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Foreword

This issue of MarIus contains three selected theses written by our LLM students over the last couple of years. The topics span from charter party law involving the Covid-19 pandemic, to environmental law topics involving recycling of ship, and to human rights and the law of the seas involving migrants at sea. The topics illustrate the width of areas in which our students take interest, while at the same time depicting important research areas of key interest to the Institute. We congratulate Zymantas Vicinskis, Olga Tsomaeva and Iva Svalina on their achievments!

Trond Solvang

Content overview

Applicability of the safe port warranty in time charters amid the Covid-19 pandemic

Zymantas Vicinskis

Contents

Acknowledgements

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Oslo, February 2022

Zymantas Vicinskis

1. Introduction

1.1. Statement of the problem and purpose of the thesis

On 11 of March 2020, the World Health Organization declared that Covid-19 is a global pandemic.[1] After almost two years, this ongoing infectious respiratory disease has infected around 267 million people and caused over 5 million fatalities worldwide.[2] The pandemic has been disturbing people's health and lifestyles ever since, consequently negatively affecting international trade that is primarily based on shipping.

Shipping, like other commercial industries, is focused on generating profits. One specific attribute of the shipping business is the enormous monetary investments in ships and their maintenance. Hence, in merchant shipping, time is money since a shipowner has a commercial incentive to employ his vessel as often as possible.[3]

There are many options for a shipowner to exploit his ship in order to make returns on his investment. For instance, the owner could either carry his cargo or charter his vessel in bareboat, voyage or time chartering forms. However, this thesis will focus only on time charters and specifically the safe port warranty in the context of the Covid-19 pandemic.

The defining characteristic of a time charterparty is that it is not a contract for the carriage of goods but a contract for permitting the charterer in a particular time to exploit the ship's commercial potential, to enter into commercial activities of cargo trading by sea either directly or through sub-charters.[4] This notion implies that while the time charterer takes charge of the ship's revenue-producing activities and consequently

1 An outbreak of a disease that occurs over a wide geographic area (such as multiple countries or continents) and typically affects a significant proportion of the population, see www.merriam-webster.com/dictionary/pandemic.

2 https://covid19.who.int

3 The Gregos (1995) 1 Lloyd's Rep. 1, page 4 by Mustill J.

4 The Danah (1993) 1 Lloyd's Rep. 351, page 353.

covers commercial risks, the responsibilities of management and navigation are still at the shipowner's disposition.[5]

Moreover, a vessel and crew are the main assets to accumulate the owner's profit in the shipping business. Therefore, the shipowner has a genuine interest in the vessel's preservation from loss or damage, crew's health and well-being, and the vessel's profitability potential.[6] Thus, it is of the utmost importance for the shipowner to have reinsurance in a time charterparty that the charterer will excise his right to employ the ship in the same way as the shipowner would do to preserve the above-mentioned interests.[7] Generally, it is common ground between the shipowner and the charterer that the latter will only instruct the vessel to safe ports under a time charter.[8]

This line of thought gives business efficacy for a time charterparty makes the contract work, since if there had not been the safe port undertaking[9], whether expressed[10] or implied[11], it could have allowed the charterer to abuse its power to exploit the vessel for its financial benefit without any consequences regarding dangers exposed against the ship and her crew. Hence, according to Donaldson J in *The Hermine*[12], the safe port undertaking is an absolute charterer's obligation in a time charterparty, whether expressly stated or implied.

The Covid-19 pandemic has caused uncertainty whether the shipowner is exposed to more significant risks by following the time charterer's orders to call infected ports and whether the safe port warranty is robust

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5 The Hill Harmony (2001) 1 Lloyd's Rep. 147, page 156 by Hobhouse LJ.

6 Carver, Bennett, Bright. *Carver on Charterparties*, page 2.

7 The Houston City (1954) 2 Lloyd's Rep. 148, page 153.

8 The Marinicki (2003) 2 Lloyd's Rep. 655, page 656.

9 Word "warranty" is not accurate in this context. It is instead a contractual promise than a warranty. However, the word is still used as a matter of convenience. See The Evia (No 2) (1982) 2 Lloyd's Rep. 307, page 321 by Roskill LJ.

10 See NYPE (2015), Clause 1, sub-clause b) and Baltime, Clause 2: *"The vessel shall be employed…between safe ports and places"*.

11 The decision in The Evaggelos Th (1971) 2 Lloyd's Rep. 200 re the implied safe port warranty was affirmed by the House of Lords in The Evia (No.2) 2 Lloyd's Rep. 307, page 318 by Donaldson LJ.

12 The Hermine (1978) 2 Lloyd's Rep. 37, page 47.

enough to protect the owner's interests from those risks. This uncertainty, in all probability, will cause disputes between the parties in the future. Thus, this specific issue is exercising the minds of many maritime lawyers and other stakeholders at present, and so it is a worthy topic to address in greater detail, especially when case law and literature are silent on this matter.

Having acknowledged the above, this dissertation attempts to give a comprehensive overview of the safe port doctrine to understand better how the safe port warranty correlates with the Covid-19 pandemic that is a novel risk to us all. Also, the dissertation provides a systematised source of information to shipowners, charterers and maritime lawyers in an attempt to provide more certainty in the upcoming dispute preparations.

1.2. Research questions

In view of the observations, the research questions will be:

1. How does the present-day English law determines whether a port is safe or not for a time chartered vessel?
2. Does the Sellers LJ's safety test applies to the Covid-19 pandemic, or is it an issue of law, not of fact?
3. Can the shipowner be indemnified through the employment clause in time charters for loss and damage caused in the nominated port by the Covid-19 pandemic?

1.3. Methodology and structure of the thesis

To address the above-mentioned research questions, a legal theoretical framework[13] will be used in this thesis to assess the raised legal problematics analytically within the established research scope.

In order to conduct the analysis, the thesis distinguishes two types of legal sources: case-law and scholarly writings. The former is the primary

[13] Legal theoretical framework discusses current legal background/framework. See Chynoweth, "Legal Research," page 28.

source and consists mainly of English law since the majority of time charters are governed and construed in accordance with the English jurisdiction. Hence, the English Courts have much experience examining the safe port warranty clause in time charters. The latter is the secondary source that consists of books and articles that helps to obtain necessary background information concerning the thesis's research questions.

Simultaneously, it is essential to acknowledge that US maritime law is also essential regarding the safe port warranty issue because it is also a popular jurisdiction for time charters, especially in the NYPE form. However, the thesis does not address US case law since both the US and UK legal systems have the same position regarding the safe port warranty.

The US Supreme Court in *The Athos I*[14] recently concluded that an unqualified safe-berth clause establishes an absolute warranty of safety that causes a strict liability for the breach. Hence, this decision settles a split between the second and the fifth circuit courts of appeal regarding the safe port warranty and charterer's liability. Consequently, this makes US law generally in line with UK law.

The thesis consists of seven parts. The first part covers the short introduction of the research questions and the purpose of the thesis. The next part, which covers the more significant part of the thesis, presents the safety concept. The exact second chapter consists of five sub-chapters that delineate the separate elements of the port's safety test in great detail. The third part focuses on the timing and content of a time charterer's obligations. Next, the fourth part deals with the standard of care that the safe port warranty requires from the charterer. The parts between second and fourth are devoted to answering the first research question. The fifth part attempts to cover the second research question in the thesis. The sixth chapter discusses an alternative remedy option if the owners cannot be compensated via damages. The final part summarises the findings and presents concluding remarks on the research question.

[14] See Citgo Asphalt Refining Co v Frescati Shipping Co Ltd (2020) 140 S Ct 1081, where on page 5, the Court judged that: *"But as a general rule, due diligence and fault-based concepts of tort liability have no place in the contract analysis required here. Under elemental precepts of contract law, an obligor is liable in damages for breach of contract even if he is without fault."*

2. An overview of the legal definition of safe port

As mentioned in the introduction, the first part of the thesis consists of the safe port legal framework. *The Eastern City*[15] is the well-renowned and leading case, where Sellers LJ, in *ratio decidendi*, elucidated what a safe port means. After the Sellers LJ's test outline, this section analyses every critical component of the test, such as particularity, the relevant period of time, abnormal occurrences, good navigation and seamanship, to comprehend the essence of the current state of the law regarding safety in ports.

2.1. The Sellers LJ's test

The seminal passage was born in *The Eastern City*, where the vessel with a deadweight of 5236 tons was chartered on a voyage charterparty to proceed to one or two safe ports in Morocco to load a full and complete cargo of barley in bulk and to ship the cargo to one safe port in Japan. The charterers nominated Mogador port as one of two ports in Morocco. Further, it was well-known among the stakeholders that it could be unsafe to stay in the port during winter months for large vessels, such as the Eastern City. On December 26, the vessel entered and anchored at the port, and subsequently, on December 28, the weather conditions worsened due to strong winds that caused a slight drag of the anchor. The master endeavoured to take the vessel out of the port to sea by anchors aweigh. Despite the fact, the Eastern City ran aground on rocks and shoals close to the anchorage. In this case, Lord Justice Sellers of the Court of Appeal famously held that:

> "*A port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the*

[15] The Eastern City (1958) 2 Lloyd's Rep. 127.

> *absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship."*[16]

The court rigorously examined the master's actions to decide whether stranding of the Eastern City was due to the master's negligence or unsafe Mogador port.[17] According to the Sellers LJ's test, the court assessed that there was no negligence from the master's actions. Hence, the port was plainly unsafe.

It is noteworthy to acknowledge that the acclaimed Sellers LJ's test originates from *The Stork*[18] — another Court of Appeal judgement where factual circumstances were closely alike[19]. In this case, Morris LJ stated identically the same principles of the safe port test, except without the element of good seamanship.[20] As a matter of fact, the line of case law regarding the legal definition of a safe port could be traced back to the 19th century.[21]

That being said, the rationale behind the Sellers LJ's test unconditional approval by the present courts, arbitrators and legal scholars is that the passage has existed in the last six decades through judicial acceptance and continues to exist up till these contemporary times.[22] For instance, the Sellers, LJ's test was approved in *The Hermine*[23] on pages 214–215, by Roskill LJ, who said:

> "*(I)t is now quite unnecessary, in these unsafe port or unsafe berth cases, to refer back to the multitude of earlier decisions… There is the*

16 The Eastern City (1958) 2 Lloyd's Rep. 127, page 131.

17 Ibid, 130.

18 The Stork (1955) 1 Lloyd's Rep. 349.

19 The vessel was chartered on a voyage charterparty to load a cargo of logs in Newfoundland. The weather deteriorated, and subsequently due to a strong wind the ship dragged her anchors into deeper water. The master decided to anchors aweigh and put the engines full ahead from the danger. The masters actions were unfruitful, and the vessel was run aground.

20 The Stork (1955) 1 Lloyd's Rep. 349, page 373.

21 Shield v Wilkins (1850) 4 WLUK 75.

22 D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 26.

23 The Hermine (1979) 1 Lloyd's Rep. 212.

> *law clearly stated. What has to be determined by the tribunal of fact in each case is whether, on the particular facts, the particular warranty of safety has or has not been broken."*[24]

Further, in *The Evia*[25] on page 310, Diplock LJ stated in his *obiter* that:

> *"For my part, I would regard the nature of the contractual promise by the charterer that a chartered vessel shall be employed between safe ports ("the safe port clause") as having been well-settled for a quarter of a century at the very least. It was correctly and concisely stated by Lord Justice Sellers in The Eastern City."*[26]

Lastly, it was again newly reinstated by the Supreme Court in *The Ocean Victory*[27] at paragraph 11 by Clarke LJ, who stated: *"In any event that test has stood the test of time and should remain the test for subsequent cases in the future."*[28]

All in all, the final court of appeal in the United Kingdom has perpetually reinstated the Sellers LJ's test through time as the exemplary standard regarding the law of port's safety. Hence, the passage on page 131 of *The Eastern City* has become a keystone concept[29] and the starting point to any safe port dispute or discussion.[30]

2.2. Particularity

The subsection focuses on the particular that is the first attribute of the Sellers LJ's safety test. The legal definition of a port's safety assesses

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24 The Hermine (1979) 1 Lloyd's Rep. 212.

25 The Evia (No. 2) (1982) 2 Lloyd's Rep. 307.

26 The Evia (No. 2) (1982) 2 Lloyd's Rep. 307 at 310.

27 The Ocean Victory (2017) 1 Lloyd's Rep. 521.

28 Ibid, 5.

29 However, the concept is not necessary concluded; See The Mary Lou (1981) 2 Lloyd's Rep. 272 on page 276.

30 D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 26.

whether the specific port is risk-free for the specific vessel at the specific time.[31]

Safety for the particular ship is reflected in the standardised time charter forms[32] that the vessel is not employed to safe ports in general but employed between ports that are safe for the contractually named vessel. Moreover, Gatehouse J in *The Universal Monarch*,[33] where the vessel was too large for the loading port, held that: *"The test of whether a port is safe is, of course, whether it is safe for the particular vessel to enter, unload and leave the port in question."*[34]

This issue is well-illustrated in *Brostrom & Son v Dreyfus & Co*,[35] where the steamship Sogaland was the largest vessel that had entered the Londonderry port, and subsequently, the river bends made it unsafe for the Sagoland to go in and out under her own steam. Hence, tugs had to be brought from the Clyde port since there was no tug assistance available at the unloading port. The court agreed with the arbitral award that Londonderry was an unsafe port against the vessel due to her size, and the coasts re tugs fall on the charterer.

To assess whether a port is safe for the particular vessel, the time charterparty stakeholders need to evaluate not only the vessel's size but other characteristics as well, such as type, class, nature of cargo and other features.[36] Furthermore, it is pivotal to determine whether the vessel will be secure when she is laden or in ballast. In other words, if she needs lightening or has an inadequate level of air-draft to commence the port or to depart from it, that renders a lack of safety against that vessel.

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31 D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 29.

32 NYPE (2015) Clause 1, sub-clause b, Baltime (2001) Clause 2 and Shelltime 4 (2003) Clause 4 sub-clause c).

33 The Universal Monarch (1988) 2 Lloyd's Rep. 483.

34 The Universal Monarch (1988) 2 Lloyd's Rep. 483.

35 Brostrom & Son v Dreyfus & Co (1932) 44 Lloyd's Rep. 136.

36 D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 30.

The lightening of a ship is illustrated in *The Archimidis*,[37] where the vessel was chartered on a voyage charterparty for three consecutive voyages for carriage of gasoil from "1 safe port Ventspils". Caused by bad weather conditions in the area, the dredged channel had silted up due to a water shortage. Consequently, because of draft restrictions, the vessel could not load charterers' tendered amount of cargo. The court judged that:

> *"In principle, a port could be unsafe because of a need for lightening to get into or out of it. "Safely" meant "safely as a laden ship". The vessel had to be able to reach, use and return from the warranted port. Necessary routes to and from the port were within the warranty, so that unsafety in such routes amounted to a breach. There was no realistic distinction between loading and discharging. If the chartered vessel, laden with the chartered cargo, could not undertake those operations in safety, then prima facie, there might be a breach."*[38]

Regarding a vessel in ballast, *The Irishboffin*,[39] is a good example, where the vessel cleared the bridge before entering the port of Manchester due to the fact that she was laden, and thus her masts were low enough to clear the bridge but too high to leave the port after discharge. Hence, the masts needed to be cut off. Justice Bailhache ruled that:

> *"(T)he cutting of the masts and the expenses of that fell on the charterers. That is for this reason. The charterers were only to order the ship to a safe port and a safe port means a port to which she can safely get and from which she could safely return."*[40]

Therefore, if a nominated port renders additional coasts to a shipowner due to chartered vessel's characteristics, then, in all probability, according to the Sellers LJ's test, the charterer would have breached the safe port

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37 The Archimidis (2007) 2 Lloyd's Rep. 101.

38 The Archimidis (2007) 2 Lloyd's Rep. 101 at 102; The Court of Appeal reinstated Mrs. Gloster J *ratio*, see The Archimidis (2008) 1 Lloyd's Rep. 597 at para. 40.

39 The Irishboffin (1920) 5 Lloyd's Rep. 190.

40 Ibid, 192.

undertaking against the owner. Consequently, the charterer would be liable to cover these expenditures in damages.

Be that as it may, the charterer can remedy itself if it could be proven that the owner breached the vessel's description warranty in the charterparty. For instance, in *The Hilal I*,[41] the shipowner incorrectly submitted the vessel's moulded depth, and subsequently, the vessel's air-draft inevitably exceeded the air-draft restrictions at the loading port. Hence, the owner was estopped to claim damages under the safe port undertaking and had to bear its own losses. In this case, Mr. Kealey J held that:

> *"In a charterparty a charterer charters a vessel with a specific description and promises to employ that vessel only at and between safe ports and/or berths, his promise applies to that vessel as described: the charterer has not made any promises to the owner in respect of a ship with materially different physical characteristics."*[42]

Moreover, the time charterer needs to assess not only if the nominated port will be safe against the specific vessel but also when in time the vessel will cause to use the port since the port's safety could be impacted by external forces at a certain time, such as weather seasons[43], the upcoming political realignment or that the port's safety conditions could change during day-time and night-time. In other words, the crucial moment when the test of safety is to be adjudicated is when the chartered ship arrives at, uses, or departs from the port, whichever mode is in issue.[44]

All things considered, the port's safety is a relative conception and relates only to the specific ship and her cargo in the specific moment of time.[45] It is insignificant if the port's safety level is at its highest if the port renders unsafety to the particular vessel. Therefore, on the one hand, the

41 The Hilal I (2010) 1 Lloyd's Rep. Plus 107.

42 Ibid, para.50.

43 A port may be safe at the time of its nomination in summer but will be blocked by ice by the time of its intended use in the next winter.

44 D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 28.

45 Maass, "The Safe-Berth Warranty and Its Critics," page 321.

shipowner should always submit the correct vessel's details, in order to not to breach the description warranty and, at the same time, not to waive the charterer's safe port promise. On the other hand, it is necessary for the charterer, before nominating a port, to evaluate the chartered vessel's characteristics and the moment in time when to safely approach the port, use it, and in due course leave it.

