The central question is whether national law should envisage opportunities for recourse against an operator in cases where Norway as a launching State is held internationally liable under the international liability regime for damage caused by the space object. Another question is whether the operator should be directly liable for damage going beyond the scope of international liability provisions. A question of insurance also arises: should the law envisage a mandatory insurance and (or) other form of security of compensation?

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62 For a detailed discussion of these issues in the committee's work, see Trine-Lise Wilhelmsen, Ansvar for skade voldt av romgjenstand [Liability for damage caused by a space object], Tidsskrift for erstatningsrett, forsikringsrett og trygderett, Årgang 17 , nr. 1 -2020, s. 39–71, https://doi.org/10.18261/ISSN.2464-3378-2020-01-03.

63 On the Cosmos 954 accident, see, e.g., Lyall&Larsen (fn. 20).

The space law in force does not expressly regulate the issue of liability, compensation and insurance, but it would be feasible to impose such requirements on operators in light of Norway's international liability as a launching State.[64] However, it may be more reasonable to lay down such provisions in the legal text: among other points, this enables the injured private persons to seek compensation directly from the operators in the national courts.

Section 21 of the proposed law provides that the operator is "irrespective of fault liable for damages to persons and property on earth as well as aircraft in flight caused by space objects." The proposed legal text imposes the liability for damage on the operator of space activities. However, the strict liability does not apply if the injured has acted intentionally or grossly negligently, or were injured during the participation in the same launch project. For other types of damage caused by space activities, the operator is liable in accordance with Norwegian law of torts.[65] Section 23 of the proposed law enables Norway to seek recourse from the operator in cases where Norway has compensated for the damage in line with the international liability rules.

The committee assessed the issue of the amount of compensation to be borne by an operator. The Liability Convention does not contain any limitations on the launching State's liability in cases of damage caused by the space object. Considerations of the foreseeability of economic burdens, insurance and the need to set up an industry-friendly legal framework suggest that the operator's liability should not be unlimited.[66] The operator's liability is proposed to be limited to the amount of 600 million Norwegian krone (NOK), unless the operator acted with intent or with gross negligence.

The proposed legal text recommends to provide for a requirement for the operator to hold insurance or other adequate security sufficient

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64 See Right into Orbit (fn. 13), p. 101. See also Act relating to electronic communications (The Electronic Communications Act) # 83 adopted on 4th July 2003, para 6-7.

65 Article 22. See also Wilhelmsen (fn. 62).

66 See Right into Orbit (fn. 13), p. 110.

to cover the compensation.[67] The upper limit of 600 million NOK is also proposed for such insurance coverage. The legislator's task here would be to consider whether this approach to liability is acceptable.

The committee also examined the question of liability in cases of joint launch projects and the feasibility of regulating such cases expressly through the legal text, i.e. by imposing certain rules on the agreements between operators and insurance, and whether strict liability provisions should be envisaged in such cases. As noted earlier, the Liability Convention's provisions on strict liability do not apply in cases of joint launches by two or more States (between these States and their nationals).[68] In practice, liability issues are resolved by participating States or industry participants, through inter-party cross-waiver of liability,[69] also known as the knock-for-knock principle.[70] If necessary, such agreements may be regulated through governmental regulations. Lastly, the committee decided not to extend the strict liability provisions to cases where damage is caused through joint launches, but instead to leave these cases to be regulated through general Norwegian torts law.[71]

6 Conclusions

This article presents some of the central provisions in the proposed draft of the new Norwegian space law and the expert committee's analyses and arguments behind these provisions. With regard to the draft space law, it remains to be seen whether the legislator will find the committee's proposal acceptable and whether any adjustments will be made to the proposed legal text. It was not always easy to come up with solutions for the complex issues which the committee faced. International space

67 Article 25 of the proposed law. Some sectors are state-insured.
68 Article III and VII.
69 See Steven Freeland, appendix to Right into Orbit (fn. 13).
70 Wilhelmsen (fn. 62), pp 66–67.
71 Wilhelmsen (fn. 62), p. 67; Right into Orbit (fn. 13), p. 110.

treaties are not clear and to a large extent out-of-date on some of the important issues pertaining to central definitions in space law, standards for the responsible use of outer space, and liability issues. While the work on the proposed legal text was informed by other countries' experiences with the space legislation, different countries have also chosen somewhat varying approaches to central space law issues and legislative formats. The committee kept in mind that Norway differs from most other European and Nordic states because of its plans to begin orbital launches from its own territory at Andøya.

The work on the Norwegian space law draft began in 2019, but it is fair to say that the Norwegian space law reform had begun even earlier: Norway's joining as a member of UN COPUOS in 2017 may have been the decisive step in this direction. It should be pointed out that the reform of space legislation will not be finished with the Norwegian Parliament's enacting the legal text; rather, this will be yet another important event, to be followed by the adoption of regulations, development of administrative and branch practices etc. The international space law framework is also evolving, with new instruments being adopted under the auspices of COPUOS and other international fora. New issues arise which are not included in the scope of the draft space law arise and are not properly regulated at the international level, for example, space tourism, space mining and 'privatisation' of natural resources of the Moon, asteroids and Mars. These should be considered in the future space legislative work.

EU Energy Law and Fundamental Rights

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Contents

1 Introduction

A number of years ago, one of the authors was asked by an economic consultancy to investigate possible fundamental rights implications of proposed new rules on third party access to infrastructure and stranded costs in the water sector.[3] This was – to his shame – the first time that he had given serious consideration to the possibility that fundamental rights law might have an impact upon the substance of the law concerning utilities in general, and in the energy field in particular. Naturally, various questions of procedure (access to justice,[4] rights of the defence, fair trial, etc.) were always presumptively relevant to the energy sector, and were an area where fundamental rights had long acted to shape the design and development of legislation and case law at European and national levels. Yet on closer inspection, and in spite of some high profile fundamental rights cases relating to the energy sector – such as that of the European Court of Human Rights in the *Yukos* case,[5] awarding the very large sum[6] of €1.8 billion to Yukos's former shareholders for breach

[3] A. Johnston, 'Human Rights dimensions of possible stranded costs situations' (unpublished, July 2002) (the substance of its analysis has been published elsewhere in later pieces, which will be referred to below where relevant). This was stimulated by an earlier NERA report: R. Hern *et al.* 'Access Pricing in the UK Water Industry: The Efficient Component Pricing Rule – Economics and the Law' (March 2001) (available at: http://www.nera.com/extImage/3694.pdf).

[4] See, e.g., A. Johnston, 'Maintaining the Balance of Power: Liberalisation, Reciprocity and Electricity in the European Community' (1999) 17 *Journal of Energy and Natural Resources Law* 121, at 135 (esp. the reference to Case 222/86 *UNECTEF* v. *Heylens* [1987] ECR 4097 (ECLI:EU:C:1987:442) in light of missing dispute settlement provisions which might cover claims of lack of reciprocity between national systems in the free trade context).

[5] Application no. 14902/04, *OAO Neftyanayu Kompaniya Yukos* v. *Russia* (ECtHR, judgment of 31 July 2014); Russia's application to transfer the case to the Grand Chamber was subsequently rejected, rendering the earlier judgment definitive: ECtHR, 'Grand Chamber's Panel decisions' (Press Release, ECHR 377 (2014), 16 December 2014). For discussion, see C. Gibson, '*Yukos* v. *The Russian Federation*: A Classic Case of Indirect Expropriation' (Suffolk University Law School, Legal Studies Research Paper 15-10, 20 February 2015; http://ssrn.com/abstract=2567784).

[6] Which pales rather when compared with the US$50 billion award under the Energy Charter Treaty 1994: *Hulley Enterprises and others* v. *The Russian Federation* (Awards of 18 July 2014, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1599).

of property rights under Article 1 of Protocol 1 to the ECHR – there have actually been relatively few direct references to fundamental rights considerations in much of EU Energy Law, at least not until relatively recently.

A related question, which will not be discussed further here, is whether access to energy as such may be considered a fundamental right. As emphasised in the preamble to Electricity Directive (EU) 2019/944, energy services are fundamental to safeguarding the well-being of the EU´s citizens.[7] Rather, we will in the following focus on aspects where fundamental rights may provide legal argument for restricting the requirements following from EU energy market legislation. In this respect, the Electricity Directive emphasises that it respects the EU Charter of Fundamental Rights and that the Directive should be interpreted and applied in accordance with its rights and principles.[8]

The present contribution does not seek exhaustively to examine the nature and scope of the EU law fundamental rights relevant to the energy sector; rather, it first seeks to map out key areas where issues in Energy law in the EU have been, and/or are likely to be, affected by fundamental rights considerations. Then, some of those areas will be examined in more detail, highlighting the implications of fundamental rights for their analysis and development. Finally, some tentative conclusions will be offered.

An appeal against this award was lodged on 28 January 2015 ('Russia has appealed arbitration court ruling in *Yukos* case', Reuters, 6 February 2015; http://in.reuters.com/article/2015/02/06/russia-yukos-court-idINL6N0VG46D20150206): for details, see the Russian Ministry of Finance's Press Release (6 February 2015; http://old.minfin.ru/en/news/index.php?id_4=24358), where Russia alleges that the tribunal: lacked jurisdiction; violated its mandate; failed to give adequate reasons; and had shown "partiality and prejudice towards the Russian Federation".

7 Para (59) of the preamble to the Directive.

8 Para (91) of the preamble to the Electricity Directive (EU) 2019/944.

2 Mapping the Territory, Clearing the Ground

2.1 An outline of possible areas of fundamental rights impact in the energy law field.

No doubt, the table below contains certain omissions as to energy issues which may arise in future, but the breadth of topics collected provides ample material from which to develop analysis of the (likely) impact of EU fundamental rights law in the energy field.

Table 1: Energy-related issues (possibly) affected by EU fundamental rights law.

EU FRs **Energy Issues**	Property / Possessions	Freedom to conduct a business (Freedom of Contract)	Data Protection, Privacy	Fair trial, access to justice	Others?
Merger Control	X	X		X	
Long-term Contracts	X	X		X	
Unbundling	X	X		X	
Capacity Allocation	X			X	
Congestion Management	X	X		X	
TPA, Network Codes, etc	X	X		X	
RES Support Schemes	X	X		X	
Smart Metering (and grids?)			X	X	
Procedures, investigations	(X)			X	
Energy Poverty				X	X?

2.2 Some overarching general EU law and fundamental rights questions

2.2.1 Scope of EU law

(a) Situations where EU Fundamental Rights are applicable

There would seem to be hardly any situations among those considered here where the issue addressed did not already fall within the scope of EU law, either by virtue of the application of the TFEU rules on freedom of movement or competition, or else because it was covered by the terms of EU secondary legislation on the energy sector. Member States will typically be implementing the relevant EU energy legislation or seeking in some way to justify national rules which might derogate from EU rules on free movement or competition: clearly, both scenarios will fall within the scope of application of the EU Charter[9] and/or fundamental rights as general principles of EU law.[10] The likeliest borderline candidate in this regard is the question of energy poverty. The Directives that made up the Third IEM package[11] referred to the concept in places,[12] but included no binding rules on the subject. Rather, at various points the Member States were encouraged to address[13] instances of energy poverty and vulnerable customers as part of their regulation of electricity and gas. The Clean Energy for all Europeans package highlights consumer benefits as a key interest, but does not go much further than the Third IEM package in establishing binding rules on energy poverty for the Member States.[14] The main development appears to be that the Member States are now required to a greater extent than previously to assess their

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9 Article 51(1) EU Charter of Fundamental Rights [2010] OJ C83/389, confirmed that it should be read in conformity with the approach taken to fundamental rights as general principles of law: Case C-617/10 *Åkerberg Fransson* (judgment of 26 February 2013), ECLI:EU:C:2013:105.

10 See, e.g., Case C-260/89 *ERT* [1991] ECR I-2925, ECLI:EU:C:1991:254.

11 See Directives 2009/72/EC [2009] OJ L211/55 (electricity) and 2009/73/EC [2009] OJ L211/94 (gas) [together, 'the Third IEM Directives'], and Regulations 713/2009/EC [2009] OJ L/ (ACER), 714/2009/EC [2009] OJ L211/15 (cross-border trade in electricity) and 715/2009/EC [2009] OJ L211/36 (cross-border trade in gas); for discussion, see generally Johnston & Block, *EU Energy Law* (Oxford: OUP, 2012) (hereafter, 'Johnston & Block'). [I don't understand the point of the bracketed words here, given that the book and names are then given again in full in the next footnote]

12 Johnston & Block, paras. 7.76–7.96.

13 For an example of the difficulty in getting States to take concrete steps to tackle energy poverty, in the face of competing calls on the public purse, see *Friends of the Earth and Help the Aged* v. *Secretary of State for Business, Enterprise and Regulatory Reform* [200] EWHC 2518 (Admin).

14 See in particular Article 28 of Electricity Directive (EU) 2019/944, which broadly corresponds to Articles 3(7) and (8) of Electricity Directive 2009/72/EC.

number of households in energy poverty and establish a national indicative objective to reduce such poverty if it applies to a significant number of households.[15] Moreover, the European Commission in its review of the implementation of the new Electricity Directive 2019/944 shall in particular assess whether customers, and especially vulnerable customers or those in energy poverty, are adequately protected under the Directive.[16]

Insofar as energy poverty questions arise as a result of market or regulatory design questions covered by the relevant EU legislation or the rules of the TFEU, then any relevant fundamental rights considerations would need to be addressed;[17] but as a free-standing issue, it would seem likely that it would – at present – fall beyond the scope of EU law. At the same time, it is possible that some national constitutions' broader provisions concern social rights or quality of life; these might be interpreted to include access to essential energy supplies. This raises the question of domestic law situations interacting with EU Law, where national fundamental rights could be at issue concerning access to energy and energy poverty.

(b) The UK distinctions between ECHR under the HRA and the EU Charter

There were practical fundamental rights implications for courts and applicants/claimants in the UK, which could be relevant for any current Member State where fundamental rights are vulnerable to national legislation. In the face of UK legislation which is found incompatible

15 See Article 29 of Electricity Directive (EU) 2019/944 and Article 3(3) of the Governance Regulation (EU) 2018/1999.

16 Article 69(2) of Directive (EU) 2019/944.

17 One possible example concerns national rules on energy retail price regulation, which might be adopted with a view to protecting those suffering from energy poverty: it is clear that such national rules would require objective justification under EU law, given the scheme of the Third IEM package and the TFEU rules on competition (see Case C-265/08 *Federutility* [2010] ECR I-3377, ECLI:EU:C:2010:205; and Case C-242/10 *ENEL Produzione* (judgment of 21 December 2011), ECLI:EU:C:2011:861). Another point to note is that EU law's universal service requirement concerning electricity (Art. 27 of Dir. 2019/944/EU) provides a start in addressing energy poverty in the sense of requiring access to electricity to be available to all, but does nothing on its own to address concerns of *affordability*, requiring only that it be at "competitive, easily and clearly comparable, transparent and non-discriminatory prices".

with fundamental rights requirements under the UK's Human Rights Act 1998 ('HRA'), the strongest tool[18] at the national court's disposal remains the declaration of incompatibility. But under EU law, it was open to (and indeed positively required of) a UK court to disapply the offending national law rules in favour of the protection of fundamental rights.[19] Thus, EU law could offer stronger protection in a given area or wider protection than the ECHR (and thus the HRA).[20] The complexities of what might survive of such disapplication of UK domestic law in the face of EU law after the UK's withdrawal from the EU pending any formal and final agreement are interesting,[21] but beyond the scope of the present piece.

2.2.2 Vertical and Horizontal Direct Effect

(a) Of the relevant TFEU provisions and/or EU legislation

So far as the various potentially relevant provisions of the TFEU are concerned, their ability to confer rights upon individuals is subject to the usual restrictions derived from the case law, so that some Treaty provisions are capable of granting rights and imposing obligations between private

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18 Under s. 4 HRA 1998, acknowledging, of course, that where possible some judges have striven hard to find an interpretive solution to such incompatibility under s. 2 HRA 1998: see, e.g., *Ghaidan* v. *Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

19 E.g. Case C-60/00 *Carpenter* [2002] ECR I-6279, ECLI:EU:C:2002:434, concerning fundamental rights as general principles. And see now *Benkharbouche* v. *Embassy of Sudan* [2014] 1 CMLR 40, nicely showing that the limits under the HRA drove national courts to engage in creative interpretation (albeit in that case one that could not help the applicant under national law) *and*, as a result, leading to the use of EU fundamental rights law as a *stronger* tool (Art. 47 EU Charter of FRs). The Court of Appeal reached the same conclusion, [2015] EWCA Civ 33; the Supreme Court, meanwhile, did similarly, but with barely a mention of the EU Charter.

20 See Case C-300/11 *ZZ (France)* v. *Secretary of State for the Home Department*, ECLI:EU:C:2013:363, and the subsequent domestic ruling of the Court of Appeal: [2013] Q.B. 1136. In Norway, meanwhile, it follows from Norwegian legislation that the main part of the EEA Agreement as well as ECHR apply as Norwegian law with priority before other legislation.

21 See, e.g., A. Young, '*Benkharbouche* and the Future of Disapplication', U.K. Const. L. Blog (24 Oct. 2017) (https://ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/).

individuals (e.g. Articles 101 and 102 TFEU), while others can only do so vertically upwards as against the state (e.g. Article 34 TFEU). Regulations are in principle capable of operating vertically and/or horizontally, while Directives typically only function to grant rights to private individuals vertically upwards as against the state. This sets the context in which EU fundamental rights may be applicable in cases concerning Energy law.

With regard to the internal energy market Directives which comprise the Clean Energy for all Europeans package, the interesting judgment in *Portgás*[22] seems to reinforce the approach taken in *Foster* v. *British Gas* concerning direct effect: the case concerned a company limited by shares under Portuguese law, yet seen as providing a public-interest service, and so it could be bound by the provisions of an unimplemented Directive (there, on procurement). This is seen by Albors-Llorens[23] as a version of 'intermediate horizontal direct effect', and is of interest here as it shows the potential to expand further the possible scope of application of the EU Charter concerning Member States' implementation of EU law.

(b) Of Fundamental Rights[24]

The EU Charter of Fundamental Rights of the European Union[25] gained status as EU primary law by the Treaty of Lisbon entering into force on 1 December 2009, which amended Article 6(1) of the Treaty on the European Union (TEU). Article 6(1) TEU now sets out that the Union recognises the rights, freedoms and principles set out in the charter "which shall have the same legal value as the Treaties".

The well-known and much discussed *AMS* case[26] suggests that it is possible for fundamental rights under the EU Charter to apply directly

22 Case C-425/12 *Portgás* (CJEU, 12 December 2013), ECLI:EU:C:2013:829, discussed by E. Szyszczak (2014) 5(7) *JECLP* 508, at 512; and A. Albors-Llorens (2014) 39 *E.L. Rev.* 851.

23 A. Albors-Llorens (2014) 39 *E.L. Rev.* 851.

24 D. Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 *ELRev* 479.

25 [2012] OJ C 326/391, 26.10.2012.

26 Case C-176/12 *Association de Médiation Sociale* v. *Union Locale des Syndicats CGT*, EU:C:2014:2.

in cases between private parties, provided that the matter falls within a Member State's implementation of EU law. While on its own facts, the nature of the relevant provision of the Charter (its Article 27 concerning workers' rights to information and consultation) was not such as to be directly effective, the implication is that others certainly can be. By contrast, the subsequent *Egenberger* judgment[27] is careful to explain that the principle of non-discrimination (to be found in Article 21(1) of the Charter) could be invoked between private parties because it was a general principle of law, rather than due to its status under the Charter. The even more recent judgment of the Court in *Bauer and Brosson*[28] shows clearly that, where the provision of the Charter is capable in itself of conferring rights upon private individuals (there, workers), then it can be relied upon directly in a dispute, even between private parties. Thus, it would seem that the potential for the application of fundamental rights under the Charter in such horizontal situations will depend upon the wording of each provision of the Charter and the context within which it is to be applied. The relevance of this framework for our discussion is that it establishes the potential availability of the EU Charter of Fundamental Rights in actions between private parties in the Energy field, as well as when cases involve the position of private individuals *vis-à-vis* the State.

The case of *Alemo-Herron*[29] *is worth dwelling upon under this heading for its apparent beefing up of freedom of contract as part of the coverage of business freedom under Article 16 of the EU Charter of Fundamental Rights.*

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[27] Case C-414/16 *Egenberger* v. *Evangelisches Werk für Diakonie und Entwicklung*, ECLI:EU:C:2018:257.

[28] Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal* v. *Bauer* and *Wilmeroth* v. *Brosson*, ECLI:EU:C:2018:871. These cases make the point especially clearly, since the first was a vertical situation, so that Article 7 of Directive 2003/88/EC sufficed to protect the employee via vertical direct effect against a State body, while the second case was a horizontal situation, under which only Article 31(2) of the Charter could offer protection to the employee, given the bar on horizontal direct effect of directives. See paras. 76 and 87-92 of the judgment.

[29] Case C-426/11 *Alemo-Herron* v. *Parkwood Leisure*, ECLI:EU:C:2013:521, discussed by J. Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42(4) *Ind. LJ* 434; and M. Bartl & C. Leone, 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review' (2015) 11(1) *Eur. Const. LRev.* 140.