2.3. The relevant period of time

The subheading's title describes the following attribute of the safe port test. *"The relevant period of time"* is when the vessel exploits the port from the moment of arrival to the time of departure. However, there is some uncertainty regarding the notion of approaching the port and returning from it. Therefore, the question is whether the safe port undertaking covers the entire voyage to the loading port and from it up to the discharge port or not? If not, where terminates the voyage risks and commences the port risks, since it determines whenever the risk of unsafety should fall on the charterer or the shipowner.[46]

The Sussex Oak,[47] where the steamship was chartered on the Baltime form and ordered in the month of January to load flour at London for Hamburg and on arrival there to load timber for London. On the voyage to and from the Hamburg port, the ship sustained damage by ice in the River Elbe. The owner claimed damages under Clause 2 but the charterer refuted this claim due to the master's negligence to proceed towards the port without ice-breaker assistance. Devlin J pointed out in *obiter* that:

> *"In my judgment, there is a breach of Clause 2 if the vessel is employed upon a voyage to a port which she cannot safely reach. It is immaterial in point of law where the danger is located, though it is obvious in point of fact that the more remote it is from the port the less likely it is to interfere with the safety of the voyage. The charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an*

[46] Girvin, *Carriage of Goods by Sea*, page 324.

[47] The Sussex Oak (1949) 83 Lloyd's Rep. 297.

> *ordinarily prudent and skilful master can find a way of making in safety."*[48]

Justice Devlin's line of thought was reinstated and further clarified in *The Mary Lou*[49], where the vessel was damaged by grounding due to insufficient draft in the Mississippi River. Justice Mustill pointed out that:

> *"There remains the question whether the warranty extends only to areas in reasonably close proximity to the port itself. Certainly it is not easy to accept at first sight the idea that hazards existing nearly one hundred miles away can be treated as features of the port. But logically the distance should make no difference, although the further away the obstacle, the less likely it will be that there is no alternative route which will enable the ship to reach the port in safety."*[50]

Moreover, the charterer's obligation to safety could be extended not only to rivers[51] and canals[52] but to some extent, even to the open seas[53]. For instance, *The Palace Shipping v. Gans*[54] is a good illustration of this notion, when during The Great War, the German Government promulgated that the waters around Great Britain and Ireland to be considered as military areas, and all hostile merchant ships should be destroyed. Subsequently, the time charterer ordered the vessel that was under the British flag to steam from a port in France to the port of Newcastle in England. Despite the owners' protests and claims that the Newcastle port is unsafe, the ship nevertheless was ordered to the discharge port, which she reached safely. Sankey J held that:

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48 The Sussex Oak (1949) 83 Lloyd's Rep. 297, page 304.

49 The Mary Lou (1981) 2 Lloyd's Rep 272.

50 Ibid, 280.

51 The Hermine (1979) 1 Lloyd's Rep. 212.

52 The Irishboffin (1920) 5 Lloyd's Rep. 190.

53 The Saga Cob (1992) 2 Lloyd's Rep. 545; The vessel was attacked by Eritrean guerrillas in the Read Sea about four to five miles north east of the harbour entrance.

54 Palace Shipping Co. v. Gans SS Line (1916), 1K.B. 138.

> *"(A)lthough dangers encountered on the way could render a port unsafe, the promulgation was not carried into effect by the German government and Newcastle was, in fact, a safe port."*[55]

In brief, it is noteworthy to underline that Devlin J's *obiter*[56] extends the charterer's promise too widely that may cover voyage risks, which were already agreed between the parties in the charter.[57] Moreover, Devlin J's notion resembles the continuing safe port promise approach that was developed in *The Mary Lou*[58]. Both Judges supported their decisions by focusing on the time charter's wording *"between good and safe ports"*[59] that implicates the charterer's obligation to promise safety for the chartered vessel not only in ports but between them as well.

However, The House of Lords in *The Evia*,[60] as a seminal case regarding a safe port undertaking, identified *The Mary Lou* as "heresy" and overruled Mustill J's decision for its continuing safe port promise approach. Hence, *The Sussex Oak* is also not consistent with the notion of prospective safety developed in *The Evia*[61]. Furthermore, Lord Roskill in *obiter*[62] alluded to the division between voyage risks and port risks by positing through an example that port risks commence in *"the approaches"* to a port or place.[63] Be that as it may, "*the approaches*" perception does not give the final answer when the voyage risks end and port risks commence. The law has no sound clarification on how to divide those risks, thus leaving this issue to the facts of each case and the fundamental contract

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55 Palace Shipping Co. v. Gans SS Line (1916), 1K.B. 138, page 142.

56 The Sussex Oak (1949) 83 Lloyd's Rep. 297 at 304.

57 D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 36.

58 The Mary Lou (1981) 2 Lloyd's Rep 272.

59 NYPE (2015) Clause 2.

60 The Evia (No. 2) (1982) 2 Lloyd's Rep. 307.

61 Ibid, 308. The Court held: *"The charterer's contractual promise related to the characteristics of the port or place in question and meant that when the order was given that port or place was prospectively safe for the vessel to get to, stay at so far as necessary, and in due course, leave".*

62 The Evia (No. 2) (1982) 2 Lloyd's Rep. 307 at 315.

63 D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 36.

law principles. For instance, to assess when the vessel crosses from voyage risks to the nominated port risks, i.e., when the relevant period of time commences, depends on when the vessel begins to confront dangers connected with the nominated port, or if the parties of the charterparty contemplated those risks before the voyage, had they foreseen that by approaching the nominated port, the vessel, in all probability, will tackle these dangers that are linked to the port.[64]

Overall, the Courts and Tribunals Judiciary tend to acknowledge that the geographical reach of safe port undertakings could be extended many miles away from the actual port's territory, even to the open sea, mainly when it is the only passage to the port.[65]

2.4. Abnormal occurrences

This sub-chapter provides an overview of the concept of the abnormal risks, which is another element of the charterer's safe port undertaking formula enunciated by Lord Justice Sellers in *The Eastern City*. According to the test, if the parties have not expressly agreed otherwise, the charterer is only liable to the chartered vessel for losses and damages caused by the port's normal characteristics.[66] Hence, the charterer will not be accountable for damages and losses born by completely unusual or unforeseeable events.[67]

Justice Diplock observed this line of thought regarding normal attributes versus abnormal occurrences in *The Evia (No.2)*, where he stated that:

> *"So great is the variety of ports to which chartered vessels are ordered to go, it is not surprising that disputes should arise as to whether*

64 Wilson, *Carriage of Goods by Sea,* page 26.

65 The Hermine (1979) 1 Lloyd's Rep. 212. A vessel leaving Distrahan on the Mississippi was held up for 30 days at a point 115 miles down river due to silting, and the port was held not unsafe.

66 See The Ocean Victory (2015) 1 Lloyd's Rep. 381, para. 53. Moreover, the normal characteristics in a port that causes a risk of unsafety to a particular ship can be divided into several groups: physical, political, administrative and commercial risks.

67 D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 48; The Mary Lou (1981) 2 Lloyd's Rep 272 at 278.

> *damage sustained by a particular vessel in a particular port on a particular occasion was caused by an "abnormal occurrence" rather than resulting from some normal characteristic of the particular port at the particular time of year."*[68]

Thus, to resolve the dispute between the parties whether the risk constitutes abnormality, in each case, would be a matter of fact.[69] However, it is noteworthy that relevant legal principles must be applied to the facts found to determine the port's safety, i.e., what qualifies as safe or unsafe port is a matter of law.[70]

How to tackle the abnormality issue was well illustrated in *The Saga Cob*,[71] where a time chartered tanker was ordered to carry aviation fuel between Assab and Massawa ports. While anchored five miles away from the Massawa port, the tanker was attacked by Eritrean guerrillas in motorboats with machine guns and rocket grenades. As a result, substantial damages were caused to the ship and her master. The Commercial Court adjudicated that since the danger had been foreseeable, then the seaborne attack was a characteristic of the port, and subsequently, the Massawa port was prospectively unsafe. However, this judgment was overturned in The Court of Appeal, where Parker LJ held that the charterers did not breach the safe port undertaking, i.e., the attack was not an inherent attribute of the port. Even though the attack was a foreseeable possibility, the risk was not a real threat, rather quite a remote one. Hence, the attack by Eritrean guerrillas was an abnormal event and the port was prospectively safe during the nomination.

Diamond J in The Commercial Court pointed out that the abnormal occurrence's influence on safety is decreased if the danger originated from the port's normal characteristics. The Judge held that:

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68 The Evia (No 2) (1982) 2 Lloyd's Rep. 307 at 310.

69 The Hermine (1979) 1 Lloyd's Rep. 212, page 219.

70 The Archimidis (2007) 2 Lloyd's Rep. 101 at para. 41; The Polyglory (1977) 2 Lloyd's Rep. 353.

71 The Saga Cob (1991) 2 Lloyd's Rep. 398.

> *"(T)he primary task of the Court is to ascertain whether a particular source of danger can properly be described as a characteristic of the port and, if so, whether that danger renders the port prospectively unsafe. If the particular risk amounts to an abnormal occurrence then it will usually follow that it does not constitute a characteristic of the port and so does not render the port prospectively unsafe. This is because, in the ordinary way, "abnormal occurrence" is the opposite side of the coin to something which is a characteristic of the port."*[72]

Moreover, to determine if a source of danger is an attribute of the port, a risk should not only exceed a *de minimis* threshold of negligible hazard but cause a real threat.[73] This line of thought was pointed out by Parker LJ that:

> *"All that can be said in this case is that since a guerilla attack may take place anywhere at any time and by any means, that the guerillas had two boats and that they had made one seaborne attack 65 miles away, it was foreseeable that there could be a seaborne attack either en route from Assab to Massawa or in the anchorage at Massawa. If this were enough it would seem to follow that, if there were a seaborne guerilla or terrorist attack in two small boats in the coastal waters of a country in which there had been sporadic guerilla or terrorist activity on land and which had many ports, it would become a normal characteristic of every port in that country that such an attack in the port or whilst proceeding to it or departing from it was sufficiently likely to render the port unsafe. This we cannot accept".*[74]

If the Court cannot delineate the risk as a normal characteristic of the port, then, in all probability, the source of danger constitutes an abnormal risk, which is something well removed from the normal.[75] Additionally, it is noteworthy to underline that if the abnormality reoccurs after the

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72 The Saga Cob (1991) 2 Lloyd's Rep. 398 at 405.

73 Carver, Bennett, Bright. *Carver on Charterparties*, page 207.

74 The Saga Cob (1992) 2 Lloyd's Rep. 545, pages 550–551.

75 The Ocean Victory (2017) 1 Lloyd's Rep. 521, para. 16.

initial event, it may transmogrify to the normal, and the risk becomes a characteristic of the port.[76] Similarly, the port's characteristic attribute could be converted or lead to an abnormal risk.

This notion could be depicted with two well-known cases, *The Evia (No.2)*[77] and *The Lucille*[78], linking with the Iran-Iraq war. In the former, the shipowner let the vessel on Baltime form for 18 months. Then, in mid-March, the charterer ordered the vessel to Cuba to load a cargo of cement for carriage to the Iraqi port Barash. Unfortunately, after the discharge of the cargo on Sept. 22, the war broke out between the countries of Iraq and Iran, and subsequently, the vessel was trapped in the waterway nearly six months after she would have sailed from the Gulf. Consequently, it was held that the port was prospectively safe at the time of the nomination, and the war was an unexpected event that arose after the ship arrived at Barash. Hence, there was no breach of the safe port undertaking. However, in the latter, the charterer nominated Barash as a discharge port on Sept. 20 on the NYPE form, the eve of the outbreak of the war. Thus, the charterer was in breach of the safe port warranty since the risk that caused the port to be unsafe subsequently extended and affected the chartered vessel. Lord Kerr in the Court of Appeal held that:

> *"In this finding I differentiate between going to Basrah with every chance of being blockaded and going to a port where out of the blue and without warning the port is attacked."*[79]

This comparison also points out that the same risk at the same port, in this case, war hostilities, can be both an abnormal event and a port characteristic simultaneously, but for different vessels, the outcome would also be different, depending on when in time the charterer nominated the port.

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[76] D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 53.

[77] The Evia (No 2) (1982) 2 Lloyd's Rep. 307.

[78] The Lucille (1984) 1 Lloyd's Rep. 244.

[79] Ibid, 250.

Moreover, regarding an attribute of the port, and its manifestation to an abnormal event, Professor D. Rhidian Thomas illustrated it with the example that perhaps if a port's characteristic is its vulnerability to unpredictable gales, thus on the occurrence of particular unpredictable gales, its ferocity and consequences may be so severe as to qualify as an abnormal risk.[80]

2.4.1. The Ocean Victory

The Ocean Victory,[81] which is the latest Supreme Court case that extended the applicability of the abnormal occurrences by analysing whether the simultaneous coincidence of the two critical features, such as long waves and a severe northerly gale, was an abnormal occurrence or a normal characteristic of the port.[82]

In this case, the vessel was ordered to load 170,000 tonnes of iron ore at Saldanha Bay in South Africa and to discharge at Kashima in Japan. The berth was affected by considerable swell caused by long waves and high winds of up to Force 9 on the Beaufort Scale. The master then decided to leave the berth for open water but due to severe gale force winds in the fairway lost control of the vessel while leaving the port and was driven back onto the breakwater wall. The ship became a total loss.

The Commercial Court held that the port was prospectively unsafe for the vessel. Teare J pointed out that:

> "*The danger facing Ocean Victory was one which was related to the prevailing characteristics of Kashima. The danger flowed from two characteristics of the port: the vulnerability of the Raw Materials Quay to long swell, and the vulnerability of the Kashima Fairway to northerly gales caused by a local depression. It may well be a rare event for these two events to occur at the same time but nobody at the port could, I consider, be surprised if they did. There is no meteoro-*

[80] D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 50.

[81] The Ocean Victory (2017) 1 Lloyd's Rep. 521.

[82] The Ocean Victory (2015) 1 Lloyd's Rep. 381, para. 55.

> *logical reason why they should not occur at the same time. Long waves were clearly a feature of the port (as they must be of any port facing the Pacific) and low pressure systems generating gale force winds cannot, in my judgment, be regarded as abnormal."*[83]

However, The Court of Appeal overruled Teare J decision, and subsequently, The Supreme Court reinstated the second instance's ruling that the port was not unsafe and the risks were rather abnormal.[84] Justice Longmore expressed in obiter that:

> "*(I)nstead of asking the unitary question directed at establishing the correct characterisation of the critical combination (abnormal occurrence or normal characteristic of the port), the judge merely addressed the respective constituent elements of the combination separately. He looked at each component and decided that, viewed on its own, neither could be said to be rare and both were attributes or characteristics of the port. That was the wrong approach; what mattered was not the nature of the individual component dangers that gave rise to the events, but the nature of the event (ie the critical combination) which gave rise to the vessel (on the judge's findings) effectively being trapped in port."*[85]

The key takeaway from the case is that if the vessel is affected by two unforeseen risks simultaneously, those risks should be assessed in a unitary approach to decide whether they are normal or abnormal events. However, this test of the unitary question requires to be scrutinised further on different factual circumstances since it is uncertain whether the unitary approach will operate in situations when two concurrent events contribute differently to the loss or two foreseeable events strikes at the same time for the first time.[86] In other words, whether the unitary approach has broad applicability is a question for future judicial consideration.

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83 The Ocean Victory (2014) 1 Lloyd's Rep. 59, para. 127.

84 The Ocean Victory (2017) 1 Lloyd's Rep. 521, para. 46.

85 The Ocean Victory (2015) 1 Lloyd's Rep. 381, para. 56.

86 Choi Wai Bridget Yim, "Safe Port Promise by Charterers: Rethinking Outstanding Complications,", page 9.

2.4.2. Summary

Overall, to reiterate, the Sellers LJ's test indicates that abnormal risks are not included in the charterer's safe port promise scope. That is to say, an abnormal occurrence does not make a port unsafe for the chartered vessel. Also, an abnormal event is"*the broad statement of the law*"[87] since Sellers LJ did not thoroughly clarify this issue in *The Eastern City*. Nevertheless, through time, the case law has been elucidating how to tackle an abnormal event in the safe port warranty cases.

2.5. Good navigation and seamanship

The notion of good navigation and seamanship is the last but equally important element of the Sellers' test. The purpose of this qualification is similar to the concept as mentioned earlier of an abnormal occurrence, which is to highlight that the charterer is not responsible under the safe port promise against all perils linked to a port and its vicinity. In other words, the shipowner is not entirely protected by the charterer's promise, and therefore the normal port risks that the master can overcome by the vessel's ordinary navigation and seamanship are not in the scope of the safe port promise. Alternatively, a port will not be unsafe if the vessel is exposed to danger caused only by the negligence of the master or other stakeholders to whom the shipowner is vicariously liable.[88]

To elaborate, ports are constantly exposed to seaborne or windborne perils, and simultaneously one of the port's objectives is to provide safety for vessels during their visit against these natural dangers. If safety was commensurate with a complete absence of risk, it would constitute an unattainable standard.[89] In other words, the perception of a risk-free port does not exist for visiting vessels since a port cannot control natural events. However, a port's safety is obtained by establishing an appropriate

87 The Saga Cob (1991) 2 Lloyd's Rep. 398, page 405.

88 The Polyglory (1977) 2 Lloyd's Rep. 353 at 365.

89 Carver, Bennett, Bright. *Carver on Charterparties*, para. 4-015.

set-up[90] and management system that enables vessels with good navigation and seamanship to avoid or overcome these existing natural hazards. This notion was reflected in *The Eastern City*[91], where Sellers LJ said that:

> "*Most, if not all, navigable rivers, channels, ports, harbours and berths have some dangers from tides, currents, swells, banks, bars or revetments. Such dangers are frequently minimized by lights, buoys, signals, warnings and other aids to navigation and can normally be met and overcome by proper navigation and handling of a vessel in accordance with good seamanship.*"[92]

The significance of a vessel's navigation and crew's seamanship to a port's safety was addressed in *The Polyglory*,[93] where the vessel was let on a time charter and subsequently ordered to Port la Nouvelle to discharge a cargo of gas oil. Due to the potential danger of high winds, the master and pilot decided to leave the port after discharge. Unfortunately, during the process, the vessel's starboard anchor dragged and damaged an underwater pipeline. Subsequently, the shipowner covered the claim for caused damages. Further, the shipowner requested the charterer to indemnify the claim coasts regarding the pipeline under the safe port undertaking, expressly stated in the charter. The charterer denied the claim stating that the port was safe and the damage to the pipeline was caused through negligence by the pilot, for which the owner is vicariously liable. The Commercial Court upheld the arbitration award that even though the pilot was negligent, it did not break the chain of causation, and the port was unsafe since the use of ordinary care and skill would not have prevented the vessel from being exposed to danger. Justice Parker held in obiter that:

> "*If there is a dangerous obstruction in the port but with ordinary care and skill the vessel will never be at risk of collision with it, the port is in ordinary parlance safe. On the other hand if the situation in the port is such that even with ordinary care and skill there will*

90 The Evia (No 2) (1982) 2 Lloyd's Rep. 334 at 338, per Lord Denning.

91 The Eastern City (1958) 2 Lloyd's Rep. 127.

92 Ibid, 131.

93 The Polyglory (1977) 2 Lloyd's Rep. 353.

> *still be a risk of collision, the matter is quite different. The vessel will then be exposed to danger despite the use of care and skill. It may not in fact come to harm and if it does it may be because some negligence has occurred but again in ordinary parlance it appears to me that a port is not safe if it is, despite ordinary prudent and skilful navigation and handling, such that a vessel will be at risk."*[94]

Moreover, Parker J's point of view was summarised by Teare J in *The Ocean Victory*[95], where the judge held that:

> *"The phrase "good navigation and seamanship" describes the standard of navigation expected of the ordinarily prudent and skilful master. If navigation out of a port is "very difficult" such that "high standards of navigation and seamanship" are required to avoid a danger then the port will be unsafe."*[96]

There are two lines of thought concerning the sound navigation and seamanship aspect in the safe port promise conception.[97] First, risks that are manageable by the ordinary navigation and seamanship will be automatically excluded from the safe port promise scope since the charterer only is promising safety from risks that are beyond manageable perils, except abnormal occurrences. Second, when all port perils, including the manageable risks, are in the safe port undertaking scope. However, the charterer is secured by the master's negligence that breaches the duty to act prudently, and thus it breaks the chain of causation, i.e., *novus actus interveniens*. Both approaches cause the same result that the charterer is not liable for the perils that can be avoidable by the master's reasonable care[98], i.e. the avoidance principle.[99] However, if the master

94 The Polyglory (1977) 2 Lloyd's Rep. 353, page 365.

95 The Ocean Victory (2014) 1 Lloyd's Rep. 59.

96 Ibid, para. 112.

97 D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 55.

98 The judiciary is tending to favour the former approach. See The Polyglory (1977) 2 Lloyd's Rep. 353; The Mary Lou (1981) 2 Lloyd's Rep 272.