This has potential implications for regulatory attempts to shape, attenuate or even overturn certain contracts which may raise questions under competition law or the broader EU liberalisation scheme for the internal energy market. In this regard, a possible link has been tentatively suggested[30] *between the implications of Alemo-Herron* and some consumer law cases in the energy sector in Germany. In *Schulz and Egbringhoff*,[31] the CJEU acknowledged that, where mandatory national rules apply due to the need to provide for a supplier of last resort so as to ensure that a Universal Service Obligation is respected (as was indeed the case on the facts of both of those cases):

> [a]s those suppliers of electricity and gas are required, in the framework of the obligations imposed by the national legislation, to enter into contracts with customers who request this and who are entitled to the conditions laid down in that legislation, *the economic interests of those suppliers must be taken into account in so far as they are unable to choose the other contracting party and cannot freely terminate the contract*.[32]

While this point does not receive any attention in the remainder of the judgment, it may yet prove of no little significance for suppliers faced in the future with arguments based upon the reasoning in the case: the willingness of the Court to accept the need to consider the supplier's economic interests here shows potential interactions with the approach taken to Public Service Obligations in the cases under Article 106(2) TFEU, and, indeed, the *Altmark* judgment.[33] In these cases, the Court has shown more tolerance for the terms on which Member States confer public service obligations, acknowledging that these functions must be

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30 A. Johnston, 'Seeking the EU "Consumer" in Services of General Economic Interest (with a focus upon the Energy sector)' in D. Leczykiewicz & S. Weatherill (eds.), *The Images of the Consumer in EU Law* (Hart Publishing, 2015), in section D(i)(c) on the links and overlaps between EU energy-specific and EU general consumer protection law.

31 Joined cases C-359/11 and C-400/11 *Schulz* v. *Technische Werke Schussental* and *Egbringhoff* v. *Stadwerke Ahaus* (judgment of 23 October 2014), ECLI:EU:C:2014:2317.

32 At para [44] of the *Schulz* judgment (emphasis added).

33 Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v. *Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747, ECLI:EU:C:2003:415.

able to be performed under 'economically acceptable conditions' for the undertaking concerned,[34] which would justify *prima facie* infringements of the free movement or competition rules by virtue of Article 106(2) TFEU.[35] In other words, undertakings entrusted with a public service function – like many in the energy field – could enjoy some degree of exemption from the strictures of the TFEU rules on trade and competition, by virtue of how the Member State sets the conditions for the performance of such functions. This shows a measure of acceptance of the interests of suppliers of such services and the need for them to be able to operate under 'economically acceptable conditions'.

One could speculate whether the Court's reasoning in the *Alemo-Herron* judgment[36] concerning the inclusion of freedom to conduct a business – and its incorporation of the principle of freedom of contract – in Article 16 of the Charter of Fundamental Rights of the EU[37] might be used to bolster claims that such energy supplier interests be respected in a proportionate fashion. This might seem no less paradoxical an argument here in the consumer protection scenario than in the employee protection context of *Alemo-Herron* itself,[38] and typically the Court has shown a willingness to interpret EU consumer legislation to provide far-reaching protection for the

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34 Cases C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, ECLI:EU:C:1997:499, at [43]: the question was whether the enterprise would not be able to fulfil its public duties, not the much higher threshold that the Member State must show that the enterprise's financial viability would be threatened as the Commission had argued in its submissions.

35 For further discussion, see A. Johnston, n. 28, above, section 3.2.2 of that chapter.

36 N. 27, *supra*, discussed (critically) by J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfer of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42(4) *Ind LJ* 434.

37 [2010] OJ C83/389.

38 E.g. in other recent cases, the Court has emphasised that "the freedom to conduct a business is not absolute, but must be viewed in relation to its social function [and may] be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest" (Case C-281/11 *Sky Österreich* v. *Österreichischer Rundfunk* (CJEU, 22 January 2013), ECLI:EU:C:2013:28, [45]-[46]. In *Alemo-Herron*, the distinction relied upon by the Court was that the UK measure adversely affected the "core content" (*Sky Österreich*, at [49]) or "very essence" (*Alemo-Herron*, at [35]) of that freedom, in a way that it had not found in the *Sky Österreich* case.

consumer,[39] as well as a refusal to give much weight to the argument in consumer cases to date.[40] Still, the link to the need to ensure "the performance, under economically acceptable conditions, of the tasks of general economic interest which [the member State] has entrusted to an undertaking"[41] would be relevant in a situation such as that in *Schulz and Egrbinghoff*, where the energy supplier concerned has been appointed as a supplier of last resort.

3 Selected topics in Energy Law with Fundamental Rights implications

The focus here will be on areas raising issues which are (relatively) particular to the energy sector. Thus, some examples readily identifiable from the table (in 2.1, above) will not be examined separately here, since they raise questions largely identical to those arising in that area generally: e.g. in EU merger control law, the issue of divestment as a condition of merger clearance will always raise questions of property rights, business freedom and the proportionality of a Commission decision to require sale of assets, etc. The same applies to the possibility of structural remedies under Articles 101 and/or 102 TFEU, in conjunction with Regulation 1/2003/EC, and to the general procedural questions arising in competition and State aid law (hearings, rights of the defence, access to justice, etc.).

Below, an outline diagram (Diagram 1, annexed at the end of this chapter) is reproduced which seeks to set out the basic structure of energy networks, business links, etc., using the electricity supply industry as the example: the idea of this is to help to illustrate the context in which

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39 See, e.g., H Unberath and A Johnston, 'The Double-headed Approach of the ECJ Concerning Consumer Protection' (2007) 44 *CMLRev* 1237, esp. 1252ff and, generally: S Weatherill, *EU Consumer Law and Policy* (Cheltenham, Edward Elgar, 2nd edn, 2014); and N Reich *et al*, *European Consumer Law* (Antwerp, Intersentia, 2nd edn., 2014).

40 See Case C-12/11 *McDonagh* v. *Ryanair* (CJEU, 31 January 2013), ECLI:EU:C:2013:43, [60]-[64], where the EU objective of ensuring a high level of protection for consumers is emphasised.

41 Case C-157/94 *Commission* v. *Netherlands* [1997] ECR I-5699, ECLI:EU:C:1997:499, at [43].

sections 3.1 and 3.2 below raise issues of EU trade, competition and of course fundamental rights law.

3.1 Unbundling

3.1.1 An outline of unbundling

The idea of 'unbundling' the management, legal corporate status and even ownership of the energy network is a core element of the EU's energy legislation. Most of the ex-incumbent electricity and gas companies were typically vertically integrated, which can create difficulties for liberalizing these markets:

> [t]hey have an inherent interest in retaining their customers, market share, and thus profitability. When competition is introduced, the ex-monopolists hold a 100% market share. Thus, any gain in market share by new competitors means a loss in market share by the ex-incumbent. It is perfectly natural that the ex-incumbent will endeavour to prevent any loss of market share. Where the ex-incumbent owns the network, it has a natural incentive to make third party access to it as difficult as possible.[42]

In essence,[43] unbundling seeks to:

- introduce competition where possible within the system, including through trade from other countries, thus enhancing the system's responsiveness to changes (on matters such as input costs, etc.);
- reduce incentives to cross-subsidise up- or downstream business using profits garnered from control over natural monopoly assets in transmission and distribution (as illustrated by Diagram 1, above) or otherwise favour such other parts of the business (e.g. via sharing market-sensitive information): this should also

[42] C. Jones (gen. ed.), *EU Energy Law – Volume I: The Internal Energy Market* (Leuven: Claeys & Casteels, 3rd edn., 2010), 10.

[43] For details, see Johnston & Block, ch. 3.

encourage the network operator to focus on its own issues and performance, rather than being run to serve the interests of associated up- or downstream parts of a vertically integrated business;
- encourage investment and innovation across the system;
- ease the supervisory tasks entrusted to the National Regulatory Authority ('NRA'), concerning issues like tariffs, market monitoring and transparency;
- enable – if this were thought desirable by the relevant Member State – privatisation of (elements of) the energy supply system.

Alongside these potential benefits, unbundling in general, and ownership unbundling in particular, also impose various costs upon system operators, users and customers; for some, these costs may well outweigh the benefits to be gained from unbundling.[44] These costs may include:

- one-off transaction costs on asset sales and/or structural reorganisation;
- replacing internal processes with a series of contracts (time delays, ongoing transaction costs);
- the need for regulation of natural monopoly assets, which itself imposes costs on society or at least users of the system;
- more generally, unbundling models stopping short of full ownership unbundling require policing the limits of such other approaches, which imposes further regulatory oversight costs, and compliance costs on the part of the undertaking;
- the loss of (easy?) government ability to achieve policy goals through the energy system.

There are also arguments for moving beyond functional and legal separation to require the full ownership unbundling of the transmission

[44] See, e.g., M. Mulder, V. Shestalova and M. Lijesen, 'Vertical separation of the energy-distribution industry' (CPB No 84, 2005) and B. Baarsma *et al*, 'Divide and Rule. The Economic and Legal Implications of the Proposed Ownership Unbundling of Distribution and Supply Companies in the Dutch Electricity Sector' (2007) 35 *Energy Policy* 1785.

system operator, which essentially reside in improving or enhancing various elements of the benefits outlined above.[45]

Under the current EU legislative framework, Member States are required to use of one three basic models for Transmission System Operators:

> (1) the ownership unbundling model (which is the basic principle and the default model[46] from the EU Commission's perspective), was first introduced in Article 9 of the Third Electricity and Gas IEM Directives, and is now included in Article 43 of Electricity Directive (EU) 2019/944 with respect to the electricity sector. This requires complete separation of the ownership of the transmission business from other levels up- and/or downstream (generation, distribution, supply, etc.);
>
> (2) the independent system operator (ISO), provided for by Articles 44 and 45 of the (EU) 2019/944 (previously Articles 13 and 14 of Electricity Directive 2009/72/EC) and Articles 14 and 15 of the Gas Directive 2009/73/EC. Ownership of the network can still be held by the vertically integrated entity, but the transmission network must itself be managed by an independent system operator, which must be entirely separate from the vertically integrated company and which is to perform all network operator functions; or
>
> (3) the independent transmission operator (ITO), detailed in Articles 46 to 51 of the Electricity Directive (EU) 2019/944 (previously Articles 17 to 23 of the Electricity Directive 2009/72/EC) and Articles 17 to 23 of the Gas Directive 2009/73/EC. Hereunder, separation of the transmission activities must be achieved through the establishment of an ITO, which must be responsible for the maintenance, development, and operation of the net-

[45] See, further, M. Pollitt, 'The Arguments For and Against Ownership Unbundling of Energy Transmission Networks' (2008) 36 *Energy Policy* 704.

[46] See, e.g., the Third IEM Directives, recitals 11 (Elec.) and 8 (Gas).

works, even though those networks remain the property of the vertically integrated company.

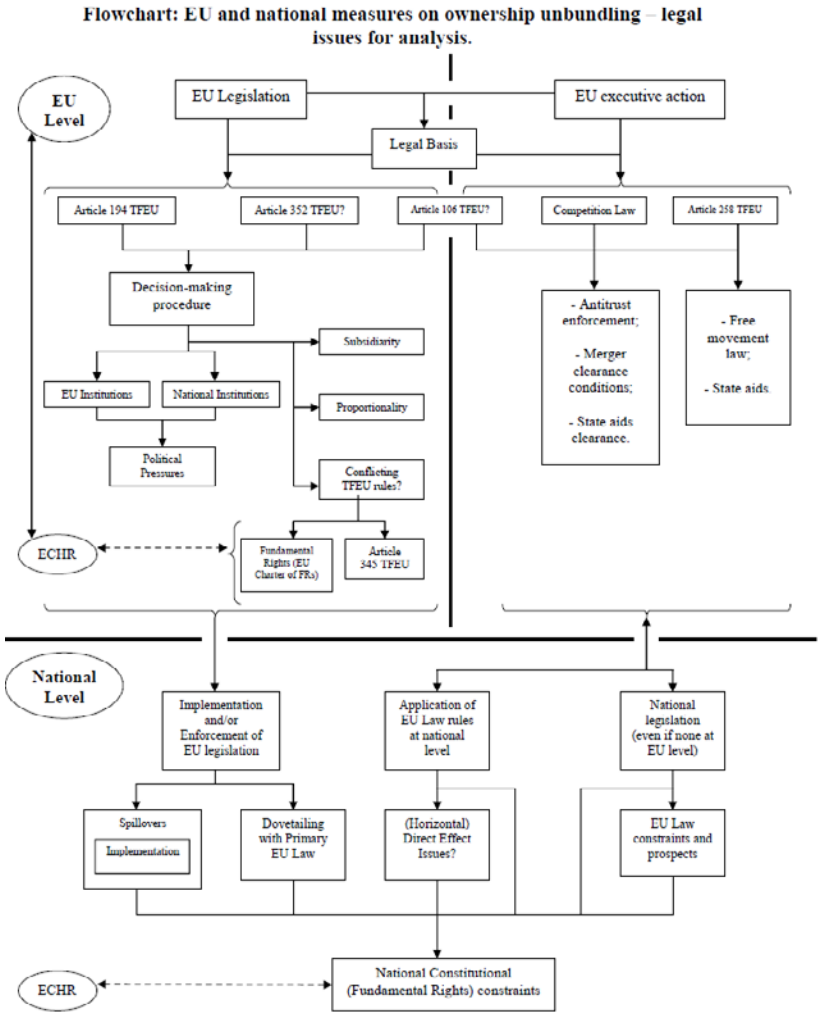
Once a Member State has adopted the first model, under the Directives it is not permitted to 'regress' back to a weaker unbundling model in future. It should be emphasised that these Directives provide a significant amount of detail concerning the national rules which will be required to govern the ISO and, in particular, the ITO models, in an attempt to ensure that these options "provide the same guarantees regarding independence of action of the network in question and the same level of incentives on the network to invest in new infrastructure that may benefit competitors".[47] The concomitant of providing these alternatives is that the NRA will have a significant role to play in ensuring the respect of these detailed rules by the transmission system operator:[48] from a fundamental rights perspective, this is significant, in that it may render the NRA the appropriate defendant if any of its regulatory activity is found to be disproportionate in its effects upon that operator.

The reason for providing some detail concerning unbundling is that its goals and detailed regulation will prove crucial in any analysis of the fundamental rights implications of EU or national rules which establish or further extend the unbundling principles: *prima facie*, rules which strongly control the enjoyment of property (i.e. the transmission business) held by a company, even to the extent of requiring that property to be sold *and* specifying certain key characteristics of those allowed to buy it, amount to a restriction upon rights to free enjoyment of property and possessions under Article 1 of the First Protocol to the ECHR and/or Article 17(1) of the Charter.

47 Commission, 'Proposal for the Third Package Directives', COM(2007) 195 (19 September 2007).

48 For detailed discussion, see Johnston & Block, paras. 3.32-3.94.

Diagram 2: Flowchart on legal issues raised by national ownership unbundling measures



The flowchart reproduced in Diagram 2 (above) tries to locate the relevance of such fundamental rights arguments within the EU law firma-

ment, noting the potential impact of fundamental rights upon the EU's law-making process and competence as well as their relevance to national implementation of EU law and national level law-making, where EU fundamental rights law may operate as a constraint upon national competence and autonomy.[49]

3.1.2 Ownership unbundling and fundamental rights

Despite the relative paucity of case law to date, the issue remains one of real significance: strong views have been expressed[50] that the far-reaching implications of unbundling in general, and ownership unbundling in particular, require strong and cogent justifications if the intrusion upon property rights is to be found proportionate. Praduroux and Talus, on the other hand, have concluded that there does not appear to be a conflict between fundamental rights and general principles of EU law on the one hand and ownership unbundling on the other hand.[51] The key fundamental right in question is likely to be the right to property laid down in Article 1 of the First Protocol to the ECHR (and the corresponding terms of Article 17 of the EU's Charter of Fundamental Rights). In short, provided the transmission assets are *sold* off, thus ensuring that their current owners receive some compensation in return for their inability any longer to own such assets, it seems that this should amply satisfy the proportionality requirements imposed by the ECHR under this provi-

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[49] This was developed from A. Johnston, 'Ownership Unbundling: Prolegomenon to a Legal Analysis', ch, 23 in M. Bulterman, L. Hancher, A. McDonnell & H. Sevenster (eds.), *Views of European Law from the Mountain* – Liber Amicorum *Piet Jan Slot* (Alphen aan den Rijn: Kluwer Law Intetnational, 2009).

[50] See, e.g.: J-C Pielow, G Brunekreeft, and E Ehlers, 'Legal and Economic Aspects of Ownership Unbundling in the EU' (2009) 2(2) *Journal of World Energy Law & Business*[96] (see the comment in reply by K. Talus & A. Johnston, (2009) 2(20 *Journal of World Energy Law & Business* 149)[:] and E. Ehlers, *Electricity and Gas Supply Network unbundling in Germany, Great Britain and The Netherlands and the Law of the European Union: A Comparison* (Antwerp: Intersentia, 2010).

[51] S. Praduroux and K. Talus, 'The third legislative package and ownership unbundling in the light of the European fundamental rights discourse' (2008) 9 *Competition and Regulation in Network Industries* 3-28.

sion.[52] A brief discussion is required to justify this assertion, which is based upon the broader case law under the ECHR, given that the issue has yet to be addressed directly under EU (fundamental rights) law.[53]

3.1.2.1 'Deprivation of property'?

The main test for 'deprivation' of property under Article 1 of the First Protocol is the extinction of the owner's rights in the property, usually by means of a legal transfer of those rights to another by operation of law or the exercise of a legal power to do so. Ownership unbundling mandated by EU law would appear to conclude that the only way to promote competition would be to force current incumbents to transfer certain companies or assets to new market entrants. Such a move would be a State act and would no doubt be laid down in the relevant legal framework (thus satisfying the basic conditions for such a deprivation).[54] However, even in this hypothetical situation, the typical method would be to force the *sale* of such assets, thus ensuring some form of compensation for

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52 It can be noted that the rationale underlying the fundamental rights analysis under the ECHR (mirrored in many national systems) is very similar to the basis upon which claims to recover stranded costs have been developed and subsequently analysed under EC law in the State aids field. See Commission Communication relating to the methodology for analysing State aid linked to stranded costs (26 July 2001), which document is available on the internet at: https://ec.europa.eu/competition/state_aid/legislation/stranded_costs_en.pdf. See further the brief article by B. Allibert, 'A methodology for analysing State aid linked to stranded costs, and first cases', (2001) *Competition Policy Newsletter*, Number 3, October 2001, pp. 25-27, discussing the Decisions taken by the Commission on the applications by Austria, Spain and the Netherlands.

53 The same structure of discussion could also apply to rules mandating third party access (TPA) to energy networks at the transmission and distribution levels, although we are not aware that it has been utilised in practice.

54 It should be noted that the reference to 'the general principles of international law' as a condition for such deprivation of property has been held by the European Court to be relevant *only* in the situation where the party claiming interference with his possessions is *not* a national of the expropriating state: see *James* v. *U.K.* (1986) 8 EHRR 123, confirmed in *Lithgow* v. *U.K.* (1986) 8 EHRR 329, at (*inter alia*) para. 115. However, given the approach of the Court to compensation in deprivation cases (considered briefly below), the inapplicability of the public international law principle (requiring compensation to be given to non-nationals for deprivation of their property) is unlikely to make much difference in practice.

the incumbent operator. The *adequacy* of the compensation that such a method might provide falls to be considered below.

3.1.2.2 Justifying an infringement?

In all situations where an infringement by means of some interference with possessions has been shown, the state must show that this interference was justifiable to escape a finding that its conduct has been unlawful. There are separate elements[55] to be considered here, but it should not be forgotten that there is an essential link between how the public interest is defined and the shape of the proportionality argument that follows. The question of compensation is part of that proportionality analysis, but given its centrality to the ownership unbundling scenario, it will be highlighted separately in what follows.

3.1.2.2.1 Public interest/General interest

Any justification for an infringement upon the right to the peaceful enjoyment of possessions must state the grounds upon which that interference is to be made. The Strasbourg Court has tended to be deferential to the Member States' definitions and explanations of why a certain restriction was necessary: for example, leasehold enfranchisement legislation in the U.K. was held to be a policy calculated to enhance social justice within the community and therefore was 'properly described as being "in the public interest"'.[56]

On the case law as it stands, therefore, it seems highly likely that the type of public/general interest ground that would be relied upon by the state in the ownership unbundling scenario (such as benefiting overall social welfare by the introduction of competition) would be difficult

[55] Clearly, ownership unbundling rules under EU law meet the criterion of being 'conditions provided by law' which is necessary for any justifiable infringement of Convention Rights. This basis in law must be accessible, sufficiently certain and must provide protection against arbitrary abuses. Thus, it is not only a requirement to be able to point to a positive legal provision empowering the body in question to take the action of which the applicant complains; there is also an element of the 'Rule of Law' about this requirement. These criteria seem satisfied in the case of ownership unbundling under EU law.

[56] *James* v. *U.K.* (1986) 8 EHRR 123, at para. 49.

and perhaps impossible to characterise as not being acceptable under the Convention. However, while the ground of public interest may be legitimate, it must still be analysed whether the means chosen to fulfil that ground were proportionate to the benefit to be gained.

3.1.2.2.2 Proportionality

Although there is no express reference to a proportionality test in the wording of Article 1 of the First Protocol, it is clear from the Strasbourg Court's jurisprudence that such a requirement is inherent in that Article. Proportionality is a general principle of the Convention and requires there to be a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[57] In the context of Article 1 of the First Protocol, the Strasbourg Court has developed a requirement that a 'fair balance' must be struck 'between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[58] This approach is followed by the Court in all cases of infringement of Article 1 of the First Protocol, whether concerning deprivation, control of use, or more general interference with the enjoyment of possessions.