99 It is a well-established element of U.S safe port warranty law. See Pare Jr., "The Safe Port/Safe Berth Warranty and Comparative Fault," page 142.

acts reasonably but simultaneously falsely, it will not break the chain of causation, and thus the charterer is obligated to continue with the safe port undertaking against the owner.[100]

Furthermore, it is noteworthy that not in all cases, when the vessel is exposed to danger even though with good navigation and seamanship, the responsibility automatically transfers to the charterer. For example, Justice Mustill in *The Mary Lou* suggested a different perception that:

> *"Proof of reasonable skill and care will go a long way towards establishing unsafety; proof of a lack of reasonable skill and care will greatly weaken the inferences which would otherwise be drawn from the nature of the accident. But care and safety are not necessarily the opposite sides of the same coin. A third possibility must be taken into account, namely, that the casualty was the result of simple bad luck".*[101]

All in all, the good navigation and seamanship element is another rule that clarifies the scope of the charterer's safe port promise. The wording makes it plain that a safe port undertaking in a charterparty does not entirely emancipate the shipowner and master from port risks.[102] For instance, suppose the master fails to exercise the ordinary standard of navigation and seamanship and does not act as a prudent master when a vessel arrives at, uses or leaves the port. Consequently, all possible damages and losses will in all probability accrue to the master and vicariously to the shipowner and therefore cannot be attributed to the charterer. Nevertheless, the charterer needs to prove that the perils of the port did not require a high-level standard of navigation and seamanship, and subsequently, there was not only the master's negligence but also the causal link between the master's actions and the damages to the vessel.[103]

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100 The Stork (1995) 1 Lloyd's Rep. 349 at 363. The Sussex Oak (1949) 83 Lloyd's Rep. 297.

101 The Mary Lou (1981) 2 Lloyd's Rep 272, page 279.

102 D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 54.

103 The Mary Lou (1981) 2 Lloyd's Rep 272, pages 279–280.

3. A time charterer's safe port obligations

A time charterer's primary obligation as to safety commences at the moment when the order is given to sail to a new port of call or discharge. However, if the port becomes unsafe for the vessel after the nomination, the charterer is under the secondary obligation to issue a fresh order[104], except if it is still possible to avoid unsafety and if the owner is willing to continue to trade the vessel.[105]

3.1. Primary obligation

It is essential to highlight that a charterer's safe port promise does not last continuously while the vessel is steaming to and using the port as it was thought in the Commercial Courts in the past.[106] In accordance with the leading case decision in this matter[107], the charterer's safe port promise is to be adjudicated when the ship receives the initial order to commence to the port. At that time, the port must be safe with all its permanent and temporary attributes for the vessel when she affects the port in the future.[108] In other words, the charterer's promise is one of prospective safety.[109]

This line of thought was reflected in *The Evia (No.2)*[110], where Lord Diplock stated that:

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104 The Houston City (1956) 1 Lloyd's Rep. 1 at 10.

105 The Hill Harmony (2001) 1 Lloyd's Rep. 147.

106 See The Mary Lou (1981) 2 Lloyd's Rep 272 at page 277, where Justice Mustill held that: "*(T)hat the charterer is liable for any resulting damage if the system breaks down while the ship is in port, notwithstanding that the port was safe at the moment of nomination*".

107 The Evia (No 2) (1982) 2 Lloyd's Rep. 307.

108 See Wilson, *Carriage of Goods by Sea,* page 30. A port could be unsafe at the time of its nomination in winter because of the ice which will have disappeared by the time of its intended use in the following summer.

109 Carver, Bennett, Bright. *Carver on Charterparties*, page 196.

110 The Evia (No 2) (1982) 2 Lloyd's Rep. 307.

> *"It is with the prospective safety of the port at the time when the vessel will be there for the loading or unloading operation that the contractual promise is concerned and the contractual promise itself is given at the time when the charterer gives the order to the master or other agent of the shipowner to proceed to the loading or unloading port."*[111]

In the same case, Lord Roskill delineated that the safe port warranty does not imply a continuing promise of safety. Thus, the charterer does not break the promise and is not liable for any losses or damages to the ship if the port subsequently appears unsafe after the nomination of the port due to unexpected or abnormal occurrences.[112] Lord Roskill posited that:

> "*The charterer's contractual promise must, I think, relate to the characteristics of the port or place in question, and in my view, means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary, and in due course, leave. But if those characteristics are such as to make that port or place prospectively safe in this way, I cannot think that if in spite of them, some unexpected and abnormal event thereafter suddenly occurs which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial. So to hold would make the charterer the insurer of such unexpected and abnormal risks which in my view should properly fall upon the ship's insurers under the policies of insurance the effecting of which is the owner's responsibility under cl. 3 unless, of course, the owner chooses to be his own insurer in these respects."*[113]

Unless those unexpected occurrences after the charterer's undertaking could be identified with the port's attributes at the moment of the nomination, then the charterer would have broken the promise of safety. This

[111] The Evia (No 2) (1982) 2 Lloyd's Rep. 307, page 310.
[112] See the sub-chapter re abnormal occurrences.
[113] The Evia (No. 2) (1982) 2 Lloyd's Rep. 307, page 315.

question was raised in *The Marinicki,*[114] where the vessel was fixed on an amended NYPE form for a one-time charter trip from Vancouver to Jakarta. Before the vessel arrived at her discharge berth in Jakarta, she sustained severe bottom damage. The owners claimed that the damage was caused by an underwater obstruction located within the dredged channel, which constituted the designated route into and out of Jakarta. However, the facts indicated that the damage to the vessel was in all probability due to an abnormal occurrence. Thus, the owners did not manage to prove that the obstacle had been there at the moment of the port's nomination. Nonetheless, the charterers actually breached the safe port warranty since the deputy judge acknowledged that there was no appropriate system in place to check and monitor the safety of the channel to the port.[115]

3.2. Secondary obligation

Roskill L in *The Evia (No.2)* stated that the safe port warranty, under a time charterparty inflicts on a charterer the secondary obligation[116] to cancel the primary nomination and order the vessel out of unsafety if the charterer ought reasonably to know[117] that after the original promise the port has become unsafe due to unexpected supervening events. He concluded that:

> "*(I)t is my opinion that cl. 2, on its true construction, (unless the cause of the new unsafety be purely temporary in character) imposes on the time charterer a further and secondary obligation to cancel*

[114] The Marinicki (2003) 2 Lloyd's Rep. 655.

[115] Ibid, para. 71.

[116] Lord Diplock preferred a bit different analysis that the initial undertaking of prospective safety was a continuing one. See The Evia (No. 2) (1982) 2 Lloyd's Rep. 307, page 310.

[117] See Carver, Bennett, Bright. *Carver on Charterparties*, page 198. For a time charterer to respond effectively to danger, it is suggested that the charterer must be at least aware of the impending danger. However, it might be insignificant if the view is false since the owner can rely on the indemnity clause whether the charterer should have had actual or constructive knowledge.

> *his original order and, assuming that he wishes to continue to trade the ship, to order her to go to another port which, at the time when such fresh order is given, is prospectively safe for her. This is because cl. 2 should be construed as requiring the time charterer to do all that he can effectively do to protect the ship from the new danger in the port which has arisen since his original order for her to go to it was given."*[118]

If the vessel is already in an unsafe port, the charterer should issue a new order to leave, except if the circumstances permit the vessel to comply with the new order.[119] In such case, Lord Roskill in obiter expressed that:

> "*(T)he question whether cl. 2, on its true construction, imposes a further and secondary obligation on the time charterer will depend on whether, having regard to the nature and consequences of the new danger in the port which has arisen, it is possible for the ship to avoid such danger by leaving the port. If, on the one hand, it is not possible for the ship so to leave, then no further and secondary obligation is imposed on the time charterer. This is because cl. 2 should not be construed as requiring the time charterer to give orders with which it is not possible for the ship to comply, and which would for that reason be ineffective. If, on the other hand, it is possible for the ship to avoid the new danger in the port which has arisen by leaving, then a further and secondary obligation is imposed on the time charterer to order the ship to leave the port forthwith, whether she has completed loading or discharging or not, and, assuming that he wishes to continue to trade the ship, to order her to go to another port which, at the time when such fresh order is given, is prospectively safe for her."*[120]

Thus, it is straightforward that the secondary obligation is imposed on the charterer since the nature of a time charterparty and the construction of the safe port warranty requires the charterer to do its utmost to protect the vessel in case of new perils in the nominated port and its vicinity.

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118 The Evia (No. 2) (1982) 2 Lloyd's Rep. 307, page 320.

119 In The Evia (No. 2), the charterer did not have the secondary obligation since the outbreak of the war was so rapid that there was no time to issue a new order to dispatch the vessel out of the port to circumvent unsafety.

120 The Evia (No. 2) (1982) 2 Lloyd's Rep. 307, page 320.

Be that as it may, this obligation is unenforceable on the charterer if the shipowner notices that complying with the charterer's legitimate order could cause further unsafety to the vessel, crew and cargo.[121] In that case, the owner has the right to disobey the initial order and claim damages or even termination of the contract[122], except if provisions of the time charterparty posit otherwise.

The perception of owner's disobedience was addressed in the House of Lords in *The Hill Harmony*[123], where Lord Hobhouse stated that:

> "*The master remains responsible for the safety of the vessel, her crew and cargo. If an order is given compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it: indeed, as the safe port cases show, in extreme situations the master is under an obligation not to obey the order.*"[124]

Alternatively, there could be no secondary obligation requirement for the charterer if loading or discharging port is already named in a time charterparty without any other option[125], i.e., the charterer removes his obligation to cancel the nominated port in case of unsafety and to order the vessel to another port that is not included in the contract.[126] In those conditions, the charterer would be, however, obligated to continue to pay hire to the owner, even if the owner did not act on the charterer's order to steam to a prospectively unsafe port. Nevertheless, if the owner complies with the order to sail, the charterer would have to indemnify

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121 Coghlin, *Time Charters*, para. 10-51.

122 See The Gregos (1995) 1 Lloyd's Rep. 1 by Lord Mustill on page 9 where he posited that: *"There are however a number of judgments, concerned with unsafe ports, which assert or assume that an illegitimate order is in itself a breach."*

123 The Hill Harmony (2001) 1 Lloyd's Rep.149.

124 Ibid, 160.

125 See The Archimidis (2007) 2 Lloyd's Rep.101 by Sir Anthony Clarke MR at page 605 where he states that the charterer's primary obligation to warrant a port as prospective safety for the vessel is fulfilled upon finalising the contract.

126 Kharchanka, "The Meaning of a Good Safe Port and Berth in a Modern Shipping World," page 19.

all the expenditures that could occur during reaching, using or leaving the unsafe port.

3.3. Summary

To encapsulate, *The Evia (No.2)* decision established the fundamental principles that are the current standard in adjudicating a time charter's and shipowner's rights and obligations regarding the safe port undertaking.[127]

Simultaneously, *The Evia (No.2)* rejected the previous line of thought that the charterer's undertaking as to safety continues throughout the entire period when the vessel uses the port.[128] Hence, the prospective safety approach established the commercially orientated balance between the parties. In other words, the owner and his insurer must also display an interest in navigating to and exploiting only safe ports. Additionally, the owner has no recourse to the charterer for the financial losses caused by the port's unsafety after the charterer's safe port nomination.[129] The time charterer, in this case, can focus more on the trade business since the charterer's liability scope against the owner regarding the safe port is somewhat reduced.

[127] E.g., the Supreme Court reaffirmed *The Evia (No.2)* in the relatively recent case *The Ocean Victory,* (2017) 1 Lloyd's Rep. 521, where at paragraph 24, Clarke L summarised the essence of the safe port promise.

[128] The Mary Lou (1981) 2 Lloyd's Rep 272.

[129] However, the owner could claim damages on the grounds of the time charterer's breach of the secondary obligation if one appears to exist or if unsafety is related to the port's attributes during the nomination.

4. The nature of safe port undertaking

In English law, the safe port undertaking is the absolute obligation[130] whether expressly stated in the contract[131] or implied[132]. The recognition of this perception was firstly introduced in *The Lersen Shipping v. Anglo-Soviet Shipping*[133] since before this case, judges had a propensity to adjudicate that both contractual parties obtain the responsibility for the port's nomination.[134] However, in *The Lersen Shipping v. Anglo-Soviet Shipping,* where the ship was time chartered to load heavy oak planks at Leningrad, sustained damages, the vessel grounded, and due to heavy winds, lost part of the cargo overboard. The judges held that even though the vessel was not seaworthy for the cargo, the charterers did not fulfil the expressed clause in the charterparty that the ship would always lie safely afloat. Hence, the court highlighted that the safe port warranty is equally important as the warranty of seaworthiness.

The necessity of the charterer's absolute obligation is delineated in *The Hermine*[135] where Roskill LJ held that:

> "*(T)he main purpose of such a warranty of safety in a charter-party is to ensure that a charterer, who has an otherwise unfettered right to nominate a port or berth, does not do so in such a way as to imperil the shipowner's ship, or, it may be, the lives of the shipowners' servants, by putting that ship or those lives in danger and thereby impose upon the shipowner the risk of financial loss. This limitation upon the charterer's right of nomination is of crucial importance to the shipowner because, by the terms of the contract of affreightment, whether it be a charter-party for time or for voyage, the shipowner has contracted with the charterer that his servants, that is, the*

[130] The charterer's strict liability could be contracted out by limiting language in the contract, such as the due diligence clause in Shelltime 4, Cl. 4.

[131] Baltime, clause 2, NYPE (2015), Clause 1b).

[132] The Evaggelos Th (1971) 2 Lloyd's Rep. 200, page 205.

[133] The Lersen Shipping v. Anglo-Soviet Shipping (1935) 52 Lloyd's Rep. 141.

[134] The Empress (1923) 14 Lloyd's Rep. 96.

[135] The Hermine (1979) 1 Lloyd's Rep. 212, page 214.

> *master, officers and crew, will comply with the charterer's orders, so long as those orders are within the terms of the charter-party."*[136]

Furthermore, the meaning of the prospective safety established in *The Evia (No.2)* should not give the wrongful perception that the time charterer's undertaking consists of reasonable anticipation[137], as at the time of nomination, of the safety of the nominated port at the time that the ship will affect the port. The charterer's warranty is of actual safety, not that which might reasonably be predicted.[138] This reasoning has its support in *The Ocean Victory*[139], where Justice Teare complained about Lord Denning's approach of *"reasonably safe."*[140] He explained that:

> *"That statement or definition makes no reference to "reasonable safety" and it would, in my respectful opinion, introduce an unwelcome and inappropriate measure of uncertainty in the meaning of the safe port warranty if safety were to be understood as "reasonable safety" rather than safety. Safety is not absolute but the measure of safety is not what is "reasonable" but whether any dangers in a port can be avoided by good navigation and seamanship."*[141]

That being said, it is also worth acknowledging that there is freedom of contract in charterparties, and parties can agree on the allocation of risks however they see fit. Thus, an absolute obligation of safe port undertaking as in the standard dry cargo time charters[142] can be reduced

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136 The Hermine (1979) 1 Lloyd's Rep. 212, page 214.

137 See The Erechthion (1987) 2 Lloyd's Rep. 180 at 183 where judge stated: *"Charterers were not in breach of their obligations for a test of foreseeability must now be applied to the warranty of safety as a result of the House of Lords decision in the "EVIA" (1983)".* Also see The Greek Fighter (2006) 1 Lloyd's Rep. Plus 99, para. 324, where Colman J stated that: *"It must be established that an objective observer equipped with all the information relevant to safety could be expected to perceive the risk".* It is suggested not to follow this reasoning.

138 The Ocean Victory (2014) 1 Lloyd's Rep. 59, para. 101.

139 Ibid.

140 The Evia (No.2) (1982) 1 Lloyd's Rep. 344 at 338.

141 The Ocean Victory (2014) 1 Lloyd's Rep. 59, para. 100.

142 E.g. NYPE (2015), Cl. 1b), Baltime, Cl. 2.

to a due-diligence requirement, i.e., reasonable care[143], by expressly stating it in a time charterparty.[144]

In *The Saga Cob*[145], Diamond J., stated when referring to due-diligence clause in the Shelltime 3 that:

> *"It is, I think, clear that a charterer will not commit any breach of the due diligence obligation if he orders a vessel to a port which is found to be prospectively unsafe in fact but which neither the charterer nor anyone for whom the charterer is responsible either knew or ought to have known to be prospectively unsafe. The want of due diligence consists in sending the vessel to a port in circumstances when the charterer either knew or ought to have known of the relevant unsafety."*[146]

Therefore, a due diligence clause gives some degree of protection if the charterer, without realisation, orders the ship to a prospectively unsafe port. Hence, it is not enough for the owner to establish that the port was unsafe. It further needs to be shown that the charterer had not acted diligently concerning the port's nomination.[147] Moreover, the due diligence requirement cannot be implied in a time charter. In case of ambiguous language at the recap of the time charter fixture, the court will overrule the due-diligence requirement with the absolute safe port undertaking obligation[148]. Lastly, even though the due diligence reduces the charterer's liability scope, it would be rather exceptional for the charterer to display reasonable care and prudence when a port is unsafe since all necessary information regarding any port and its inherent risks are by far available

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143 The Saga Cob (1992) 2 Lloyd's Rep. 545 at page 551.