It is important to note that the intensity of the proportionality test applied will vary according to the severity of the infringement in question. 'Deprivation of property is inherently more serious than a control of its use',[59] thus suggesting that it will be more difficult to argue that the action of a public body in depriving a company of its property is a proportionate way to achieve the public interest goal at issue. In any application of the idea of fair balance, however, it is clear that two elements will be key: first, is there any entitlement for the property owner to compensation for the interference suffered? Second, is there any procedure open to the applicant to challenge the measure that has caused the interference with his possessions? In the parallel stranded costs situation, a good example of

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57 *James* v. *U.K.* (1986) 8 EHRR 123, at para. 50.

58 *Sporrong and Lönnroth* v. *Sweden* (1982) 5 EHRR 35, para. 69.

59 See *Gillow* v. *U.K.* (1989) 11 EHRR 335 for a clear recognition of this point.

the procedural element is provided by Article 24 of Directive 96/92/EC,[60] under which Member States were allowed to develop plans to compensate incumbent companies for stranded costs. These plans were then to be submitted to the European Commission within a certain period of time for their examination in accordance with the EU's State aid rules. Equally, the absence of any such procedure may well lead to a finding that the interference is a disproportionate one that fails to respect the balance to be struck between the competing interests at stake.[61]

3.1.2.2.3 Compensation

It would appear that there is no absolute right under the Convention to receive compensation in return for an interference with the right to the peaceful enjoyment of one's possessions. Rather, the availability and extent of any compensation falls to be considered as part of the overall analysis of the proportionality of the interfering measure. However, it is also accurate to state that the more serious the infringement of the right to peaceful enjoyment of one's possessions, the stronger the presumption that at least some compensation must be paid for the 'fair balance' of interests to be respected.

With regard to the deprivation of possessions and compensation, only in 'exceptional circumstances' will the taking of property without compensation be justifiable; otherwise, the protection afforded by Article 1 of the First Protocol 'would be largely illusory and ineffective'.[62] However, while compensation should normally be an amount 'reasonably related to [the] value' of the property taken, there is no 'guarantee [of] a right of full compensation in all circumstances, since legitimate objectives of public interest, such as pursued in measures of economic reform …, may

60 [1996] O.J. L27/20.

61 See *Sporrong and Lönnroth*, n. 51, *supra* for a good example, although here it was the combination of the failure to provide any means of compensation *with* the lack of any opportunity to challenge the measures which seemed to tip the balance overall. This illustrates the interlinked nature of the proportionality analysis in such cases, covering many different and yet connected issues.

62 *Lithgow v. U.K.*, n. 47, *supra*; see esp. paras. 80-83.

call for less than reimbursement of the full market value … '.[63] This seems to imply that there is a proportional relationship between the nature and extent of the public interest, on the one hand, and the individual burden to be borne, on the other. That is to say that 'the greater the public gain to be achieved by the legitimate aim, the greater the financial burden the property owner can be expected to bear. To this extent the state enjoys a wide margin of appreciation in calculating compensation terms'.[64] Generally, the defendant States have not been successful in arguing that their case falls within the 'exceptional circumstances' needed to escape the need to provide compensation.[65] However, there are examples where the Court has been rather deferential to the terms upon which compensation has been calculated.[66] Overall, therefore, it would appear that ownership unbundling would be likely to survive a challenge based upon fundamental rights under EU law, at least if the approach of the Strasbourg Court under the ECHR is any guide.

3.1.3 Ownership unbundling and Article 345 TFEU

The Grand Chamber judgment of the Court in *Netherlands* v. *Essent* is the only case where the Court of Justice has dealt with a privatisation ban

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63 *Ibid*.

64 Rook, *Property Law & Human Rights* (London: Blackstone Press, 2001), p. 72.

65 D. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p. 532 suggest that a possible example might be seizure of property during times of war (see now D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford: OUP, 4th edn., 2018), while D. Rook, *Property Law & Human Rights* (London: Blackstone Press, 2001), p. 71, n. 2 suggests that a local authority landlord exercising the remedy of distress for rent might be another.

66 See *Lithgow* v. *U.K.*, n. 47, *supra*, where the calculation of the compensation paid to a company which was to be nationalised was made on the basis of the value of its shares at a point before the announcement of the nationalisation plan, rather than on the basis of company assets held at the date of nationalisation. The Court acknowledged that such a broad public interest issue as nationalisation legislation involved the consideration of a very wide range of competing interests, which the Member State and its national authorities were best placed to assess. Overall, the Court found that adequate reasons did exist for the compensation criteria chosen and, as a result, held the U.K. to be within its margin of appreciation and thus found no violation of the Convention.

related to the sale of shares in electricity and gas DSO organisations under Article 345 TFEU governing national systems of ownership rights.[67] The Court found that the privatisation ban fell within the scope of Article 345 TFEU, but that the prohibition nevertheless constituted a restriction on the free movement of capital pursuant to Article 63 TFEU. The judgment is, however, more ambiguous concerning the potential influence of the principle in Article 345 TFEU on considering legitimate justification grounds.[68] Haraldsdottir argues that the role of the neutrality principle enshrined in Article 345 TFEU must be viewed in relation to the specific merits of each case, where the application of the principle may depend on the social function or strategic importance of the property at issue.[69] Based on this reasoning, the decision in *Netherlands* v. *Essent* may also be seen as not contradicting the reasoning of the EFTA Court in *Hjemfall*, where the Court noted that Norway could pursue a system of public ownership for its hydropower resources, provided the objective is pursued in a non-discriminatory and proportionate manner, with reference to the equivalent provision to Article 345 TFEU in Article 125 EEA.[70] Finally, it is notable that the CJEU judgment in *Netherlands* v. *Essent* did not refer even once to fundamental rights protection in general, the ECHR, EU or national fundamental rights law, focusing instead solely upon Article 345 TFEU and the free movement of capital under EU law.

3.2 Disputes concerning terms and conditions under EU electricity guidelines

Electricity Regulation (EC) No. 714/2009 in the Third IEM package and the subsequent Electricity Regulation (EU) 2019/943 of the Clean Energy package both set out procedures for the adoption of more detailed

67 Joined cases C-105/12 to C-107/12, ECLI:EU:C:2013:677.

68 K. Haraldsdottir, 'The nature of neutrality in EU law: Article 345 TFEU' (2020) 45(1) *E.L. Rev.* 2020 3-24.

69 *Ibid.*

70 Case E-02/06, *EFTA Surveillance Autority* v. *Norway* (judgment of 26 June 2007).

network codes and guidelines for the electricity market.[71] It would go far beyond the scope of this article to provide detailed description and analysis of this elaborate legislation and its adoption process.[72] The point we would like to make here is merely related to access to justice as a fundamental right in challenges raised under the legislative framework.

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, as well as a number of other areas.[73] In addition, the Commission may adopt guidelines for practice following similar procedures.[74] They are adopted as Commission Regulations pursuant to a process where the European Network for Transmission System Operators for Electricity (ENTSO-E) and the EU Agency for the Cooperation of Energy Regulators (ACER) play central roles in the drafting process.

Four electricity network codes and four guidelines have so far been adopted as Commission Regulations.[75] The guidelines adopted are Commission Regulations (EU) 2015/1222 establishing a guideline on capacity allocation and congestion management (CACM),[76] (EU)

71 Electricity Regulation (EC) No. 714/2009 provides the legal basis for adopting network codes and guidelines in Articles 6 and 18, respectively. The new Electricity Regulation (EU) 2019/943 sets out similar legal bases in Articles 59 and 61.

72 For a more thorough analysis, see L. Hancher, A.-M. Kehoe and J. Rumpf, 'The EU Electricity Network Codes and Guidelines; A Legal Perspective', Research Report Florence School of Regulation (2020).

73 See further Article 8(6) of the Electricity Regulation.

74 Article 18 of the Electricity Regulation 714/2009 and Article 59 of Electricity Regulation 2019/943.

75 For further information and access to the codes, see: https://electricity.network-codes.eu/network_codes/ (last visited 17 December 2020).

76 We should note here the potential relevance of fundamental rights to the operation of rules on capacity allocation and congestion management. In short (as discussed further below in section 3.3 on renewables support schemes), contractual rights to transmission capacity may count as possessions under fundamental rights law (Art. 17 EU Charter FRs and Article 1 of the First Protocol to the ECHR), such that *prima facie* interference with them by regulatory rules such as CACM will require justification on public interest grounds, following the structure discussed above in section 3.1.2 on ownership unbundling and fundamental rights. To our knowledge, to date the fundamental rights dimension has never been raised in (any dispute concerning) the application of these CACM rules.

2016/1719 establishing a guideline on forward capacity allocation (FCA), (EU) 2017/1485 establishing a guideline on electricity transmission system operation (SOGL) and (EU) 2017/2195 establishing a guideline on electricity balancing (EB).

A specific feature of the guidelines is that they provide a basis for adopting even more specific terms and conditions (TCMs). Approximately 200 TCMs need to be adopted and a large number of actors are involved in the process.[77] All four guidelines establish a system where national regulatory authorities (NRAs) shall adopt further TCMs based on proposals primarily from the TSOs (and in some cases from the Nominated Electricity Market Operators (NEMOs), i.e. the power exchanges) within a number of areas comprised by the guidelines. Some TCMs shall apply to all Member States and therefore be adopted by all NRAs,[78] some are applicable on a regional basis and shall be adopted by the NRAs in the region,[79] and some are applicable on a State-by-State basis and shall be adopted individually by each and every NRA.[80]

In cases where the NRAs are not able to reach agreement on a TCM, or where the NRAs decide to forward the case, ACER may adopt the final TCM.[81] ACER may also provide its opinion on a draft TCM earlier in the process. Moreover, in the new Electricity Regulation 2019/943, ACER also has the legal powers to revise and approve TCMs where all EU NRAs need to agree pursuant to the guidelines.[82]

Given that the TCMs may in practice turn out to be of great importance for electricity market design within a number of areas, ACER's powers to decide on TCMs are of considerable importance. Parties challenging the decisions of ACER may bring them before ACER's Board of Appeal.[83] A recent and important case before the General Court, *Aquind*

77 ACER's Annual Activity Report 2017.

78 See e.g. Commission Regulation (EU) 2017/1485 (SOGL), Article 6(2).

79 See e.g. SOGL Article 6(3).

80 See e.g. SOGL Article 6(4).

81 See further Electricity Regulation (EU) 2019/943 Articles 5 and 6(10).

82 Electricity Regulation (EU) 2019/943, Article 5(2).

83 See Article 28 of Electricity Regulation (EU) 2019/943 as well as Articles 25-27 on the composition etc, of the Board of Appeal.

v. *ACER*, concerned, *inter alia*, a complaint that the Board of Appeal had only carried out a limited review of the complex technical and economic assessments involved in the case.[84] This raises some interesting questions from the perspective of access to justice as a fundamental right.[85]

In *Aquind* v. *ACER*, the applicant had submitted a request for an exemption from the access conditions for its Aquind interconnector. The national NRAs in France and the UK had not been able to agree on the exemption request and the case was forwarded to ACER, whicrh refused the request for an exemption. ACER's decision was appealed to the Board of Appeal, which upheld ACER's decision. In its decision, the Board of Appeal held, with reference to case law, that ACER's economically and technically complex assessments were subject to a limited judicial review by the Board of Appeal and that it was confined to ruling on whether ACER had committed manifest errors in its assessments.

The Court disagreed with the Board of Appeal, emphasizing, *inter alia*, that the establishment of the Board of Appeal was part of a general tendency under EU law to establish appellate bodies where agencies have been given significant decision-making powers in complex issues.[86] The interpretation of the then prevailing Electricity Regulation (EC) 714/2009 did not, in the Court's opinion, support a limited scope of review parallel to the Court's own limited reviews of complex technical and economical decisions by the administration. Rather, the Court held that a limited review by the Board of Appeal would entail that the Court, when a case is brought before it, would carry out a limited review of a limited review.[87] Consequently, the decision of the Board of Appeal was annulled by the General Court.

Carrying out a full review of complex technical and economic assessments as required by the Court can, however, be a challenging task for a Board of Appeal with limited time and resources. Given the ongoing process of establishing a large number of TCMs for the European energy

84 Case T-735/18, *Aquind Ltd.* v. *ACER* (judgment 18 November 2020), ECLI:EU:T:2020:542.

85 See Article 47 of the EU Charter of Fundamental Rights.

86 Case T-735/18, para. 51.

87 Case T-735/18, para. 58.

market, there is every reason to assume that the number and complexity of appeals will only increase over time. If such a development is not followed by corresponding increases in the resources made available to the Board of Appeal, it may simply not be possible to carry out full reviews of decisions within acceptable time limits. This, in turn, may raise questions relating to whether such a system guarantees access to justice as a fundamental right for applicants challenging ACER decisions.

3.3 Renewable Energy Support Schemes

Fundamental rights considerations may arise in various guises in the renewables field. First, in making the shift from one support system to another (or to establishing a system in the first place), transitional regimes with phase-ins and phase-outs will be required. Ensuring appropriate treatment of pre-existing certificates and/or entitlements under the prior system will be crucial as a practical matter to secure support and credibility for the new policy and its legal framework, but could also raise difficult questions under fundamental rights law.[88]

UK litigation concerning often abrupt government changes to renewables support schemes has raised the issue of fundamental rights protection for those relying upon government schemes as the basis for entering into various contracts, only to have those contracts undermined by later changes in the rules applying to such schemes.[89] There have been public law challenges to policy changes made by governments as a result of austerity: judicial review has often focused upon fundamental rights to reject policy change, although it has also achieved the same result via (traditional) canons of statutory interpretation. In *Friends of the*

[88] See, e.g., A Johnston, 'Legal issues raised by the introduction of take-or-pay contracts for renewables deployment in the UK', in B. Delvaux, M. Hunt and K. Talus (eds.), *EU Energy Law and Policy Issues - The Energy Law Research Forum Collection* (Euroconfidentiel/European Study Service, 2008), Section 4, ch. 4.

[89] A. Johnston, 'Recent Renewables Litigation in the UK: Some Interesting Cases' (2015) 13(3) OGEL.

Earth v. *Department of Energy and Climate Change*,[90] the courts at first instance and appellate level concluded that the changes to the Feed-in Tariff scheme for smaller-scale renewables operated retrospectively for a particular category of schemes which had qualified for the old tariff, by removing vested rights to receive that higher tariff for 25 years and instead replacing it with the new, lower tariff after only 4.5 months. No express authorisation for such retrospective operation could be found in the parent legislation which empowered the government to adopt the new rules in secondary legislation. This case can be contrasted with the decision in *Solar Century Holdings* v. *Secretary of State for Energy & Climate Change*,[91] concerning the decision to end the Renewable Obligation scheme (for new solar farms with capacity >5MW) two years earlier than it had originally intended. Here, the judge found that the scheme had to be understood as balancing a range of objectives, meaning that there could be no legitimate expectation that it might not be changed prior to its planned end date. Further, insofar as there was a measure of retrospective impact upon stranded investments made by the applicants – in having begun the process of seeking accreditation for their installations, which would now be wasted effort in view of the changes –, these were held not to amount to vested rights, so that the consultation conducted, the grace period offered for phasing in the new rules, and the reasons given by the government for making the changes were all satisfactory and did not render the impact upon such investments unfair in the circumstances.

In neither case was the issue of fundamental rights crucial to the analysis or the judgments of the courts: the assessment and outcome turned entirely on statutory interpretation, the aims of the schemes and the reasons for amending them, in the context of potentially vested rights and possible retrospectively applicable rules involved in the policy changes. Yet it should be noted that questions of the status of such 'vested rights' in the *Friends of the Earth* case could easily have triggered analysis under Article 1 of the First Protocol to the ECHR concerning the quiet

[90] [2011] EWHC 3575 (Admin), upheld: [2012] EWCA Civ 28, [2012] Env LR 25.

[91] [2014] EWHC 3677.

enjoyment of possessions. This is evident from the analysis in the next group of cases.

These cases concerned actions for damages under the HRA/ECHR, brought by solar installation companies against UK government: *Infinis* v. *GEMA*[92] *and Breyer Group*[93]. *It has been striking that these claims have been successful. Their focus was upon whether damages were available for breach of Article 1 of the First Protocol to the ECHR under the UK's HRA 1998. In Infinis*, this was due to GEMA's failure to accredit two renewables generating installations so that they earned ROCs for given periods; in *Breyer*, meanwhile, the claims concerned planned renewables installations that had been abandoned as a result of the proposed change in government policy on renewables support, and whether the interests held by the claimants were sufficient to found a claim in damages.

In *Infinis*, neither the first instance judgment nor that of the Court of Appeal engaged in extensive discussion of the HRA, the ECHR or the case law thereunder. Once the detail of the analysis of the various schemes and secondary legislation had been completed, just 13 paragraphs in Lindblom J.'s judgment[94] (including the arguments of the parties)[95] and 5 paragraphs in the Court of Appeal[96] were devoted to the claim for just satisfaction under fundamental rights law. Nevertheless, the willingness of the judiciary in these cases to accept this line of argument is significant, as is the absence of any attempt to identify or introduce a threshold[97] criterion which would assess the (more or less) flagrant nature

92 [2013] EWCA Civ 70.

93 *Breyer Group* v. *Department of Energy and Climate Change* [2014] EWHC 2257 (QB) and *Department of Energy and Climate Change* v. *Breyer Group* [2015] EWCA Civ 408. See, most recently, Solaria Energy UK Ltd v. Department for Business, Energy And Industrial Strategy [2020] EWCA Civ 1625, where the result in *Breyer* was essentially followed on the substance (although the claim was ultimately dismissed on limitation grounds).

94 [42]-[47], [56], [65] and [103]-[107].

95 [56] and [65], for *Infinis* and the Authority, respectively.

96 [23]-[27].

97 As opposed to considering the matter as part of the overall assessment of the need to award damages and their quantification: see [2011] EWHC 1873 (Admin), at [47].

of any breach[98] of a fundamental right (as would commonly be found in many continental jurisdictions and, indeed, in the case law of the Court of Justice of the EU, concerning both Member State liability under the *Francovich* line of cases[99] and liability of the EU's own institutions[100]). Instead, the focus of Lindblom J. was on a demonstrable and direct causal link between the violation and the loss or damage,[101] and the need to achieve *restitution in integrum*, placing the applicant, so far as possible, in the same position as if his ECHR rights had not been breached.[102] In particular, "[w]here the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded".[103]

GEMA had conceded at first instance that Infinis's claim to be accredited was sufficiently established to amount to a possession for the purposes of the Article 1 claim, but it endeavoured to withdraw that concession on appeal, and argued that Infinis held no sufficient legitimate expectation that could be recognised as founding an Article 1 claim, in the absence of settled case law or a judicial declaration recognising the validity of such a claim (relying on the *Kopecky* v. *Slovakia* judgment[104] of the Strasbourg Court). This was firmly rejected by the Court of Appeal. Sullivan L.J. clarified that the *Kopecky* case required that a legitimate expectation

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98 Lindblom J. described the situation as follows: "[t]hough acting in good faith, [GEMA] misapplied the statutory scheme, and the claimants were unlawfully denied that to which they were statutorily entitled" (at [106]). From this, Coulson J. in *Breyer* (n. …, above) concluded that an *unlawful* act which amounted to an infringement upon rights under Article 1 of the First Protocol to the ECHR meant that such an interference could not be justified (at [135]-[137]): see further the discussion in section 3.2, below.

99 Case C-6/90 *Francovich and Bonifaci* v. *Italy* [1991] ECR I-5357, ECLI:EU:C:1991:428, and Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur* v. *Germany* and *R* v. *Secretary of State for Transport* ex p *Factortame (No. 3)* [1996] ECR I-1029, ECLI:EU:C:1996:79.

100 Case *Aktien-Zuckerfabrik Schöppenstedt* v. *Council of the European Communities* [1971] ECR 975, ECLI:EU:C:1971:116.

101 [2011] EWHC 1873 (Admin), at [47], citing *Kingsley* v. *United Kingdom* [2002] 35 EHRR 177.

102 *Ibid*., [45]-[46], and [2013] EWCA Civ 70, [26]-[27]: both citing *Anufrijeva* v. *Southwark London B.C.* [2004] QB 1124 (at [57]-[59], *per* Lord Woolf C.J.) and *R (on the application of Greenfield)* v. *Secretary of State for the Home Department* [2005] UKHL 14 (http://www.bailii.org/uk/cases/UKHL/2005/14.html) (at [10], *per* Lord Bingham of Cornhill).

103 *Anufrijeva* (n. 57, above), at [59].

104 [2005] 41 EHRR 43 (ECtHR).

must "be of a nature more concrete than a mere hope and based on a *legal provision or a legal act* such as a judicial decision" (his emphasis). For Sullivan L.J., the right to accreditation under a statutory scheme was perfectly adequate to found Infinis's legitimate expectation, and it was not necessary that it should be based upon "*both* a legal provision giving the applicant an entitlement to some pecuniary benefit *and* a legal act such as a judicial decision confirming that entitlement"; one or the other would suffice.