144 Shelltime 4, clause 4, sub-clause c), as it reads: *"Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places.Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid".*

145 The Saga Cob (1991) 2 Lloyd's Rep. 398.

146 Ibid, 408.

147 The Chemical Venture (1993) 1 Lloyd's Rep. 508; A situation of *res ipsa loquitur.*

148 The Greek Fighter (2006)1 Lloyd's Rep. Plus 99, para. 315.

in various sources[149]. Hence, a prudent charterer cannot ignore any of the port's attributable risks if the charterer wants to satisfy the due diligence requirement. Nevertheless, the exception from the rule could be in the circumstances, such as an uncharted coral bank in the port's seabed[150].

Additionally, without modification of the charterparty terms, there are other suggestions on how the charterer could avoid the strict liability under the safe port warranty. Firstly, the charterer should demonstrate that an abnormal occurrence caused the port's unsafety or that the danger in the port could have been overcome by the vessel's good navigation and seamanship. Alternatively, in some extreme cases, the charterer could establish a case of *volenti non fit injuria*[151] since a master cannot enter ports that are clearly unsafe and subsequently claim damages against charterers.[152] For instance, in *The Chemical Venture,*[153] the vessel's owners were induced by the time charterers to agree to proceed to Mina Al Ahmadi port in Kuwait during the Irak/Iran war in exchange for war bonuses, even though initially the master and crew of the vessel were against it due to danger of air attacks. All communications were conducted through telex exchanges. Subsequently, the vessel was struck by a missile fired from an Iranian jet that caused severe damage to the ship and her's master. As a result, the owners claimed damages contending that the charterers were in breach of their obligation in cl. 3 of the charter.[154] However, the Gatehouse J. dismissed the owners' claim by stating that:

> *"The charterers had to demonstrate an unequivocal representation by the owners that they would not treat the order to load at Mina Al Ahmadi as a breach of cl. 3 in order to establish promissory estoppel or waiver; it was self-evident that the owners did not expressly say that they would waive their right to claim damages should the vessel*

[149] D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 23.

[150] The Mediolanum (1984) 1 Lloyd's Rep. 136.

[151] The Stork (1955) 1 Lloyd's Rep. 349; The Houston City (1956) 1Lloyd's Rep. 1.

[152] The Kanchenjunga (1987) 2 Lloyd's Rep. 509 at 515.

[153] The Chemical Venture (1993) 1 Lloyd's Rep. 508.

[154] Shelltime 3, cl. 3: Charterers shall exercise due diligence to ensure that the vessel is only employed between and at safe ports.

> *be attacked en route for the Kuwait terminal, but construing the telex exchanges objectively, by a combination of what they said and more particularly what they did not say taken in context, the owners made an unequivocal representation."*[155]

Furthermore, it is worth highlighting that the owner's intentional compliance with the charterer's order to proceed to a prospectively unsafe port is not enough for the court to constitute an unequivocal representation that could be used as a charterer's defence mechanism against the owner's claim for damages. This line of thought was delineated in The House of Lords in *The Kanchenjunga*[156] where Lord Goff expressed that:

> *"Because the arbitrators did not approach the issue of election correctly, they failed to consider the correct questions. In particular, they did not ask themselves whether there had been the necessary unequivocal representation by the owners. It is true that they did ask themselves whether there had been the necessary "clear and unequivocal promise" when considering the alternative principle of equitable estoppel; they held that there was not, on the basis that the mere acceptance of orders without protest does not amount to such a promise. As a general proposition, this is no doubt correct."*[157]

In summary, whether expressly stated or implied, the safe port undertaking construes an absolute obligation for the charterers that causes strict liability in case of a breach of that promise. However, the charterers can contract out the strict liability by establishing the due diligence requirement. Alternatively, the charterer could avoid the strict liability if the owners show an unequivocal representation in commencing a prospectively unsafe port.

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155 The Chemical Venture (1993) 1 Lloyd's Rep. 508, page 509.

156 The Kanchenjunga (1990) 1 Lloyd's Rep. 391.

157 Ibid, 400.

5. Applicability of the Sellers LJ's test amid Covid-19 surge

In this part of the thesis, we are going slightly beyond *de lege lata* and into *de sententia ferenda,* as we have no case law affirming that a pandemic could render an unsafe port. Moreover, the legal definition of safety discussed in Chapter 2 implicates that the Sellers LJ's test primarily focuses on physical and political dangers that cause damage to a vessel. However, legal scholars suggest that even if there is no damage to a vessel *per se*, the port could be nevertheless rendered unsafe if a vessel's crew is exposed to severe health risks.[158] The proposal is credible since the interlinkage between a vessel and her crew could be supported through clauses in standard time charters such as the Baltime and the New York Produce Exchange that regulates risks regarding employment[159], off-hire[160] and seaworthiness[161] between the parties. Furthermore, an infectious disease such as Covid-19 could cause a vessel to be exposed to legal risks at a port, resulting in commercial damage, for instance, a vessel's detention or blacklisting.[162]

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158 See Carver, Bennett, Bright. *Carver on Charterparties*, page 210; Coghlin, *Time Charters*, para. 10.3; D. Rhidian Thomas, "The Safe Port Promise of Charterers from the Perspective of the English Common Law," para. 30.

159 See Baltime cl. 9 and NYPE cl. 8, which posits that the master shall render assistance with the ship's crew throughout the hire period. Hence, the meaning of safe employment consists not only of the ship herself but of the crew as well.

160 See Baltime cl. 11 and NYPE cl. 17. The objective of the off-hire clause is laid out in The Mareva A.S. (1977) 1 Lloyd's Rep. 368, where Kerr, J. declared on page 382 that: *"The owners provide the ship and the crew to work her. So long as these are fully efficient and able to render to the charterers the service then required, hire is payable continuously. But if the ship is for any reason not in full working order to render the service then required from her, and the charterers suffer loss of time in consequence, then hire is not payable for the time so lost."*

161 See Baltime cl. 1 and NYPE cl. 2, sub-cl. b). Re seaworthiness see The Hongkong Fir (1962) 2 Q.B. 26 at 71, where Diplock L.J., held that: *"(T)he shipowner's undertaking to tender a seaworthy ship...embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself."*

162 Ward, "Unsafe berths and implied terms reborn," page 493.

This chapter discusses whether the coronavirus renders an unsafe port within the meaning of the safe port warranty that enables the owners to claim damages against the charterers and whether the owners have the right to refuse the charterers' orders to operate a port amid Covid-19. In other words, if the safe port test applies to this novel situation, then it is not a question of law but essentially the question of fact, according to Leggatt J in *The Apiliotis*.[163]

Moreover, two conditions need to be addressed before commencing with the analysis. Firstly, it should be noted that not all time charterparties have a safe port warranty, and even if a charterparty has a safe port warranty, it may only require the exercise of due diligence to ensure safety. Thus, the premise for the discussion is that a time charterparty has an absolute safe port warranty. Secondly, the discussion will be framed into a timeline when a vessel affects a port before and after 11 March 2020, viz. when the World Health Organisation (hereinafter referred to as the "WHO") declared the coronavirus as a pandemic.[164] This time division is an essential factor in the safe port warranty decision matrix since timing and knowledge impact the Sellers LJ's test applicability.

5.1. A time chartered vessel using a port before 11 March 2020

This subchapter examines whether a safe port warranty expressly stated or implied in a time charter would protect the owners if a vessel with her crew had been exposed to the coronavirus at a nominated port before the WHO declared Covid-19 a global pandemic.

In addition, we need to project some probable factual circumstances to unfold this examination. For instance, the most credible claim should be born from those shipowners whose vessels were ordered to use China's ports since the highest contagious level of the virus was in that country

[163] The Apiliotis (1985) 1 Lloyd's Rep. 255, page 258.

[164] https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020

at that time.[165] Hence, it is improbable that vessels that used other ports worldwide before 11 March 2020 would have been exposed to the virus.

The assessment should be straightforward since the judiciary, first of all, would have to evaluate whether the particular port at the time of nomination was prospectively safe from all dangers for the particular vessel to reach it, exploit it and in due course depart from it. According to the Supreme Court in *The Ocean Victory*[166] the judges held in *ratio* that:

> *"The question whether the port was unsafe had to be tested as at the moment that the charterers instructed the owners to proceed to it. A safe port promise was not a continuing warranty but was a prediction about safety when the ship arrived in the future. The promise necessarily assumed normality; given all of the characteristics, features, systems and states of affairs which were normal at the port at the particular time when the vessel should arrive, the question was whether the port was prospectively safe for that particular ship. Would a reasonable shipowner in the position of the particular shipowner trading the ship for his own account and knowing the relevant facts, proceed to the nominated port?"*[167]

It would be difficult for the owners to demonstrate that a novel virus was an inherent and normal attribute of the port at the moment of the charterers' nomination that could have occurred between 9 January 2020 when WHO reported that the outbreak in China was caused by a novel coronavirus and 11 March 2020 when the virus was proclaimed a pandemic. There are a few reasons for that. For instance, the owners would have to have the onus to show to the court that the virus was a prevailing characteristic of the port and represented a genuine threat to the vessel and her crew that could not be overcome with good navigation and seamanship. Furthermore, the court should perceive that

[165] Covid cases until 11.03.2020: China: 80,832 cases, EU: 16,550 cases and US: 797 cases. See: https://ig.ft.com/coronavirus-chart/?areas=eur&areas=usa&areas=chn&areasRegional=usny&areasRegional=usla&areasRegional=usnd&areasRegional=usak&areasRegional=usfl&areasRegional=ustn&cumulative=1&logScale=1&per100K=0&startDate=2020-01-01&values=cases

[166] The Ocean Victory (2017) 1 Lloyd's Rep. 521.

[167] Ibid, 522.

the Covid-19 infection had occurred sufficiently frequently so as to become a characteristic of the port. Lastly, it should be proven by the owners that the port's set-up had been inadequate to support the vessel to overcome or at least to reduce the danger. Thus, for owners to prove that the charterers broke the safe port warranty even if the owners suffered loss or damage such as the vessel being off-hire[168] due to insufficiency of men that Covid-infected crew members caused are improbable. Hence, the coronavirus would be, in all probability, equated as an abnormal occurrence by the judiciary. For instance, in *The Ocean Victory,* judges posited that:

> *"The term "abnormal occurrence" had its ordinary meaning. An "occurrence" was just an event – something that happened on a particular time at a particular place in a particular way. "Abnormal" was something well removed from the normal. It was out of the ordinary course and unexpected. It was something which the notional charterer would not have in mind. The question was: was the danger alleged an abnormal occurrence, that was something rare and unexpected, or was it something which was normal for the particular port for the particular ship's visit at the particular time of the year."*[169]

Be that as it may, there is a scenario where the owners could have some credibility to display that the charterers breached the safe port warranty by nominating an infected port and negating the charterers' defence of abnormal occurrence. First of all, the charterers' nomination must be after 30 January 2020 when WHO declared the coronavirus was a Public Health Emergency of International Concern (hereinafter referred to as the "PHEIC")[170] under the International Health Regulations (hereinafter "the IHR").[171] This fact is of great factual importance since it implicates that

[168] NYPE (2015) Clause 17; Baltime (2001) Clause 11 sub-clause a); Shelltime 4 (2003) Clause 21.

[169] The Ocean Victory (2017) 1 Lloyd's Rep. 521 at 522.

[170] https://news.un.org/en/story/2020/01/1056372

[171] See IHR, art. 2, where the IHR that is legally-binding on 196 countries objective is to prevent, protect against, control and provide a public health response to the international spread of disease in a way which avoids disordering to international trade.

ports, according to this regulation, must have a sufficient system in place to manage the threat that the novel coronavirus could cause.[172] Second of all, after the charterers' nomination, the vessel uses the infected port, but neither party is aware of that. However, when the vessel commences to the next port, a great part of the crew shows Covid-19 related symptoms and the vessel is quarantined before obtaining free pratique.[173] Afterward, if the facts objectively show in hindsight that the first port had been already infected with Covid-19 before the nomination and the port's system was not prepared to manage the threat, according to IHR, then the owners might have a convincing argument that the port's set-up was defective and the first port was prospectively unsafe. Thus, if it would be the case, then the charterers are strictly liable for a breach of the safe port warranty that is an absolute obligation[174], even though the charterers did not know or had no possibility of knowing that the first port had been infected before the nomination.[175]

In other words, the shipowners must demonstrate to the court that the port was not *conditionally safe*[176] to rebut the exception of the abnormal occurrence. If there is no proper system in the port to contain or reduce the risk to the minimum, the port is rendered unsafe due to insufficient systems to handle the risk and not due to the risk itself. It also implicates that the importance of abnormal occurrence is relatively reduced in cases involving the port's deficient set-up.[177] This line of thought was expressed in the Court of Appeal in *The Evia*,[178] where Lord Denning stated that:

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172 McKinnon, "Administrative Shortcomings and Their Legal Implications in the Context of Safe Ports," 203.

173 See The Delian Spirit (1971) 1 Lloyd's Rep. 506 at 510, where Lord Denning stated that: "*I can understand that, if a ship is known to be infected by a disease such as to prevent her getting her pratique, she would not be ready to load or discharge.*"

174 See The Evaggelos Th (1971) 2 Lloyd's Rep. 200, page 205, where it is stated: *"Mr. Goff, on the other hand, submits that "safe port" terms are not concerned with negligence, due diligence or reasonable foreseeability, but operate as absolute warranties."*

175 Chong, "Revisiting the Safe Port," 101–102.

176 The Khian Sea (1979) 1 Lloyd's Rep. 545 at 547 by Stephenson LJ.

177 McKinnon, "Administrative Shortcomings and Their Legal Implications in the Context of Safe Ports," 196.

178 The Evia (No.2) (1982) 1 Lloyd's Rep. 334.

> *"Every port in its natural state has hazards for the ships going there. It may be shallows, shoals, mudbanks, or rocks. It may be storms or ice or appalling weather. In order to be a 'safe port', there must be reasonable precautions taken to overcome these hazards, or to give sufficient warning of them to enable them to be avoided. There must be buoys to mark the channel, lights to point the way, pilots available to steer, a system to forecast the weather, good places to drop anchor, sufficient room to manoeuvre, sound berths, and so forth. In so far as any of these precautions are necessary – and the set-up of the port is deficient in them – then it is not a safe port."*[179]

5.1.1. Causation and remoteness of loss

For the charterers to be liable in Covid-19 cases, there should be an unbreakable causal link connecting the owners' damage or loss with the danger that appears to be a characteristic of the nominated port. That is to say, even if the nominated port is unsafe, it does not automatically indicate that the cause of the shipowners' loss and damage is due to the charterers' nomination.[180] For example, there are cases where the unsafe port has no causal link to the loss or damage since it was born by either master's negligence that breaks the chain of causation such as excessive speed,[181] third party accidents that are outside the scope of safe port warranty like when the vessel is run into by other vessel[182] or simply bad luck.[183]

Finally, even if the causal link between the claimants' loss or damage and the coronavirus in the nominated port is established, it should be a close causal connection since for the owners to recover damages, the charterers' breach must be subject to the doctrine of remoteness.[184] The law of remoteness of damage[185] states that the claimant must display

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179 The Evia (No.2) (1982) 1 Lloyd's Rep. 334, page 338.

180 Carver, Bennett, Bright. *Carver on Charterparties*, page 232.

181 The Hellen Miller (1980) 2 Lloyd's Rep. 95 at 99.

182 The Evia (No. 2) (1982) 2 Lloyd's Rep. 334, page 338 by Lord Denning.

183 The Mary Lou (1981) 2 Lloyd's Rep. 272, page 279.

184 The Sussex Oak (1949) 83 Lloyd's Rep. 297 at 308.

185 Hadley v. Baxendale, (1854) 9 Ex. 341.

not only a causal nexus between the loss or damage and the breach but as well that the connection is not too remote, meaning that the loss or damage has not been outside the scope of reasonable contemplation of the parties at the date of the contract.[186] For instance, in *The Lucille*[187] for the court it was uncomplicated to determine that the charterers' order to sail to Barash port breached the safe port warranty since it was clear that military activities between Iran and Iraq is the prevailing characteristic of the port. Hence, the trapping of the vessel was a foreseeable risk before the nomination and the risk was not too remote that owners could recover damages.

5.1.2. Concluding observations

If a dispute would emerge for a breach of the safe port undertaking due to Covid-19 in the period before the WHO declared a global pandemic, then the charterers' defence could be that the virus either was an abnormal occurrence or it was an unforeseeable risk during the nomination.

About foreseeability, in safe port cases, The Supreme Court in *The Ocean Victory*[188] where the vessel grounded while leaving the discharge port due to a heavy storm, in which the vessel confronted long swells and strong northerly gales simultaneously, expressed that:

> *"Reasonable foreseeability is a well-known test in some parts of the law of tort, notably negligence and remoteness of damage. The courts could well have adopted such a test but they have not done so. Instead they have asked whether the relevant event was an abnormal occurrence."*[189]

Hence, in all probability, the owners' would not be able to recover the loss and damage incurred by Covid-19 in this particular period of time. Especially when the outburst of the virus appeared for the first time, even

[186] The Eurus (1998) 1 Lloyd's Rep. 351.
[187] The Lucille (1984) 1 Lloyd's Rep. 244 at 250.
[188] The Ocean Victory (2017) 1 Lloyd's Rep. 521.
[189] Ibid, para. 14.

if the nominated port had an IHR system in order, the risk had not been causing a real threat at the time of nomination. Subsequently, Covid-19 was not identified as a port characteristic but rather as an abnormal occurrence. In other words, it was unforeseeable and parties did not contemplate that at the time of nomination, Covid-19 could cause a real threat to the owner's vessel and her crew. Hence, the coronavirus as a risk was too remote from the claimants' loss and damage at that time.