The *Infinis* judgments stand as a robust affirmation of the principle that statutory entitlements under such renewables promotion schemes amount to a clearly defined legitimate expectation that pecuniary benefits will be received where the qualifying conditions are satisfied. The protection of such expectations – or vested rights, as they were described once accreditation had been granted, as in the *Friends of the Earth* case discussed above – is crucial to the predictability of the policy framework and investment climate relied upon in setting up such schemes, with a view to encouraging capital investment, and renewables development and deployment in any national electricity generating system.

The *Breyer* litigation, meanwhile, followed on from the conclusions in the *Friends of the Earth* case discussed above, and addressed the difficult question of what sorts of interests held by the claimants would qualify for protection under Article 1 of the First Protocol to the ECHR, such that interference with those interests would sound in damages. The claimants were companies who had been involved in renewables installation projects which had been abandoned because they would not have been completed in time to meet the cut-off date under the government's proposed new scheme. In summary, concluded contracts (and those so close to final formal conclusion that an agreement was already clearly reached) qualified, as did marketable goodwill that could be established at the time of the interference by the change in the scheme's rules. But other interests such as possible loss of future goodwill and unconcluded contracts did not amount to possessions protected under the ECHR.

The Court of Appeal agreed with almost all of the first instance judge's conclusions in *Breyer*, differing only on the point that the government's

proposal itself was not an unlawful interference *per se* as a result of the *Friends of the Earth* judgment; rather, it had to be open for proposals to be made and consulted upon.[105] At the same time, the fact that the proposal was made was acknowledged to be an interference, and one which failed at the proportionality stage to strike a fair balance between the interests of investors in renewables schemes and the public interest, as the first instance judge had also concluded.[106]

Finally, it is also notable that all discussion in these UK cases concerned the HRA and ECHR: no references at all were made to EU law and its possible fundamental rights implications. Practically speaking, the HRA approach was possible here because the relevant national rules have been secondary legislation (or lower), meaning that the HRA's mechanisms *could* offer protection on fundamental rights grounds: the story might have been different had primary legislation been involved. In those Member States where fundamental rights offer protection at the constitutional level, there may similarly be less pressure to resort to EU law fundamental rights arguments, yet adding this element alongside arguments based upon domestic constitutional law and the ECHR could prove important in future cases, especially where EU law's supremacy might offer stronger protection for claimants affected by drastic and financially damaging changes in government policy, whether in the renewables field or elsewhere.[107]

105 [2015] EWCA Civ 408, [81], [83].

106 *Ibid*., [99]: "[i]n view of (i) DECC's statements that April 2012 was the cut-off date, (ii) the statements that there would be no retrospective tariff changes, (iii) the scale of the investments made by the claimants (and others who were in the same position) in reliance on these statements, and (iv) the fact that the losses caused by the interference with their possessions were dwarfed by the savings achieved by DECC as a result of the interference"; upholding [2014] EWHC 2257 (QB), [145]-[147].

107 Note the similar issue concerning government policy change in the energy sector which arose in Germany following the government's decision to phase out nuclear power from the German electricity system. The legality of this decision and its detailed terms and conditions reached the Bundesverfassungsgericht, which ruled on the case in late 2016 (BVerfG, judgment of the First Senate of 6 December 2016 – 1 BvR 2821/11, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/12/rs20161206_1bvr282111en.html) and again in 2020 (BVerfG, Order of the First Senate of 29 September 2020 – 1 BvR 1550/19, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/09/rs20200929_1bvr155019en.html). In 2016,

3.4 Smart Grids and Smart Metering[108]

The development of smart metering and smart grids are often highlighted as an important technological development in the transition to a low-carbon energy sector.[109] The Electricity Directive defines a "smart metering system" as "an electronic system that is capable of measuring electricity fed into the grid or electricity consumed from the grid, providing more information than a conventional meter, and that it is capable of transmitting and receiving data for information, monitoring and control purposes, using a form of electronic communication".[110] Smart

the Constitutional Court found that parts of the legislation (2011 original and 2018 amendments) were unconstitutional due to violations of the principle of proportionality concerning the power of use of and disposition over property, and in 2020 it held that the State's new legislation had failed adequately to address this violation. See: L. Kramm, 'The German Nuclear Phase-Out After Fukushima: A Peculiar Path or an Example for Others?' (2012) 3(4) *Renewable Energy Law and Policy Review* 251 for the background; T. Leidinger, 'The judgement of the Federal Constitutional Court on the nuclear phase-out in Germany. Every light has its shadow' (2017) 62(1) *Internationale Zeitschrift für Kernenergie* 26, on the 2016 judgment; and R. Fleming, 'German Atomic Energy Act Amendment Illegal - Case Comment BVerfG 1 BvR 1550/19' (13 November 2020, http://energyandclimatelaw.blogspot.com/2020/11/german-atomic-energy-act-amendment.html), on the 2020 Order.

108 Note that these issues stretch far beyond smart meters and grids in the energy sector, as discussions and implementation of smart(er) cities increase: see L. Edwards, 'Privacy, Security and Data Protection in Smart Cities - A Critical EU Law Perspective' (2016) 2(1) *European Data Protection Law Review* 28.

109 See, e.g., C.W. Gellings, *The Smart Grid: Enabling Energy Efficiency and Demand Response* (Lilburn (GA), USA: Fairmont Press, 2009) for a helpful (if US-centric) overview; S. Pront-van Bommel, 'Smart Energy Grids within the Framework of the Third Energy Package' (2011) 20 *EEELRev.* 32; S. Vanwinsen, 'Smart grids: Legal Growing Pains' (2012) 21 *EEELRev.* 142; and P.M. Connor *et al.*, 'Policy and regulation for smart grids in the United Kingdom' (2014) 40 *Ren & Sust Energy Revs* 269. See also M. Goulden *et al.*, 'Smart grids, smart users? The role of the user in demand side management' (2014) 2 *Energy & Soc Sci* 21; D. Xenias *et al.*, 'UK smart grid development: An expert assessment of the benefits, pitfalls and functions' (2015) 81 *Ren Energy* 89, esp. at 93 and 96; and N. Balta-Ozkan *et al.*, European smart home market development: Public views on technical and economic aspects across the United Kingdom, Germany and Italy' (2014) 3 *Energy Research & Soc Sci* 65, esp. at 67, 72 and 75.

110 Art. 2(23), Electricity Directive (EU) 2019/944.

grids may more loosely be defined as grids that by their design encourage decentralised electricity generation and energy efficiency.[111]

An important aspect of smart metering (and to some extent smart grids) is that it facilitates real-time measurement of electricity consumption. This, in turn, opens up the possibility of incentivising consumption at times when the aggregate electricity consumption is low by facilitating hourly electricity market pricing for consumers. Customers will then, for example, have an incentive to charge their electric vehicles or to wash their clothes at times with the lowest electricity prices, contributing to evening out the periods of peak demand. Combined with other technology provided through app management and new service-based market actors, the need for building new electricity generation capacity to ensure electricity supply in peak load hours may then be reduced, contributing to reducing the impact on the environment and climate, and reduced costs for society.

At the same time, smart metering generates new customer data, raising questions concerning privacy and data protection. In this respect, the preamble of Electricity Directive (EU) 2019/944 sets out rather broadly that the Directive respects and shall be interpreted in accordance with the Charter, in particular with respect to data protection issues,[112] and that 'the privacy of final customers and the protection of their data shall comply with relevant Union data protection and privacy rules',[113] primarily the General Data Protection Regulation (GDPR).[114] The issues of privacy and data protection raise a number of questions, which to some extent also involve fundamental rights aspects. Yet this new status of the protection of personal data as a fundamental right has implications that have not necessarily been clearly or carefully worked through.[115] This is

[111] See para. 51 of the preamble to the Electricity Directive (EU) 2019/944. For an earlier piece on smart meters as a key part of developing the smart grid, see Pront-van Bommel, n. 107, *supra*.

[112] Para. 91 of the preamble to Electricity Directive (EU) 2019/944.

[113] Art. 20(c), Electricity Directive (EU) 2019/944.

[114] Reg. 2016/679/EU [2016] O.J. L119/1.

[115] See, for example, O. Lynskey: 'Deconstructing Data Protection: The 'Added-Value' of a Right to Data Protection in the EU Legal Order' (2014) 63 *ICLQ* 569, and *The*

not the place to pursue detailed analysis of the finer points of data privacy law and policy in general, or its sophisticated application to smart grid operation and the installation and use of smart meters. Nevertheless, it is important to highlight this area as one where the relatively newly-found status of data privacy as a free-standing EU law fundamental right could yet have implications for the energy sector and its customers.[116] As one smart meter company representative has commented:

> When it comes to the protection of utility assets, our experience shows us that utilities are completely aware of the risks and that they are requesting adequate security for their end-to-end solutions. The real challenge for the utility, however, is the protection of the end-consumer and their personal data. … [I]n addition to transmitting data securely, it is at least equally important for utilities to adopt secure organizational procedures governing the use of and access to their IT systems – and for them to ensure that the privacy of end-consumer data is ensured while it is being stored and processed.[117]

These concerns will no doubt be familiar to anyone who has worked in a large company or institution handling significant volumes of personal data, where the requirements of data protection and privacy legislation have brought new obligations and risks to data controllers, and have engendered far-reaching changes in practice concerning data storage, transfer and the like.[118] These concerns at the consumer end are height-

Foundations of EU Data Protection Law (OUP, 2015); and G. González-Fuster, *The Emergence of Personal Data Protection as a Fundamental Rights of the EU* (Heidelberg: Springer, 2014).

116 Specifically with regard to smart metering and data protection/privacy issues, see R. Knyrim & G. Trieb, 'Smart metering under EU data protection law' (2011) 1(2) *Int Data Priv L* 121 and N.J. King & P.W. Jessen, 'Smart Metering Systems and Data Sharing' (2014) 22 *Int J Law & Info Tech* 215.

117 'Smart metering in Europe: The Challenges Are Greater' (http://www.engerati.com/article/smart-metering-europe-challenges-are-greater, 16 September 2014), reporting the comments of Oliver Iltisberger (Executive V.P. for Europe, Middle East and Africa) of Landis+Gyr (http://www.landisgyr.co.uk/).

118 See, generally, C. Kuner: *European Data Protection Law: Corporate Compliance and Regulation* (2nd edn., Oxford: OUP, 2007); *Transborder Data Flows and Data Privacy*

ened by the far-reaching potential of smart metering to grant access to all kinds of data concerning their energy usage and, thereby, their daily behaviour and preferences. And that is before the prospect which is often raised that external actors might be able to intervene remotely in a consumer's energy usage to manage it for them, whether in response to emergencies or on a more general level. For some, if this were to promise cost savings and greater economic and environmental efficiency, this might be a welcome involvement in their lives; for others, it threatens unacceptable intrusion into their lives and their privacy at home.