However, the courts and arbitrators could take a more stringent point of view in the event of PHEIC. For instance, if the judiciary objectively determines that a vessel's crew got infected with the coronavirus in the nominated port due to a deficient IHN system when WHO issued PHEIC, the courts might render a breach of the safe port warranty. Except if master's *novus actus interveniens* or third-party negligence did not break the chain of causation.

5.2. A time chartered vessel using a port after 11 March 2020

This part of the chapter further discusses whether the unsafety of a coronavirus-affected port could render a breach of the safe port warranty when WHO declared Covid-19 a global pandemic that is still prevalent worldwide with all its different mutations.

The anticipation of the charterers' argument that Covid-19 renders an abnormal occurrence from 11 March 2020 onwards, in all probability, will diminish since this infectious respiratory disease has been infecting a significant portion of the population. Thus, the virus exists everywhere, including ports around the world. In other words, the fact of the pandemic could deem that Covid-19 is a normal characteristic of ports or at least *pro tempore* because each port worldwide has established resultant quarantine plans and other preventive measures according to IMO regulation[190] to contain or reduce the disease to unthreatened levels. In those circumstances, it would be of great difficulty for the time

[190] IMO Circular No. 4204.

charterers to display that ports affected with Covid-19 constitute an abnormal occurrence.[191] Although, the position may be different if there is a particular new Covid-19 variant that substantially increases the risk to the ship and/or the crew.

Furthermore, the loss of an abnormal occurrence as the charterers' defence should not necessarily give rise to the perception that the charterers will constantly be liable for the risk that crew members can get infected with Covid-19 in the nominated port during the pandemic. Firstly, the coronavirus as the danger could be alleviated from ports with the support of ports' implemented public health measures. For instance, port authorities could manage access to anchored vessels and control physical contact between ships' crew and shore-side personnel.[192] Secondly, for the owners to claim a breach of the safe port undertaking due to Covid-19, there should be a massive outbreak between the crew members that prevents full working of the vessel, which subsequently causes financial loss to the owners since the absence of one single crew member due to Covid-19 could not affect the overall efficiency of the crew and the vessel.[193] Hence, a single crew member infected with the virus will not cause the port to be legally unsafe.

5.2.1. Obeying an order to proceed to a coronavirus-affected port

The next issue should be whether the owners and the master should obey the charterers' order to proceed to a nominated port that is, perhaps, badly affected with the coronavirus amid the pandemic. In general, the owners with the master must follow the charterers' orders under the employment obligation[194] and the owners have no requirement according to terms of a time charter to inspect whether the nominated port is safe or not since the owners presume that the charterers exercising their right of

[191] Essex Court Chambers, "Coronavirus update – note on safe port obligations".

[192] IMO Circular No. 3485.

[193] The Good Helmsman (1981) 1 Lloyd's Rep. 377.

[194] Baltime (2001) Clause 9.

employment within the agreed charterparty terms. This line of thought was expressed in *The Kanchenjunga,*[195] where Justice Hobhouse held that:

> "*Generally speaking a person is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. Even if the breach of contract is clear it is vital to the proper conduct of business that the relevant party should be able if he considers the breach a minor one to proceed without sacrificing his right to be indemnified. But this does not mean that a master can enter ports that are obviously unsafe and then charge the charterers with damage done. It is also the rule that an aggrieved party must act reasonably and try to minimize his damage.*"[196]

Although, if there is a reason to believe that the charterers' nominated port is unsafe due to Covid-19, the owners with the master should evaluate the port. It would not be against the employment obligation.[197] According to the Court of Appeal in *The Houda*[198] regarding the owners' and the master's right to check the charterers' orders, Millett LJ held that:

> *"In my judgment the authorities establish two propositions of general application: (1) the master's obligation on receipt of an order is not one of instant obedience but of reasonable conduct; and(2) not every delay constitutes a refusal to obey an order; only an unreasonable delay does so.*"[199]

Overall, the owners and the master have the right to refuse to sail to the nominated port if they are knowledgeable enough to prove that the port is inherently unsafe since an unsafe port is not within the scope of the agreed time charter under which the vessel is employed. So, it was expressed in *The Sussex Oak,*[200] where the judiciary expressed that:

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195 The Kanchenjunga (1987) 2 Lloyd's Rep. 509.
196 Ibid, 515.
197 Baltime (2001) Clause 14.
198 The Houda (1994) 2 Lloyd's Rep. 541.
199 Ibid, 555.
200 The Sussex Oak (1949) 83 Lloyd's Rep. 297.

> *"I cannot think that the clause in a time charter-party which puts the master under the orders of the charterers as regards employment is to be construed as compelling him to obey orders which the charterers have no power to give."*[201]

However, the owners should be extremely careful to conclude that they have the right to refuse the charterers' order due to Covid-19 since if it is discovered afterward that the port was actually safe for the chartered vessel, the owners' demurral could constitute a repudiatory breach[202] of the charterparty.

5.2.2. Covid-19 as a physical threat to a vessel

A coronavirus-affected port could cause the risk not only to a crew but also to a vessel. It is suggested by the editors of *Voyage Charters* that:

> "*…if a port or place is the subject of a fever epidemic which would result, were the vessel to call there, in her being blacklisted, detained or impounded at a subsequent port, then that port would be unsafe for it would render the vessel unseaworthy and would thus pose a physical threat."*[203]

This line of thought was reflected over a century ago in *Ciampa v British India Steam Navigation Co Ltd,*[204] where a ship had called a port contaminated with a plague before sailing further. The ship in the next port was detained in order to be fumigated. Judge Rowlatt held that the ship was unseaworthy since it was inevitable for the ship to be detained and fumigated at the next port after the contact with the plague in the last port.

The *Ciampa v British India Steam Navigation Co Ltd* argumentation could be used as an analogy to issues of port safety amid the coronavi-

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201 The Sussex Oak (1949) 83 Lloyd's Rep. 297, page 307.

202 The Santa Clara (1996) 2 Lloyd's Rep. 225.

203 Cooke, *Voyage Charters,* para. 5.66.

204 Ciampa v British India Steam Navigation Co Ltd (1915) 2 KB 774.

rus. For instance, if a vessel is at risk of being detained[205] at the port of discharge due to anchoring previously at the port of loading that was affected with Covid-19, then the port of loading could be rendered unsafe by creating a physical threat to the vessel not to be able to leave the port of discharge because of quarantine restrictions. Although, this reasoning cannot be applied by default to every vessel's detention and quarantine since the delay should be for an inordinate period that frustrates the charter. The Court of Appeal expressed it in *The Hermine,*[206] where the vessel after completion of loading at Destrehan was delayed to leave the port by three grounded vessels and during that delay, seasonal siltation took place, causing a further substantial delay. The court in ratio held that: "*an obstruction which merely caused delay did not render a port unsafe unless the delay was sufficient to frustrate the adventure.*"[207]

Hence, it is improbable that a quarantine regarding the coronavirus could render a port legally unsafe since most occupied ports implement only 14-day quarantine or even less that could not frustrate a time charter. However, the outcome could be reversed regarding the delay if a time charter is of short duration or some ports extend the quarantine period immensely by responding to new mutations of the coronavirus.

5.2.3 Concluding remarks

The test for the ports' safety is fact-sensitive, and therefore the judicial outcome will depend on the particular factual circumstances. Also, there is no specific authority on the Covid-19 issue yet, and therefore this conundrum remains open and not solved.

Regarding the coronavirus as the risk to the crew, it is suggested by the editors of Carver on Charterparties that "*contagious disease can in principle render a port unsafe but is unlikely to do so in fact*"[208] since ports and shipowners could impose preventative measures to manage entrance

[205] Ogden v Graham (1861) 121 E.R. 901.

[206] The Hermine (1979) 1 Lloyd's Rep. 212.

[207] Ibid, 213.

[208] Carver, Bennett, Bright. *Carver on Charterparties*, para. 4-037.

to the vessel and avoid physical contact between the crew-members and individuals on the shore such as pilots, stevedores and agents. Nevertheless, of course, those preventive measures' effectiveness will depend on the nature of the vessel and loading and unloading methods.

Furthermore, for Covid-19 to impose a risk to the vessel that makes her unable to leave the port in the form of quarantine restrictions, the quarantine needs to be for an inordinate period of time. In other words, the delay must be sufficient enough to frustrate the voyage. Most ports appear to inflict a 14-days quarantine period. Thus, according to the editors of Carver on Charterparties that: *"Quarantine, however, is merely a form of delay, and the required duration of quarantine necessarily incidental to visiting an affected port will be inadequate to render the port unsafe."*[209] However, the position might be different if the quarantine lasts longer due to newer mutations that appear to be more contagious and dangerous.

Lastly, the owner has the right to decline the charterer's nominated port if he can objectively evaluate that the port of call is inherently unsafe for the ship, even though the ship's master is contractually obligated to obey the time charterer regarding the employment.[210] In the case of a coronavirus-affected port, the master is *"on horns of dilemma"*[211] whether to call the nominated port or not. The master must be meticulous in this decision not to call the port because the threshold is extremely high to prove that the nominated port is inherently unsafe for the vessel and her crew due to coronavirus. Thus, if the master decides not to call the corona-affected port, in all probability, his actions will cause liability to his owner in damages.

[209] Carver, Bennett, Bright. *Carver on Charterparties*, para. 4-039.

[210] Tillmanns & Co. v. Knutsford S.S. Ltd (1908) 2 KB 385 (CA), 406 (Farwell LJ).

[211] The Stork (1995) 1 Lloyd's Rep. 349, page 350.

6. Time charter indemnities

The shipowners are accustomed to claiming indemnity against the charterers under the so-called *Employment and Indemnity* clause, whether expressed or implied in the standard time charter forms. [212] Thus, if the owners would not recover damages for the safe port warranty because of the limited applicability of the Sellers LJ's test concerning the pandemic, the owners should indemnify their damage in accordance with the employment clause.

The rationale regarding indemnities was laid out in the Supreme Court in *The Kos,*[213] where Lord Sumption held that:

> "(*Shelltime 3) Clause 13 is the employment and indemnity clause which is found in most modern forms of time charter. The indemnity reflects the breadth of the powers conferred on the charterers as to the employment of the vessel. As Devlin J observed in Royal Greek Government v Minister of Transport (The Ann Stathatos) (1949) 83 Ll L Rep 228, page 234 col 1: "if [the owner] is to surrender his freedom of choice and put his master under the orders of the charterer, there is nothing unreasonable in his stipulating for a complete indemnity in return". Indeed, the courts have held that, subject to the express terms of any particular charterparty and to the limitations which I shall consider below, the indemnity is not just "not unreasonable," it is necessary. It will generally be implied even in forms of time charter (such as the New York Produce Exchange Form) where it is not expressed.*"[214]

Although, the shipowners' right for indemnity, whether expressed or implied, will not be applicable by default since it will depend on time charters' construction. This was illustrated in *The Kitsa*[215] where the vessel, fixed on NYPE form, remained under the charterers' orders at the port

[212] NYPE (2015) Clause 8, sub-clause a), Shelltime 4 Clause 13, sub-clause a), Baltime Clause 9.

[213] The Kos (2012) 2 Lloyd's Rep. 292.

[214] Ibid, para. 9.

[215] The Kitsa (2005) 1 Lloyd's Rep. 432.

for over three weeks, during that time her hull became seriously fouled by barnacles. Hence, the owners claimed against the charterers de-fouling coasts under the implied indemnity. The Justice Aikins in his *dictum* held:

> *"I conclude that the arbitrators found that the expenses of cleaning the hull-fouling were ordinary expenses of trading under this charter-party and that the parties (at the time the charter-party was made) would have so regarded this type of expense. Moreover, as I read their reasons, the arbitrators concluded that de-fouling had to be carried out by the owners because of their obligation to keep the vessel in a thoroughly efficient state throughout her service."*[216]

Thus, it implicates that the charterers indemnify the owners only for fortuitous liability, i.e., the owners' incurred loss and damage caused by direct charterers' orders that were not expressly or implicitly agreed in the charterparty. It was reinstated in *The Kos,*[217] where Lord Sumption held that:

> *"(I)t has to be read in the context of the owners' obligations under the charterparty as a whole. The owners are not entitled to an indemnity against things for which they are being remunerated by the payment of hire. There is therefore no indemnity in respect of the ordinary risks and costs associated with the performance of the chartered service."*[218]

Further, for the owners to succeed under the indemnity, the shipowner has the burden to prove that either the charterers' orders were direct/proximate cause to the loss or that the orders were an effective cause to the loss. The former line of thought was held in *The White Rose,* [219] where Justice Donaldson posited that:

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[216] The Kitsa (2005) 1 Lloyd's Rep. 432 at 439.
[217] The Kos (2012) 2 Lloyd's Rep. 292.
[218] Ibid, 295.
[219] The White Rose (1969) 2 Lloyd's Rep. 52.

> *"A loss may well arise in the course of compliance with the time charterers' orders, but this fact does not, without more, establish that it was caused by and is in law a consequence of such compliance and, in the absence of proof of such causation, there is no right to indemnity."*[220]

The latter was pointed out in The Supreme Court in *The Kos,*[221] where Lord Sumption stated that:

> *"The real question is whether the charterers' order was an effective cause of the owner having to bear a risk or cost of a kind which he had not contractually agreed to bear. I use the expression "effective cause" in contrast to a mere "but for" cause which does no more than provide the occasion for some other factor unrelated to the charterers' order to operate. If the charterers' order was an effective cause in this sense, it does not matter whether it was the only one."*[222]

As a current state of law, *The Kos* decision suggests that it is not necessary to have the single dominant or proximate cause to claim indemnity when there is an effective cause. However, in his dissenting judgment, Mance J did not resonate with the majority and concluded that it is nevertheless required to obtain the dominant cause to claim indemnity. Accordingly, Justice Mance held on paragraph 51 that:

> *"if one asks whether the loss suffered by the shipowners was "caused by compliance with the time charterers' instructions" — Robert Goff QC's words accepted by Donaldson J in The White Rose, pages 1107 and 1108 — the natural answer, it seems to me, is: certainly not. It was caused because the charter was at an end, the owners were not performing the charterers' instructions and they were not receiving hire for the time wasted prior to discharge. The "direct" or "unbroken" causal link required by the authorities is lacking."*[223]

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220 The White Rose (1969) 2 Lloyd's Rep. 52, page 59.

221 The Kos (2012) 2 Lloyd's Rep. 292.

222 Ibid, para. 12.

223 Ibid, para. 51.

Predominantly under an indemnity, it is necessary in every case to establish an unbroken chain of causation, according to Donaldson J., in *The White Rose*. However, in *The Island Archon*[224] on page 236, Evans LJ. pointed out that:

> *"(T)he consequences for which the charterer is liable do not include two categories of loss. First, the loss may be regarded as caused in law by some subsequent or intervening event. An act of negligence may often, but not invariably, break the chain of causation. Secondly, the loss although a consequence 'in a broad sense' may have arisen from a risk which the shipowner has agreed to run."*[225]

Moreover, it is noteworthy that charter is responsible for commercial risks in the time charter, not for navigational risks. Hence, the owner cannot indemnify losses that were born from the ship's navigation and costs connected to it. In *The Aquacharm,*[226] on page 245, Lloyd J. held that:

> *"It is of course well settled that owners can recover under an implied indemnity for the direct consequences of complying with the charterers' orders. But it is not every loss arising in the course of the voyage that can be recovered. For example, the owners cannot recover heavy weather damage merely because, had the charterers ordered the vessel on a different voyage, the heavy weather would not have been encountered. The connection is too remote. Similarly, the owners cannot recover the expenses incurred in the course of ordinary navigation, for example, the cost of ballasting, even though in one sense the cost of ballasting is incurred as a consequence of complying with the charterers' orders."*[227]

At its heart, if the owner has agreed world wide trading, it may be quite hard to argue that the owner has not agreed to bear the risk involved in the vessel going to ports affected by Covid-19. It can also be tough to establish a direct chain of unbroken causation between compliance

[224] The Island Archon (1994) 2 Lloyd's Rep. 227.
[225] Ibid, 236.
[226] The Aquacharm (1980) 2 Lloyd's Rep. 237.
[227] Ibid, 245.

with charterers' orders and a covid problem arising at a particular port or place.

However, it is not to say this is not a credible line of thought, as an indemnity for the consequences of complying with charterers' orders if often a fall back in the event the charterparty does not appear to address expressly what the position is as between the owner and the charterer, respectively.

7. Conclusion

The aim of the thesis was to delineate the safe port doctrine under English law in order to better understand how the safe port warranty corresponds to the Covid-19 pandemic and to provide an orderly source of information for the stakeholders.

It was expressed in great detail what constitutes a safe port, what is a standard of liability of the party responsible for the port's nomination, and what is the content and timing of a time charterer's obligations.

The test for the ports' safety is fact-sensitive, and therefore the response whether Covid-19 renders unsafety in the port will depend on the particular circumstances. The threshold is extremely high to prove that the nominated port is unsafe because of the Covid-19 infection. In principle, the Sellers LJ's test applies to the pandemic but in fact it is unlikely. We do not have a Covid-19 specific authority yet, and therefore the issue remains whether the Sellers LJ's test is incapable of protecting the shipowner.

Regarding the express or implied indemnity for consequences through the employment clause in time charters could possibly be just as difficult as the safe port warranty clause, as there are many moving parts to contend with. Hence, a right to an indemnity can be quite tricky to pin down in practice.

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Sale of vessels for recycling

Analysis of the Standard Contract for the Sale of Vessels for Green Recycling in light of international ship recycling regulations

Olga Tsomaeva

Contents

1 Introduction

1.1 Statement of the problem

Each object has a period of useful life, and the moment when the item can no longer be used, sooner or later comes for all things in the world. The main 'object' that maritime law deals with is 'a ship'. During her useful lifetime, a ship provides services and serves as a source of income for her owners. Towards the end of life, a vessel starts experiencing more technical problems and, at some point, it becomes unprofitable for the owner to keep such a vessel.[1] When this moment comes, the owner needs to somehow liquidate the ship.

However, even an obsolete vessel that can no longer be used in trade constitutes a value. Ships are technically complex structures built using various valuable materials. Many of the components that in aggregate create a vessel (mainly, steel) can be reused after a ship reaches the end of her useful lifetime. It is logical that after a vessel cannot be traded anymore, the owner would like to phase her out in a way that allows him to recover the value of such expensive and reusable materials. For these reasons, most end-of-life vessels are *recycled*. Shipowners sell their vessels to be recycled at specialised facilities (ship recycling yards). There, vessels are dismantled, reusable components are extracted from them, and then sold.