There is insufficient space to provide a full analysis of the data privacy and fundamental rights concerns regarding smart meters here,[119] but it is important to outline some key issues and their possible implications. First, which data are covered? Some data are obviously personal in nature: name, address, billing data and payment methods. Others, however, must also be included, where they are linked to a natural person who can be identified via the meter's identification number, such as: metering and consumption data, and data required for customer switching. This is because they reveal the economic situation of the data subject[120] and are thus caught by the GDPR.[121]

Further, 'data gathered from smart meters can also be used for other purposes. Energy data allow for a better understanding of customer segmentation, customer behaviour and how pricing influences usage. As such, those data might be used for specific profiling exercises, e.g. to gather sensitive information on the end-user's energy-based footprint

Law (Oxford; OUP, 2013); and C. Kuner. L.A. Bygrave, C. Docksey & L. Drechsler, *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford: OUP, 2020).

119 E.g. there are important practical questions under the GDPR (Arts. 4(7)-(10), and 24-30) concerning who is the data controller (very often the distribution system operator in the first instance), processor or authorised third party in relation to smart meter data; and the detailed rights of the data subject under the GDPR: to be informed when data is collected and processed, to have access to the data (Arts. 13-15); to object to certain processing activities (Art. 21); and to data portability (Art. 20).

120 A. Fratini & G. Pizza, 'Data protection and smart meters: the GDPR and the "winter package" of EU clean energy law' (22 March 2018, http://eulawanalysis.blogspot.com/2018/03/data-protection-and-smart-meters-gdpr.html), a discussion which predated the final adoption of the 2019 Clean Energy Package.

121 Art. 4(1), Reg. 2016/679/EU [2016] O.J. L119/1.

in his/her private environment, his/her behavioural habits and preferences by analysing the information collected through the meters'.[122] Furthermore, 'the potential risks associated with the collection of detailed consumption data are likely to increase … where energy data can be combined with data from other sources, such as geo-location data, data available through tracking and profiling on the internet, video surveillance systems and radio frequency identification (RFID) systems. The critical issue is in fact that smart meters could constitute the entrance gateway to get a privileged access to the digital domain of a household'.[123] Indeed, this can even extend to being able to identify whether a person is at home, even which television programmes an individual watches, and other aspects of their habits, preferences and behaviours.[124]

As a result, it has long been clear that the processing of such data must be subjected to analysis to ensure that it is conducted on lawful grounds. Already in 2011, the Article 29 Working Party, working under the old Data Protection Directive,[125] identified five possible grounds for lawful processing in the smart metering context: consent, contract, performance of a task carried out in the public interest or exercise of official authority, legal obligation, and legitimate interests, and these remain valid concerns today. Consent is likely to remain the crucial area as smart meters become ever more widespread, as the technology that they contain will continue to develop and may enable more wide-ranging uses to be made of the data which they gather. Thus, consent will need to be fully informed, with regular updates to end-users on what the data can and will be used for,[126] and at a sufficiently granular scale to ensure that the range of uses is

122 Fratini & Pizza, n. 118, *supra*.

123 *Ibid*.

124 M.H. Murphy, 'The Introduction of Smart Meters in Ireland: Privacy Implications and the Role of Privacy by Design' (2015) 38(1) *Dublin University LJ* 191.

125 Directive 95/46/EC [1995] O.J. L281/31.

126 See, e.g., Energy UK, 'Privacy Charter for Smart Metering' (https://www.energy-uk.org.uk/publication.html?task=file.download&id=3190), where significant detail is provided on what the information collected will be used for, when and how it will be collected, who else may be given access to the information, how the end-user will be kept informed about the use of such information from smart meters, and the energy consumer's rights in relation to these data. At the same time, it should be noted that

appreciated. Further, it must be possible to revoke consent in a workable manner and not to become locked into that consent, should an end-user's situation or opinion change.

As a matter of proportionality – a crucial issue in assessing the fundamental rights dimensions of data privacy in the smart metering context – serious questions should be asked as to whether the data collected is necessary or merely beneficial for the functioning of the system involving meters, grids, and the achievement of the benefits claimed for such smart metering. Thus, if the goal is to enable end-users to manage their own energy usage in a more timely, efficient and cost-effective fashion, then only minimal communication of energy data outside of the home is required, so as to allow billing to take place. If it is suggested that this fails to pass on information needed for, e.g., more responsive grid management, then information could be aggregated to provide data at a scale that is granular enough to serve that purpose, while not identifying individuals where this is not necessary to the systemic benefits to be gained.[127] Failure to consider these issues at early stages in the design and planning process has caused problems in various countries;[128] now that the issue is squarely on the agenda, there should be no excuses for failing to consider the data privacy questions, conducting impact assessments and keeping consumers fully informed of what information their meter will communicate about them and how it will be used.

the list of uses is specifically stated not to be exhaustive and that energy suppliers will inform the end-user of other such uses.

127 Murphy, n. 122, *supra*, citing K. Kursawe, G. Danezis & M. Kohlweiss, 'Privacy-Friendly Aggregation for the Smart-Grid', in S. Fischer-Hübner and N. Hopper (eds.), *Proceedings of the 11th Privacy Enhancing Technologies Symposium* (Waterloo, July 2011; http://research.microsoft.com/pubs/140692/main.pdf); and A, Cavoukian, 'Privacy by Design … Take the Challenge' (Information and Privacy Commissioner of Ontario, 2009; http://www.prvacybydesign.ca/content/uploads/2010/03/PrivacybyDesignBook.pdf).

128 I. Brown, 'Britain's Smart Meter Programme: A Case Study in Privacy by Design' (2014) 28 *IRLCT* 172, 180; C. Cuijpers and B.J. Koops, 'Smart Metering and Privacy in Europe: Lessons from the Dutch Case', in S. Gutwirth *et al* (eds.), *European Data Protection: Coming of Age* (Dordrecht: Springer Netherlands, 2013), 281.

4 Conclusions

The above discussion has given an overview of a range of areas of EU Energy law where fundamental rights have been, or seem likely to be, relevant. There emerges from the analysis in this paper a clearer idea of the *roles* played by fundamental rights in energy law and policy developments in the EU. Three broad roles can be discerned.

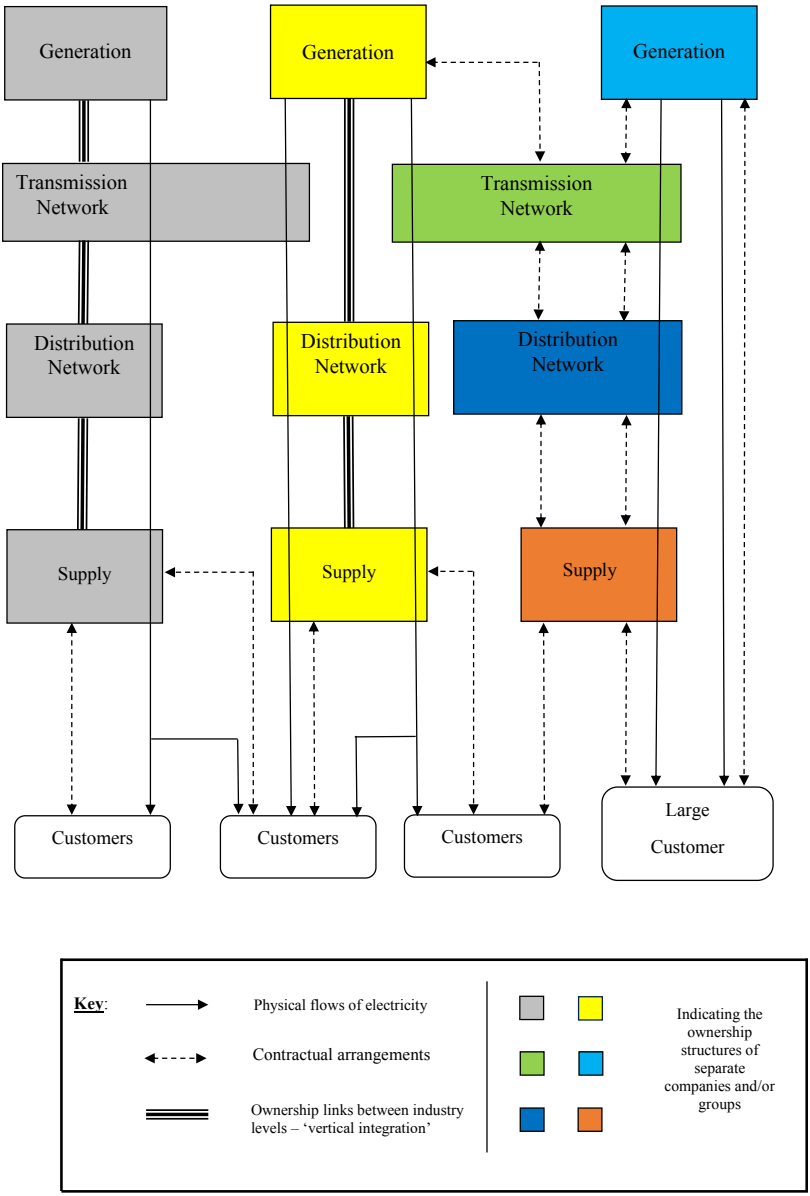
First, fundamental rights are helping – whether alongside or as a limit upon competition and free movement law – to define an acceptable range within which the EU and its Member States can pursue certain energy-related goals and policies. The unbundling discussion offers a nice illustration, showing acceptable 'bands' for regulatory intervention, safeguarding a degree of business and contractual freedom and autonomy, while acknowledging the justifiable trade and competition goals pursued by challenging the pre-existing structures. Similarly, the UK cases concerning damages claims for attempts retrospectively to change the rules concerning renewable energy show that care must be taken when designing such regimes. *Ex ante*, this should bring greater care to how the system should be set up and thought should be given to including transitional mechanisms within the scheme from the outset; a need has also been established, during the ongoing management of such schemes, for the protection of the interests of the very private investors which it was hoped would be incentivised to facilitate renewables deployment.

Second, the fundamental rights arguments have often brought a clearer focus and stronger analysis to address particular issues more coherently. Thus, policy consistency and reliability has been shown to be crucial to encouraging investment, whether in renewables, grid and network infrastructure or 'ancillary' services like smart metering: an acknowledgment that those who invest in such property and businesses have interests worthy of protection helps to concentrate the policy-maker's mind on such questions of consistency, coherence, predictability and dependability. Meanwhile, an appreciation of the privacy dimensions of smart metering serves to improve the design of such meters and the

systems that will use them, as well as to reassure the consumer that their data will not be used or disseminated in ways unacceptable to them, without their rights being respected. This is key to building consumer trust in the system.

Finally, and for the proper fundamental rights lawyer utterly unsurprisingly, the examples discussed in this paper reinforce the traditional role for fundamental rights of securing and enhancing the accountability of the State and government in its activities where the exercise of public power affects individual rights and interests, including those of businesses operating under their legal system.

Diagram 1: Vertical Integration in the Electricity Supply industry



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