For decades, ship recycling has not been considered as a part of the shipping industry. Shipowners sold their vessels for recycling on the beaches of South Asia,[2] where vessels were demolished without any safety or environmental standards. A shipowner could receive his payment

[1] I.e., when maintenance and other costs to keep the ship operative exceed the income from trading her. In addition to natural depreciation of a vessel, decision to phase a ship out can be caused by market fluctuations (meaning, when the earnings from the vessel become less than possible value of selling vessel for recycling). Changes in construction requirements (e.g., double hull requirements) may also result in the need to dispose of obsolete vessels.

[2] Mainly to India, Pakistan and Bangladesh.

and forget about the end-of-life vessel he sold, without thinking about possible negative consequences.

In recent years, the situation has changed significantly. It was recognised that ship recycling performed in unsustainable way should not continue. Various legal mechanisms were adopted in order to establish sound standards of recycling. While the responsibility for the sustainable ship demolition was assigned primarily to the shipowners.

Being responsible for the safe ship recycling, the shipowner does not perform the recycling process himself. Vessels *are sold* for recycling. The contract for the sale of ship for recycling will determine how the recycling process will be carried out. In addition to defining private rights and duties of the parties, such a contract shall also correspond with the existing public regime governing ship recycling.

This thesis is aimed at analysing the public and contractual framework for the sale of ships for recycling.

1.2 Purpose and scope of the thesis

The purpose of this thesis is to analyse the Standard Contract for the Sale of Vessels for Green Recycling (Recyclecon) in light of existing international ship recycling regulations.

When concluding a contract, the parties are generally free to create any terms for regulating their relations. However, ship recycling is subject to public rules regulating this industry. Therefore, the sale of a ship for recycling shall be drafted in such a way as to allocate the parties' private liabilities and to protect the parties from public liability.

Recyclecon incorporates key provisions of the International Convention for the Safe and Environmentally Sound Recycling of Ships.[3] It is assumed that Recyclecon defines the rights and obligations of the parties in such a way as to ensure "recycling in a safe and environmentally sound manner".[4]

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[3] The Hong Kong Convention, See section 2.2 below.

[4] BIMCO, "Recyclecon. Overview", available at: https://www.bimco.org/contracts-and-clauses/bimco-contracts/recyclecon (accessed 27.04.2021).

The goal of the research is to ascertain whether and to what extent Recyclecon is an effective tool for ensuring responsible ship recycling and protecting the parties from possible risks within the existing legal framework.

The thesis is aimed at clarifying the legal position of the parties to the contract when selling ships for recycling, within the current legal regime. The 'focus group' of this study is shipping stakeholders and academics, not legislators. For this reason, I do not take a proactive position, suggesting possible amendments to the present legislation. The dissertation also does not address environmental, technical, labour and economic issues related to ship recycling.

1.3 Structure and methodology

This research paper starts with a presentation of legal sources applicable to ship recycling at international and European levels. The existing legal instruments aimed at sound and safe ship recycling establish requirements for both shipowners and recycling facilities. Therefore, when concluding a contract for the sale of a ship for recycling, the parties should be aware of the existing legal regime, in order to avoid public liability. The relevant legal framework was analysed in Chapter 2.

Chapter 3 is devoted to the analysis of the Standard Contract for the Sale of Vessels for Green Recycling (Recyclecon) and forms the main part of the thesis. Recyclecon was not analysed in its entirety, the focus was mainly on the terms regulating *recycling* of ships.[5] The Chapter is divided into two parts. In section 3.1, I analysed how and whether the terms of Recyclecon ensure the purpose of this Contract, i.e., safe and environmentally sound recycling of ships.

In section 3.2, I examined how a breach of Recyclecon by the parties can be assessed under English contract law (when the Contract itself is silent). Not all sorts of different default situations of the parties were discussed. Only breaches related to ship *recycling* were analysed. This

[5] Recyclecon is based on the standard contract for the sale of ships for further use, and I did not examine such common provisions in detail.

issue was addressed using the English law, due to the fact that the parties to Recyclecon most often agree that the Contract shall be governed by English law. I analysed how Recyclecon can be interpreted, tried to "ascertain the meaning which the document would convey to a reasonable person",[6] based on the English rules of the interpretation of the contracts.

It was challenging to research the topic under consideration. There is practically no academic literature on contractual issues of the sale of ships for recycling. So, I studied the legal literature on English contract law[7] and on sales of ships in general. Case law plays a significant role in the English legal system, analysis of a contract is impossible without reference to case law. Because there is almost no available case law on the topic, I referred to some relevant cases under the standard contract for the sale of ships for second-hand use,[8] since Recyclecon is effectively a sales agreement based on this contract.

In search of empirical knowledge, I actively followed the ongoing discussions on ship recycling on the Internet. I was able to participate in a number of webinars on the topic. From these sources, I learned about the practical challenges and concerns of shipowners and yards related to the recycling of vessels. I managed to get in touch with some of the leading shipping practitioners[9] who shared their insights with me.

The result of these interactions is Chapter 4 of the thesis – "How can a shipowner navigate the existing recycling framework". In this Chapter, I described several practical considerations aimed at strengthening the shipowners' position in connection to ship recycling. My focus was on the shipowners, as they decide how to arrange the recycling (sale for recycling) of their vessels and, accordingly, they are primarily responsible for this.

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6 Kim Lewison, "The interpretation of contracts", Sweet & Maxwell, London, 2011, 5th ed., p. 22.

7 Mainly, Joseph Chitty, H.G. Beale, "Chitty on contracts: 1: General principles", Sweet & Maxwell, London, 2012, 31st ed.; Joseph Chitty, H.G. Beale, "Chitty on contracts: 2: Specific contracts", Sweet & Maxwell, London, 2015, 32nd ed.

8 Norwegian Shipbrokers' Association's Memorandum of Agreement for sale and purchase of ships (Saleform).

9 Mats E. Sæther from Nordisk Skibsrederforening (Nordisk Defence Club), available at: https://nordisk.no (accessed 27.04.2021); Jamie Dalzell from GMS (Singapore), available at: https://www.gmsinc.net/gms_new/index.php (accessed 27.04.2021).

2 How is ship recycling regulated at the international and European levels?

At the international level, ship recycling is regulated by two conventions: Basel Convention and Hong Kong Convention.[10] In this Chapter, I present a short overview of the Conventions. My research is not focused on a deep analysis of the Conventions, due to the fact that the Basel Convention was not designed to regulate ship recycling specifically, and the Hong Kong Convention, which specifically addresses ship recycling, has not yet entered into force.

The European Ship Recycling Regulation, which is an implementation of the Hong Kong Convention at the European level, is currently the only regional legal mechanism in force that specifically regulates ship recycling. For these reasons, in section 2.3, I present a more detailed analysis of this legal instrument.

2.1 Basel Convention

The Basel Convention[11] was designed to regulate movement of wastes rather than ship recycling. However, the Convention applies to the industry in focus. The key point is that under the Convention a ship shall be considered waste once the owner intends to dispose of her.[12]

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10 Both Basel Convention and Hong Kong Convention have been implemented at the European level through the European Waste Shipment Regulation No 1013/2006 and the European Ship Recycling Regulation No 1257/2013, respectively.

11 The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989 (*Basel Convention*), available at: http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx (accessed 27.04.2021).

12 Basel Convention, Article 2 (1). Decision VII/26 on Environmentally sound management of ship dismantling, available at: http://www.basel.int/Portals/4/Basel%20Convention/docs/meetings/cop/cop7/docs/33eRep.pdf#page=63 (accessed 27.04.2021).

The Convention is aimed at as far as possible reducing transboundary movement[13] of wastes to a minimum. Export of waste to the non-Party to the Convention is prohibited.[14] Thus, it is not allowed to sell vessels for recycling from a Party to non-Party to the Convention.[15]

Due to the fact that ships contain hazardous materials,[16] such vessels constitute a category of hazardous waste.[17] Export of hazardous waste from the members of OECD,[18] EC and Liechtenstein is allowed only to the countries within the OECD.[19] As a result, the movement of vessels from OECD, EC and Liechtenstein to the main recycling states (India, Bangladesh, Pakistan) is forbidden. While the movement for demolition in Turkey is allowed (Turkey is an OECD member).[20]

Movement of wastes, including ships for recycling, is regulated based on the physical commencement of the movement. For the Convention to apply it is necessary that movement starts or is planned to start from state-Party to the Convention. If such a voyage for recycling commences from the OECD, EC or Liechtenstein, it can take place only to the OECD countries.

All cross-border movements of wastes are subject to the prior informed consent procedure, which forms the essential mechanism of the Convention.[21] The purpose of this mechanism is that all the states

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13 'Transboundary movement' takes place when wastes are transported from one State-party to the Convention to or through another State-party; and when wastes are moved to or through an area not under the national jurisdiction of any State-party, provided that at least two States-parties are involved in the movement. Basel Convention, Article 2, 3.

14 Basel Convention, Article 4 (5).

15 At the moment, there are 188 parties to the Convention. List of Parties to the Basel Convention, available at: http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx (accessed 27.04.2021).

16 Ships contain or carry onboard materials like mercury, asbestos, polychlorinated biphenyls, and others. Such substances are described in Annex I of the Basel Convention and have hazardous characteristics mentioned in Annex III.

17 Basel Convention, Article 1 (1).

18 Organisation for Economic Cooperation and Development.

19 So-called "Basel Ban Amendment", entered into force on 05.12.2019. Basel Convention, Article 4A, Annex VII.

20 OECD, Member countries, available at: https://www.oecd.org/about/document/list-oecd-member-countries.htm (accessed 27.04.2021).

21 Basel Convention, Article 6, Article 7.

involved[22] into transboundary movement of waste (end-of-life ships), must be notified about this movement and give their consent to it.[23]

The legal person responsible for organising the transboundary movement of wastes under the Basel regime is the exporter or the generator.[24] In shipping, a shipowner trades vessel, uses her, and consequently, makes a decision to dispose of her. After it is decided to discard the ship, shipowner arranges the vessel to be sold for recycling (i.e., exported). Thus, the obligations arising from the Basel Convention primarily rest with shipowners (as either 'exporters'[25] or 'generators'[26]). The shipowner is obliged to notify the authorities of all states involved about his intent to export the vessel for the purposes of recycling.

The country of origin of the cross-border movement (State of Export) is primarily responsible for the control of movement and the environmentally sound management of vessels intended for demolition.[27] The Export State shall also take measures[28] in case of illegal traffic[29] of end-of-life ships. No special obligations are imposed on states based on the flag of the vessel[30] or residence of shipowner. For the state to become an Export State

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22 States of export, import and transit.

23 The states may allow or forbid the movement. The system consists of four key phases: notification; consent and issuance of movement document; transboundary movement; confirmation of disposal.

24 Basel Convention, Article 6.

25 Definition of 'exporter', Ibid., Article 2 (15).

26 Definition of 'generator', Ibid., Article 2 (18).

27 Ibid., Article 2 (8), Article 2 (10), Article 4 (10).

28 The Export State must ensure that a vessel is taken back by shipowner (as exporter or generator of waste); if necessary, take the vessel back itself; otherwise dispose of a vessel. Ibid., Article 9 (2).

29 Movement of vessels intended for recycling in violation of prior informed consent procedure and movement that results in deliberate disposal of wastes. Ibid., Article 9.

30 Normally, the Flag State is the one having the strongest connection with the vessel, and therefore able to exercise enforcement. United Nations Convention on the Law of the Sea, 1982, Articles 91, 94, available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed 27.04.2021). In practice, a vessel may be registered in one country, owned and managed from another country and operate in another part of the world. As the Flag State is not necessarily the one from where the last voyage commences, the Flag State does not automatically obtain duties of the Export State under the Basel Convention.

it is only required that the voyage for the purposes of disposal physically commences or is planned to commence from this State.

The Basel Convention was adopted at the European level throughout the Waste Shipment Regulation No1013/2006.[31] The desired effect of the Basel Convention at the European level was that hazardous wastes produced in the EU shall be managed within the OECD and not transported to developing countries (export ban).

Being a mechanism regulating transportation of waste in general, the Convention does not take into account the international nature of shipping and mobile characteristics of vessels. Firstly, if the voyage for recycling starts not in the State-party to the Convention, the Basel regime does not apply.[32] Secondly, the application of waste shipment rules is dependent on the disclosure of the intent to recycle a vessel.[33] Therefore, waste shipment rules may be easily circumvented by not notifying the authorities about the planned disposal.[34]

Understanding the ineffectiveness of legal mechanisms treating obsolete vessels as waste has led to the adoption of legislation specifically regulating the ship recycling – the Hong Kong Convention.

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[31] Regulation (EC) No 1013/2006 of the European Parliament and of the Council on shipments of waste, 14.06.2006, (Waste Shipment Regulation), available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006R1013 (accessed 27.04.2021).

[32] Similarly, if the decision to recycle a European-flagged vessel is made while the ship is outside the European Community, the export ban does not apply and there is no breach of the regulations.

[33] Being a subjective mental decision, the intent is extremely difficult to detect and prove, if the shipowner does not disclose this decision.

[34] See *Tide Carrier* case, NGO Shipbreaking Platform, "Press release – Norwegian ship owner sentenced to prison", 01.12.2020, available at: https://shipbreakingplatform.org/norwegian-ship-owner-sentenced-to-prison/ (accessed 27.04.2021). See *Seatrade* case, although the appeal court in July 2020 has cancelled the decision of the first instance, the case is relevant for the topic in question. NGO Shipbreaking Platform, "Press Release – Seatrade convicted for trafficking toxic ships", 15.03.2018, available at: https://shipbreakingplatform.org/press-release-seatrade-convicted-for-trafficking-toxic-ships/ (accessed 27.04.2021). See Judgement of the District Court of Rotterdam, 15.03.2018, 10/994550-15, English version, available at: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Rotterdam/Nieuws/Documents/English%20translation%20Seatrade.pdf (accessed 27.04.2021).

2.2 Hong Kong Convention

The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships[35] (hereinafter – "Hong Kong Convention") is aimed at regulating specifically ship recycling, taking into account the nature of shipping business. The Convention introduced a new approach to the industry. Unlike the waste shipment rules, which become applicable to an obsolete vessel once the owner decides to dispose of her, the Convention sets out provisions relevant for the whole lifetime of ships ('cradle to grave' approach).[36]

During their entire life cycle, ships[37] must carry on board an Inventory of Hazardous Materials (IHM), which shall be verified by the vessel's Flag State by issuance of an appropriate Certificate.[38] The Inventory must be maintained in order to reflect the real condition of a vessel (repairs, installation of new materials must be described). Closer to the recycling, IHM must be updated and complemented, a Ready for Recycling Certificate must be issued by the Flag State of a ship.[39] Duties on IHM and preparation for recycling lie on shipowners.[40]

The Convention also sets out requirements for ship recycling facilities (yards). Recycling of ships is allowed only at facilities located in the countries which are Parties to the Convention and are authorised by their states to perform ship recycling.[41] In order to be authorised to perform

35 The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009, (*Hong Kong Convention*), available at: http://www.basel.int/Portals/4/Basel%20Convention/docs/ships/HongKongConvention.pdf (accessed 27.04.2021).

36 The Convention regulates not only the last stage of ship's life cycle (recycling), but also design, construction, survey, certification and operation of ships. Hong Kong Convention, Article 1 (1), Regulation 2.

37 The Convention does not apply to warships, and other state-owned vessels used only on government non-commercial service. Ships of less than 500 GT and ships operating only in national waters are also excluded from the scope of the Convention. Ibid., Article 3.

38 Ibid., Regulation 5, Regulation 11.

39 Ibid.

40 Definition of 'shipowner' under Convention is broad. It covers operating shipowner, manager, bareboat charterer and cash buyer. Ibid., Regulation 1 (8), Regulation 24 (1).

41 Ibid., Article 6, Regulation 8 (1), Regulation 16.

ship recycling, a facility must be designed, constructed and operated in a safe and environmentally sound manner.[42] Authorised recycling yards are allowed to demolish only vessels that are in compliance with regulations, of the type (size) that this facility is authorised to recycle.[43] All facilities must prepare Ship Recycling Facility Plan, where overall procedures followed by the facility shall be described.[44] Based on the information provided by the shipowner, facility must develop a Ship Recycling Plan, presenting the planned procedures in connection to recycling of a particular vessel.[45]

Violation of the requirements of the Convention shall be prohibited by national laws of the Parties.[46] Flag States are assigned responsibility to ensure the compliance of ships with the regulations.[47] Vessels are subject to surveys and certification procedures.[48] Recycling yards are supervised, checked and authorised by their national authorities.[49] Parties to the Convention shall establish mechanisms for ensuring that facilities comply with the requirements.

The Hong Kong Convention was aimed at improving the global recycling industry and establishing sound international standards for ship recycling. Despite the fact that the Hong Kong Convention has not yet entered into force,[50] it is relevant for the industry in question. In recent years, numerous of ship recycling yards have improved their

42 Ibid., Regulation 15 (1).

43 Ibid., Regulation 17 (2).

44 Ibid., Regulation 18.

45 Ibid., Regulation 9.

46 Ibid., Article 10.

47 Ibid., Article 4 (1).

48 Ibid., Article 5, Regulation 10.

49 Ibid., Article 4 (2).

50 The conditions for entry into force are set in Article 17. After the ratification by India in 2019, the requirement on a number of States is fulfilled. However, the conditions on the percentage are still not met. See International Maritime Organization, "India accession brings ship recycling convention a step closer to entry into force", 28.11.2019, available at: http://www.imo.org/en/MediaCentre/PressBriefings/Pages/31-India-HKC.aspx (accessed 27.04.2021).

practices to meet the standards set by the Convention.[51] And now it is common practice for responsible shipowners to choose such a yard, with a Statement of Compliance with the Hong Kong Convention, when selling a vessel for recycling.

2.3 European Ship Recycling Regulation

Recycling of ships at the European level is regulated by European Ship Recycling Regulation[52] (hereinafter – "ESRR", "Recycling Regulation"). The Recycling Regulation is based on the provisions of the Hong Kong Convention. The goal of the Regulation is to make the recycling of European (and EEA)[53] ships sustainable without waiting for the Convention to enter into force. Due to the fact that the ESRR is currently the only one active legal instrument regulating ship recycling specifically, it will be presented in more detail.

Like the Hong Kong Convention, the Recycling Regulation sets requirements for both ships and recycling facilities. The key point of the Regulation is that recycling of EU/EEA-flagged vessels is allowed only at the recycling yards included in the European List of ship recycling facilities (hereinafter – "European List").

The recycling relationship in connection with the demolition of a particular vessel arises between the ship recycling facility[54] and the

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[51] Such yards have received Statements of Compliance (SoC) with the Convention. These SoC are issued by classification societies, after inspection of a yard. See International Shipping News, "Why the beaching method of ship recycling should not be criticized", 11.08.2020, available at: https://www.hellenicshippingnews.com/why-the-beaching-method-of-ship-recycling-should-not-be-criticized/ (accessed 27.04.2021).

[52] Regulation (EU) No 1257/2013 of the European Parliament and of the Council on ship recycling, 20.11.2013, (*Recycling Regulation, ESRR*), available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R1257 (accessed 27.04.2021).

[53] ESRR was incorporated into EEA agreement by the Decision of EEA Joint Committee No257/2018, 05.12.2018, available at: https://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2018%20-%20English/257-2018.pdf (accessed 27.04.2021).

[54] 'Ship recycling facility' means a defined area that is a yard or facility located in a Member State or in a third country and used for the recycling of ships. Recycling Regulation, Article 3 (1) (6).

shipowner.[55] The responsibilities of these parties to the relationship are analysed below.

2.3.1 What are the requirements for ship recycling facilities?

The Recycling Regulation applies to recycling facilities located in EU/EEA Member States and facilities located in third countries (if these facilities want to demolish European/EEA flagged vessels).[56] To recycle European ships, recycling facilities must be included in the European List.[57] Both European and non-European facilities may be included in the List.[58] In order to be included in the List, recycling yards must meet the requirements set out by the ESRR and be authorised by their national authorities to perform ship recycling.

The requirements that a recycling facility must comply with are the same for European and non-European facilities.[59] These requirements cover design, operation of the yard, safety procedures and management of hazardous materials and waste. Some of the requirements are not established by the Hong Kong Convention,[60] thus, the ESRR introduces a more stringent regime, compared to the Convention it is based on.

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55 'Shipowner' means natural or legal person registered as the owner of the ship, including the natural or legal person owning the ship for a limited period pending its sale or handover to a ship recycling facility (cash buyers). Ibid., Article 3 (1) (14).

56 Ibid., Article 3 (1) (7).

57 As of 27.04.2021, the European List includes 43 ship recycling facilities: 34 EU/EEA facilities and 9 non-European yards (8 located in Turkey and 1 in the USA). The 7th version of European List of ship recycling facilities from 11.11.2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020D1675&qid=1605170136460 (accessed 27.04.2021).

58 EU/EEA facilities are included in the European List automatically if they were authorised by their national authorities to perform ship recycling (Article 16 (1, a). If a third-country facility wants to be included in the List, it shall apply to the European Commission. The facility must prove its compliance with the regulations and confirm that it will only accept EU/EEA ships to be recycled in accordance with the ESRR (Article 15 (2)).

59 Article 13 (1).

60 ESRR requires that facilities operate from built structures, demonstrate control of any leakage, in particular in intertidal zones, ensure safe and environmentally sound management and storage of hazardous materials and waste.

As in the case of the Hong Kong Convention, each facility must operate in accordance with a Ship Recycling Facility Plan (SRFP).[61] Previous to the recycling of a specific vessel, based on the information received from the shipowner, the recycling facility must also prepare a Ship Recycling Plan (SRP).[62] SRP must describe procedures and systems that are planned to be followed by the yard in connection to the recycling of a particular ship.[63]

The SRP must be approved by the competent authority of the state where the ship recycling facility is located.[64] After that, the Plan shall be sent by the yard to the shipowner and his Flag State authority.[65] The recycling facility must also inform its competent authority that the facility is ready to start recycling of a particular ship.[66] On the completion of recycling, the yard must inform the vessel's Flag State.[67]

2.3.2 What are the requirements for ships and shipowners?

European/EEA flagged ships[68] are controlled throughout their lifespan ('cradle to grave' perspective). This approach is aimed to enhance safety during the whole life of a vessel, but in particular, to ensure that future recycling of a vessel will be performed in a sound manner. Owners of European/EEA flagged vessels are allowed to recycle them only at ship

61 SRFP describes operational processes and procedures performed by the ship recycling facility, internal allocation of responsibilities, safety and training systems as well as procedures aimed at protection of human health and the environment. Recycling Regulation, Article 3 (1) (17), Article 13 (1) (e).

62 Ibid., Article 7 (2).

63 Ibid., Article 3 (1) (16).

64 Ibid., Article 7 (3).

65 Ibid., Article 13 (2) (a).

66 Ibid., Article 13 (2) (b).

67 Ibid., Article 13 (2) (c).

68 Definition of 'ship' under ESRR is broad, it basically includes all types of vessels, Article 3 (1) (1). Ships of less than 500 gross tonnage, ships operating only in domestic waters, warships, and other governmentally owned vessels used only on non-commercial governmental service are excluded from the scope of the Regulation (Article 2).

recycling facilities included in the European List.[69] As for foreign ships, only certain provisions of the ESRR apply to them.

2.3.2.1 "Whole life" obligations, IHM

All hazardous materials[70] contained in a particular vessel must be identified in the Inventory of Hazardous Materials (IHM).[71] Each vessel shall carry the description of hazards (Part I of IHM) on board during her lifetime. Part I must be properly updated throughout the life of the ship and verified by the Flag State authorities.[72] If everything is in order, the Inventory Certificate is issued.[73]

IHM plays an important role in the ship's operational life by disclosing hazards in a vessel. This allows for the crew on board to avoid possible negative effects of such substances. The importance of IHM increases when a vessel reaches the end of life and is intended for recycling. Since the recycling facility obtains information on the hazardous materials in a particular vessel, the recycling yard is able to prepare for the recycling in a prudent way.

It is responsibility of the shipowner to comply with the IHM obligations. If a vessel is sold for second-hand use, the IHM must be transferred from the previous owner to the next one. Thus, each owner of the vessel is responsible for maintaining and updating IHM while the vessel is in his possession.

The rules on IHM and Inventory Certificate are applicable to all new EU/EEA flagged vessels from 31 December 2018. To the existing European ships these rules apply from 31 December 2020.[74] Likewise,

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69 From 31 December 2018, Recycling Regulation, Article 6 (2) (a).

70 Specified in Annex I and II of the ESRR. Certain hazardous materials shall not be used on the new ships, their use in the existing vessels shall be minimised. Ibid., Article 4.

71 Ibid., Article 5.

72 Ibid., Article 5 (3, d) (7), Article 8 (1,2). Verification of Part I takes place during the initial, renewal and additional surveys of the vessel. Ibid., Article 8 (4,5,6,).

73 Subject to renewals, Article 9 (1, 2, 3), Article 10 (1).

74 Due to Covid-19 pandemic, the European Commission suggested Member States to apply a transitional period of 6 months (i.e., until 30.06.2021). Thus, absence of completed certificates and IHM may be justified, if caused by Covid-19 pandemic. See European Commission, "Guidelines on the enforcement of obligations under

non-European-flagged vessels calling at a port or anchorage of an EU member state are required to carry IHM from 31 December 2020.[75]

2.3.2.2 Preparation for recycling, Ready for Recycling Certificate

Once the owner decides to recycle a ship, he shall make sure that the IHM is complemented by Part II (inventory of operationally generated wastes) and Part III (inventory of stores).[76] All relevant information about the vessel and the completed IHM (all three parts) shall be conveyed by the shipowner to the recycling facility prior to recycling. The Flag State authority must also be notified.[77]

Shipowners are allowed to recycle European/EEA flagged vessels only at ship recycling facilities included in the European List.[78] The shipowner must prepare the vessel for recycling – minimise cargo residues, fuel oil and waste on board the ship.[79] Before the recycling, in order to verify that the documents and the vessel are in compliance with the ESRR, the Flag State's authority conducts the final survey of the vessel.[80] If all the conditions are met, the Flag State (or delegated classification society) shall issue a Ready for Recycling Certificate.[81] All vessels intended for recycling shall carry this Certificate on board.[82]

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the EU Ship Recycling Regulation relating to the Inventory of Hazardous Materials of vessels operating in European waters No2020/C 349/01", 20.10.2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOC_2020_349_R_0001 (accessed 27.04.2021).

75 Due to Covid-19 pandemic, a transitional period of 6 months may be applied by the European States. See No. 74 above; Recycling Regulation, Article 2 (1), Article 12, Article 32 (2, b).

76 Recycling Regulation, Article 5 (5), (7).

77 Ibid., Article 6 (1).

78 From 31 December 2018, Article 6 (2) (a).

79 Ibid., Article 6 (2) (b).

80 Ibid., Article 8 (7).

81 Ready for Recycling Certificate must be supplemented by IHM. Ibid., Article 9 (9), Article 6 (2) (c).

82 Ibid., Article 6 (2) (c).

2.3.2.3 Inspections of ships

In addition to surveyance and certification procedures, all vessels falling within the scope of the ESRR (both European and non-European) are subject to inspections throughout Port State Control procedures.[83] If a ship fails to comply with the requirements, she may be warned, detained, dismissed or excluded from the ports or offshore terminals under the jurisdiction of the Member State.

2.3.3 Transfer of responsibility for the ship

The responsibility for the ship is transferred from the shipowner to the recycling yard when the facility *accepts responsibility for the ship*. Prior to this point, the shipowner is responsible for the ship and her compliance with the Flag State's requirements (Article 6 (5)).

If a vessel is in the condition which does not correspond *substantially* with the Inventory Certificate,[84] the facility may *decline to accept the ship for recycling*. In such case, the ship owner remains responsible for the ship.

The Recycling Regulation does not specify what moment shall be considered as an 'acceptance' by the facility. The consequences of the shipyard's refusal to accept the ship are also not regulated.[85] The ESRR is silent about the situation when a non-compliance of the vessel is detected after the delivery, during the process of recycling. The yard is not granted the right to return the vessel to the owner in this case. Therefore, these important issues should be in detail regulated by the contract between the shipowner and the recycling facility.

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[83] Recycling Regulation, Article 11. See also EMSA, "Guidance on inspections of ships by the port States in accordance with Regulation (EU) 1257/2013 on ship recycling", 27.09.2019, available at: http://www.emsa.europa.eu/we-do/sustainability/environment/150-ship-recycling/3721-guidance-on-inspections-of-ships-by-the-port-states-in-accordance-with-regulation-eu-1257-2013-on-ship-recycling.html (accessed 27.04.2021).

[84] Including where Part I of the IHM has not been properly maintained and updated, reflecting changes in the ship's structure and equipment.

[85] There are no provisions on the shipowner's obligation to take the vessel back.

2.3.4 Liability and enforcement

Enforcement of the ESRR is the responsibility of the Member States. The States must establish penalties for infringement of the ESRR[86] and take measures to ensure that these penalties are applied.[87]

European States are obliged to monitor the compliance of EU/EEA flagged vessels and recycling facilities located on their territory with the ESRR. Compliance of third-country facilities is ensured by their inspection and approval by the European Commission. After being included in the European List, facilities may also be subject to inspections.[88]

In addition to liability for violation of the ESRR, the Regulation provides for the 'soft' measures. The Commission shall develop a financial instrument that would facilitate safe ship recycling (Article 29). Various

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86 The following penalties are established in some European countries. In Norway, the shipowner who wilfully or through gross negligence substantially violates provisions on environmental certification (IHM, Inventory Certificate, Ready for Recycling Certificate), shall be liable to fines or imprisonment for a term not exceeding two years; Act of 16 February 2007 No. 9 relating to ship safety and security (Ship Safety and Security Act), Section 64, Section 33, available at: https://www.sdir.no/en/shipping/legislation/laws/ship-safety-and-security-act/ (accessed 27.04.2021).
In France, if a ship does not have the required by ESRR documentation on board, the penalty for the shipowner is one year imprisonment or a fine of €100 000. Code des transports (the Transport Code), 19.08.2015, Articles L5242-9-1, L5242-9-2, available at: https://www.legifrance.gouv.fr/codes/id/LEGIARTI000031052601/2015-08-19/ (accessed 27.04.2021).
Under UK law, violation of the ESRR by the shipowner is punishable with a fine or/and imprisonment for a term not exceeding two years. Ship Recycling Regulations 2018 No.1122, 30.10.2018, Regulations 9, 10, 11, available at: https://www.legislation.gov.uk/uksi/2018/1122/made (accessed 27.04.2021).

87 Article 22. See European Commission "Information on designated competent authorities, administrations and contact persons in the Member States (Articles 18 and 19 of the Ship Recycling Regulation 1257/2013)", 11.09.2020, available at: https://ec.europa.eu/environment/pdf/waste/ships/List%20of%20designated%20CAs%20and%20administrations%20and%20contact%20persons%20in%20the%20MS%20(updated%2011.09.2020).pdf (accessed 27.04.2021); See European Commission, "Relevant national laws relating to the enforcement of the EU Ship Recycling Regulation and applicable penalties", 23.10.2020, available at: https://ec.europa.eu/environment/pdf/waste/ships/MS%20enforcement%20provisions%20SRR%20(website).pdf (accessed 27.04.2021).

88 Recycling Regulation, Article 15 (4).

incentives were considered,[89] but as for now all of them were rejected. However, when an appropriate instrument will be adopted, shipowners will have additional financial incentives to recycle their vessels sustainably.

3 How is ship recycling regulated by the Standard Contract for the Sale of Vessels for Green Recycling?

This Chapter is devoted to the examination of the Standard Contract for the Sale of Vessels for Green Recycling – Recyclecon[90] (hereinafter – "the Contract").[91] As the name suggests, the Contract is intended to regulate the relationship between the parties in such a way as to ensure responsible (green) recycling. Aiming at sound ship recycling, Recyclecon incorporates crucial provisions of the Hong Kong Convention.[92]

In section 3.1 below, I examine how the specific purpose of the Contract (recycling of a vessel) is reflected in its terms. I look into the key stages of a sale of ship for recycling and analyse how Recyclecon regulates parties' relations and whether it ensures responsible ship recycling.

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89 The last initiative was to introduce a Ship Recycling Licence that would be required for the entry to EU ports, regardless of the vessel's flag. See Ecorys, DNV, Erasmus, "Financial instrument to facilitate safe and sound ship recycling", June 2016, available at: http://publications.europa.eu/resource/cellar/68d273df-433c-11e6-9c64-01aa75ed71a1.0001.01/DOC_1 (accessed 27.04.2021).

90 Recyclecon was developed by Baltic and International Maritime Council (BIMCO). Standard Contract for the Sale of Vessels for Green Recycling (Recyclecon), available at: https://www.bimco.org/contracts-and-clauses/bimco-contracts/recyclecon (accessed 27.04.2021).

91 For the sake of clarity and convenience of the reader, the Sample copy of Recyclecon with the permission of the copyright holder BIMCO is attached in Appendix I.

92 Recyclecon includes such mechanisms as IHM, SRFP and SRP (described above). Due to the fact that the ESRR is an implementation of the Hong Kong Convention at European level (see sections 2.2, 2.3 above), it may be said that Recyclecon as well incorporates key points of the ESRR.

Section 3.2 aims to examine how the parties' breaches of Recyclecon can be governed by the general principles of contract law in cases where the Contract itself is silent. Due to the fact that the parties to Recyclecon most often agree that the Contract is governed by English law, the issue is addressed from the English contract law perspective.

3.1 How is the purpose of recycling reflected in the Contract?

Recyclecon is based on the standard contract for the sale and purchase of second-hand ships (Saleform).[93] Yet, the objective of a sale of ship for recycling differs significantly from a typical second-hand sale.

The purpose of sale of a ship for recycling is exercise of demolition of the vessel. The sale may take place directly to a recycling facility or via a cash buyer.[94] Accordingly, the parties to Recyclecon are Sellers (shipowner) and Buyers (yard or cash buyer).[95] The Sellers' interest is to liquidate the vessel. While the Buyers undertake to buy the vessel and exercise recycling with an eye to selling the extracted materials after.

Taking into account public rules on ship recycling described above, the Sellers under Recyclecon are interested not only in selling the vessel and making a profit. Shipowners (Sellers) are also concerned about *how* the recycling process will be carried out.[96] In the following sections, I analyse how this specific objective (recycling) is provided by the terms of

[93] When developing the Recyclecon, provisions from the Saleform 2012 were incorporated in the Contract. BIMCO, Norwegian Shipbrokers' Association's Memorandum of Agreement for sale and purchase of ships (Saleform 2012), available at: https://www.bimco.org/contracts-and-clauses/bimco-contracts/saleform-2012 (accessed 27.04.2021).

[94] Cash buyers are professional intermediaries in sales of ships for recycling. Shipowners often sell vessel to a cash buyer and then the cash buyer enters into a contract with the recycling facility.

[95] In a situation where the vessel is sold directly to the recycling facility, the yard will be the Buyers. In a case of sale to the cash buyer, there will be no contractual relation between the Sellers and the yard. The cash buyer will enter into a contract with the recycling yard. This contract must reflect the previous agreement between the cash buyer and the shipowner.

[96] Otherwise, the shipowner may face legal proceedings and public liability for violation of the recycling regulations, as described in Chapter 2 above.

the contract at different stages of the sale: conclusion of contract, delivery of ship, exercise of recycling.

3.1.1 Conclusion of the Contract

In the vast majority of second-hand sales of ships, Buyers make the decision about the acceptance of the vessel after physical and documentary inspection,[97] whereas the description of the vessel is limited. Is the conclusion of a contract of sale for recycling different?

"The practice in demolition sales is for there to be no inspection of the vessel by either the intermediary cash buyer or by the end-buyer".[98] It is stated in Clause 2 of Recyclecon that "the vessel *has been accepted* by the Buyers and the sale is outright". The Contract does not provide for the inspections of the vessel by the Buyers. Such inspections do not form "part of the approval process".[99] The Buyers normally decide to buy a vessel and accept her *based on the description* provided by the Sellers. The sale of ships for recycling is considered to be "the only one type of sale in which a detailed description is usually included".[100]

The main interest of the Buyers under Recyclecon is extraction of valuable materials (mainly, steel) from the ship. Does this goal affect how the purchase price is determined? The amount of extractable steel directly depends on the tonnage of the vessel which forms part of the description. The purchase price to be paid for the vessel under Recyclecon is determined based on the description and set out as the price per ton.[101] In order to protect the Buyers' interests, before signing the Contract, the Sellers shall provide confirmation of the vessel's tonnage.[102]

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97 Saleform 2012, Clause 4 (a), Clause 4 (b).

98 Malcolm Strong, Paul Herring, "Sale of ships: the Norwegian Saleform", Sweet & Maxwell, London, 2016, 3d ed., p. 313.

99 BIMCO, "Recyclecon. Explanatory notes", available at: https://www.bimco.org/contracts-and-clauses/bimco-contracts/recyclecon (accessed 27.04.2021).

100 Strong, Herring, "Sale of ships: the Norwegian Saleform", p. 32.

101 Recyclecon, Box 12.

102 Clause 13.

After the parties agree on the terms and sign the Contract, Buyers shall lodge a part of purchase price as a deposit in the joint names of the parties.[103] This payment is no different from the deposit under the Saleform.

Recyclecon is a contract for the sale of ships for green recycling. How is the 'green' recycling ensured at the stage of concluding the Contract? Like the Hong Kong Convention and the ESRR, the Contract stipulates that the yard shall have a Ship Recycling Facility Plan[104] describing the overall procedures followed by the facility. A responsible Seller is likely to visit the facility and/or check the SRFP to see whether the planned yard is capable of performing safe and sound ship recycling.

Recyclecon stipulates that *on the Sellers' request* the Buyers shall provide a copy of the SRFP or of an attestation that the yard has a SRFP.[105] As well, on the Sellers' request, the Buyers shall allow the Sellers to visit the yard to review the SRFP and to verify that the yard is compliant with it.[106] The Contract does not specify the consequences if Sellers are not satisfied with the SRFP or if they discover the facility's non-compliance with SRFP during the visit to the yard. If such a non-conformity is discovered by the Sellers before the Contract is concluded, they are likely to choose alternative Buyers (or the yard, if the contract is concluded with a cash buyer).

The planned procedures for the recycling of a particular vessel shall be described by the facility in Ship Recycling Plan.[107] This Plan shall be prepared based on the information received from the Sellers (mainly, based on Inventory of Hazardous Materials). The Contract specifies that Part I and provisional Parts II and III of the IHM shall be provided by the Sellers to the Buyers *as soon as possible after the date of the Contract*, if

[103] Box 13, Clause 4.

[104] Definition of SRFP is similar to the one given in Hong Kong Convention and ESRR. Recyclecon, Clause 1.

[105] Clause 18, sub-clause 1.

[106] Ibid.

[107] Definition of SRP is similar to the one given in Hong Kong Convention and ESRR. Recyclecon, Clause 1.

not already provided.[108] *Without undue* delay after having received these documents, the Buyers shall hand over SRP to the Sellers.[109]

Thus, the Buyers' obligation to provide SRP is not related to the moment of conclusion of the Contract, but to the moment when the Sellers hand out necessary Parts of IHM to the Buyers. Are the Sellers allowed to demand changes to the SRP or cancel the contract if they are not satisfied with the SRP? No, the Recyclecon does not oblige the Buyers to agree on a SRP with the Sellers.

3.1.2 Delivery of the vessel

Delivery is the next stage of the sale. Shortly prior to the expected delivery, the Sellers agree to allow the Buyers to place their representatives on board the vessel.[110] There are no provisions granting these representatives the right to inspect the ship in order to verify her compliance with the description. Therefore, it may be concluded that the purpose of this provision is Buyers' familiarisation with the vessel.[111]

Delivery usually takes place at the recycling yard or at agreed intermediary port or anchorage. The vessel shall be delivered at the agreed place, at the agreed time, in standard seagoing condition.[112] The Sellers may not be held liable for any representations, errors, omissions and/or overall condition of the vessel upon arrival at the place of delivery, other than those stated in Part I and Annex A (Vessel details).[113] Nothing shall be removed from the vessel except items from Annex B (Excluded Items) and other agreed objects.[114]

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108 Clause 18, sub-clause 2, sub-clause 3.

109 Clause 18, sub-clause 5.

110 Clause 16.

111 The equivalent clause in Saleform specifies that these representatives are on board for the "purposes of familiarisation and in the capacity of observers only". Saleform 2012, Clause 15, sub-clause 2.

112 Clause 9 (a).

113 Clause 2.

114 Clause 12.

Upon delivery of the vessel, the Sellers must provide the Buyers with final Parts II and III of the IHM.[115] It is specifically stated that the information contained in the IHM "is given to the best of the Seller's knowledge but always without guarantee".[116]

The time when the ship shall be delivered is determined by setting the interval between earliest date of delivery[117] and the cancelling date.[118] Prior to the delivery, the Sellers shall give the Buyers advance notices of arrival[119] and notice of readiness for delivery.[120] The Buyers have the right to accept or reject the notice of readiness, a rejection shall be reasoned.

Delayed delivery is regulated by Clause 10. If the Sellers anticipate that "notwithstanding the exercise of due diligence", the vessel will not be delivered within the agreed period of time (before the cancelling date), they may notify the Buyers and propose a new date.[121] If Buyers do not accept the new date, they have the right to cancel the Contract. Regardless of the decision to cancel the Contract or to maintain it, Buyers are entitled to claim damages from the Sellers.[122]

The risk and expense for the vessel are transferred from the Sellers to the Buyers after the delivery.[123] When the vessel is delivered, the parties sign a protocol confirming the date and time of delivery.[124] Upon delivery of the vessel, but not later than three banking days after the notice of

115 Clause 18, sub-clauses 2 and 3.

116 Clause 18, sub-clause 4.

117 Box 17.

118 Box 18.

119 The purpose of this notification is to give the Buyers time to prepare for delivery. Clause 7.

120 Notice of readiness for delivery shall be given when the vessel is physically ready for delivery. The notice shall be accompanied by the necessary documents. Clause 8.

121 This provision is intended to relieve Sellers of the obligation to deliver ship to the agreed location if they realize that timely delivery will not be possible. See BIMCO, "Recyclecon. Explanatory notes", available at: https://www.bimco.org/contracts-and-clauses/bimco-contracts/recyclecon (accessed 27.04.2021).

122 Clause 10 (b) (ii).

123 Clause 9 (d), (e).

124 Clause 6.

readiness, the Buyers shall release the deposit and pay the remaining purchase price in full.[125]

After the ship has been delivered, in exchange for the full payment of the price, Sellers are required to provide Buyers with a wide range of documents.[126] These documents are essential for the execute of legal transfer for the ship.

The Sellers also warrant that at the time of delivery the vessel will be free from all charters, encumbrances, maritime liens or debts.[127] Furthermore, the Sellers undertake to indemnify the Buyers for any claims made against the vessel, for which the Sellers are responsible, and which were incurred prior to the delivery.[128]

An exemption clause (Clause 19) regulates that if the vessel becomes a total loss before delivery, or if the delivery of the ship by the cancelling date is otherwise prevented or delayed due to cause beyond the Buyers' or the Sellers' control, neither party shall be under any liability.

The analysis above demonstrates that, in general, delivery under Recyclecon is regulated in the same way as for second-hand sales of ships. After the ship is delivered, the Sellers' obligations under the Contract are, by and large, over.[129] The next stage is exercise of recycling of the vessel.

3.1.3 Exercise of recycling

Recyclecon is a standard contract for the sale of vessels for 'green' recycling. According to the Preamble, the Buyers agree to buy the named ship and to recycle her in a safe and environmentally sound manner consistent with international and national law and relevant guidelines.

Clause 17 highlights the purpose of the transaction: "the vessel is sold for *recycling purposes only*". The Buyers are not allowed to use the

125 Clause 5.

126 The list of documents includes legal bill of sale, commercial invoices, confirmation of the ownership for the vessel, confirmation that the ship is free from encumbrances, etc. Clause 6.

127 Clause 14, sub-clause 1.

128 Clause 14, sub-clause 2.

129 The Contract also provides for the post-delivery assistance by Sellers (Clause 11).

vessel in any other way other than recycling.[130] Moreover, the Buyers "undertake and warrant that the vessel will be recycled at the defined yard in accordance with Ship Recycling Facility Plan and Ship Recycling Plan".[131]

Clause 18 regulates the procedure for the safe and environmentally sound recycling. General requirement is that the recycling facility shall operate in accordance with the Ship Recycling Facility Plan. Whereas the recycling of the purchased ship must be performed in compliance with the Ship Recycling Plan.

As described above, the Sellers under the Contract are not given any authority to participate or influence the preparation of the SRP. The Contract provides only for the Sellers' right to visit the facility to ascertain that the recycling of the vessel is being conducted in accordance with the SRFP and the SRP.[132] This provision is aimed at ensuring the sound recycling of the ship and reflects the requirements of the Hong Kong Convention, on which Recyclecon is based. The effectiveness of the contractual stipulations under consideration is, however, questionable. The Contract does not specify what should be done if the Sellers discover that the recycling is carried out in violation of the agreed manner (in breach of SRFP and/or SRP). Thus, after the vessel has been delivered, the Sellers have no authority to influence the performance of recycling.

The Recyclecon does not contain any other provisions on how the recycling process shall be carried out. It is only stipulated that after the completion of recycling, the Buyers shall inform the Sellers by providing a Statement of Completion.[133]

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[130] Recycling market is linked to steel prices. Sometimes when the steel prices are low, cash buyer would like to wait before selling the vessel to the yard, in order to earn more. In such a case the buyer trades the vessel while waiting for a good offer from scrapyards. Clause 17 protects the Sellers from such situations. See *Priyanka Shipping Ltd v Glory Bulk Carriers PTE Ltd* where the cash buyer violated this provision and traded the vessel instead of recycling. Decision of England and Wales High Court (Commercial Court), 28.10.2019, available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2019/2804.html&query=(priyanka) (accessed 27.04.2021).

[131] Clause 17.

[132] Clause 18, sub-clause 6.

[133] Clause 18, sub-clause 7, Annex C.

3.1.4 Default of the parties

Recyclecon is based on a standard contract for second-hand sale of vessels (Saleform 2012). The clauses on both Buyers' default (Clause 20) and Sellers' default (Clause 21) under Recyclecon are similar to the corresponding clauses of the Saleform.[134] Due to the fact that there is no publicly available case law on the Recyclecon, the cases on parties' default under the Saleform will be used in the analysis below.

3.1.4.1 Buyers' default

The Recyclecon (Clause 20) expressly regulates two cases of Buyers' default, both of them are connected to the failure to make a monetary payment.

The first possible situation of Buyers' default is non-payment of the deposit. As described above, the Buyers shall lodge the deposit, as a security for the due fulfilment of the Contract, within five days after the signing the Contract.[135] The first limb of Clause 20 states that if the deposit is not paid as agreed, the Sellers have the right to cancel the contract and claim compensation for their losses and for all expenses incurred.

Do the Sellers have the right to demand a full deposit in a situation where they cancel the contract due to the Buyers' failure to pay the deposit? The Contract does not explicitly grant such a right, but based on case law, Sellers are entitled to do so, even if the deposit exceeds the Sellers' loss.[136] Recyclecon clearly states that the deposit serves as "*a security for the fulfilment of the Contract*"[137] by the Buyers. Therefore, such a deposit is paid in order to ensure the proper execution of the Contract by the Buyers, and the Sellers are entitled to demand the deposit in full. While the right to claim compensation established by the first limb of Clause 20 is an additional remedy.

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134 Saleform, Clause 13, Clause 14.

135 Recyclecon, Clause 4.

136 See *Griffon Shipping LLC v Firodi Shipping Ltd*, Court of Appeal, [2013] EWCA Civ 1567 and Queens Bench Division (Commercial Court), [2013] EWHC 593 (Comm), available at: www.i-law.com (accessed 27.04.2021).

137 Recyclecon, Clause 4 (a).

The second limb of Clause 20 regulates Buyers' failure to pay the purchase price. Clause 5 states that the Buyers shall release the deposit and pay the balance of the price in full on delivery of the vessel. If the Buyers fail to pay the purchase price in accordance with this provision, the Sellers may cancel the contract and forfeit the deposited amount together with the interest earned. If this sum does not cover the Sellers' losses, they have the right to claim further compensation for their losses and for all expenses incurred.

The Contract does not provide for a specific period of time for the Sellers to make a decision to cancel the contract. According to the common approach, if the Sellers are entitled to cancel the agreement, they must do so within a reasonable time. What is a reasonable time will be decided depending on the circumstances of each specific case.[138]

3.1.4.2 Sellers' default

Sellers' default is regulated by Clause 21 of Recyclecon. The first limb of the Clause states: "should the Sellers fail to give notice of readiness in accordance with Clause 7 (advance notices of arrival) or fail to execute a legal transfer or to deliver the vessel with everything belonging to her by the cancelling date, the Buyers shall have the right to cancel the Contract, in which case the deposit in full shall be returned to the Buyers together with interest earned".

Therefore, there are three possible situations of the Sellers' default. *Firstly*, failure to give advance notice of arrival.[139] *Secondly*, there is a default if the Sellers fail to execute legal transfer. Which, as analysed above, is a failure to provide the Buyers with the essential documents from Clause 6.[140] *The third* possible case of Sellers' default is failure to deliver the ship with everything belonging to her.[141]

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138 Sellers should be aware that in *Ateni Maritime Corporation v Great Marine* Ltd (No1) (*Great Marine*) a week was considered too long and unreasonable. See Queens Bench Division (Commercial Court), [1990], Lloyd's Law Reports, Vol. 2, 245, available at: www.i-law.com (accessed 27.04.2021).

139 See Clause 7.

140 See section 3.1.2 above.

141 See Clause 9 and section 3.1.2 above.

According to the first limb of Clause 21, the Buyers are entitled to cancel the Contract if the Sellers fail to fulfil the three analysed terms "by the cancelling date". It is not clear whether the stipulation "by the cancelling date" applies to all three situations, to the last two, or only to the last one. Accordingly, to clarify this point, it is necessary to resort to the analysis of the text. There are no commas between the three described situations in the first limb of Clause 21. Thus, it can be concluded that the meaning of the provision is that the words "by the cancelling date" are applicable to each situation of the Sellers' default.[142] And if Sellers violate any of the analysed obligations "by the cancelling date", Buyers have the right to cancel the Contract and retain the deposit.[143] The Buyers' right to cancel the Contract and claim the deposit does not depend on the Sellers' fault.

The second limb of Clause 21 regulates a situation where the Sellers' default is due to proven negligence. In such case, whether or not the Buyers cancel the Contract, the Sellers shall compensate the Buyers for any loss and for all expenses incurred by their failure to give notice of readiness, to execute a legal transfer or to deliver the vessel with everything belonging to her by the cancelling date.

There are three conditions for the Buyers to be able to claim compensation. *Firstly*, negligence must be on the Sellers' side. *Secondly*, negligence shall be proven by the Buyers. *And thirdly*, there must be a causal link between the negligence and the Sellers' failure. It may be assumed that according to the vicarious liability rules, the Sellers would be held liable for the negligent conduct of their servants (e.g., crew, master, etc.). However, there shall be a causal link between such negligence and the Sellers' default. Meaning, that the negligent conduct of Sellers' servant should have caused the established failure. Therefore, not any negligence in the behaviour of any Sellers' servant matters. Only the negligence "surrounding the arranging and ensuring" of these Sellers' duties (to

[142] This conclusion follows from the analysis, by analogy, of Clause 14 in Saleform 1993. See Strong, Herring, "Sale of ships: the Norwegian Saleform", p. 223.

[143] If the Buyers elect to cancel the Contract due to the Sellers' default, they must do so within a reasonable time. A reasonable period of time will be established in each particular case. See *Great Marine* case, No. 138 above; See Strong, Herring, "Sale of ships: the Norwegian Saleform", p. 109.

tender notice, execute legal transfer or deliver the vessel by the cancelling date) will be relevant.[144]

Summarizing the analysis of contractual provisions on Sellers' default, we can conclude that there are two different situations. In case of Sellers' default, Buyers are entitled to cancel the agreement and receive the deposit with the interest in any case, irrespective of the Sellers' fault. Where such a default was due to proven negligence of the Sellers, an additional remedy for the Buyers would be the right to claim compensation.

3.2 Breach of Recyclecon by the parties, under English contract law

It follows from the analysis above that Recyclecon reproduces the basic terms typical for the sale of ships for further use. The contractually defined default provisions under Recyclecon are limited to the monetary non-payment (by the Buyers) and failure to deliver the vessel (by the Sellers). These provisions do not take into account the purpose of the Contract, i.e., ship recycling.

There are no terms in Recyclecon governing situations where the Buyers do not perform the agreed "safe and environmentally sound" recycling. Neither does the Contract resolve a situation of an actual non-compliance of the vessel with the documents provided by the Sellers. Thus, in the event of breaches, which are not expressly regulated by the Contract, the terms of Recyclecon should be interpreted and construed in accordance with the principles of contract law.

Recyclecon is an international commercial contract, the parties to which are free to choose the applicable system of law to govern their relationship.[145] The most common practice is for the parties under Recyclecon to agree on English law and arbitration in London.[146] Therefore, in the vast majority of cases, the terms of the contract, the rights and duties of the parties under Recyclecon will be determined in accordance with English law.

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144 See Strong, Herring, "Sale of ships: the Norwegian Saleform", p. 227.

145 Recyclecon, Clause 22.

146 Recyclecon, Clause 22 (a), which also is a default provision (Clause 22 (e)).

When interpreting a contract, the English courts will try to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[147] Accordingly, in the following sections, I analyse how Recyclecon can be interpreted and how the principles of English contract law apply to Recyclecon in situations where the Contract is silent.[148]

In section 3.2.1, I briefly describe the classification of contractual terms under English law. Thereafter, I analyse how terms of Recyclecon can be construed by the courts. I focus on breaches possibly deriving from the Contract as an agreement for the sale of ships *for recycling*. Consequently, I examine two specific cases. In section 3.2.2, I consider a situation where Buyers fail to perform agreed sound ship recycling. Section 3.2.3 provides an analysis of how the Sellers' failure to provide correct information about the vessel can be assessed by the court in the event of a dispute. I focus on these two situations because they are inherent in ship *recycling*, while other possible breaches can also occur under conventional sales of ships for further trade.[149]

3.2.1 Classification of contractual terms in English law

Contractual terms in English law are divided into conditions, warranties and intermediate (innominate) terms.[150] A *condition* is a term of agreement any breach of which entitles the innocent party to treat

147 Kim Lewison, "The interpretation of contracts", Sweet & Maxwell, London, 2011, 5th ed., p. 22.

148 Case law plays a significant role in English legal system. In fact, there is virtually no case law on Recyclecon in the public domain. For this reason, the case law on the standard contract for the sale and purchase of ships (Saleform) and other maritime contracts will be used by analogy (Recyclecon is based on Saleform 2012).

149 There are many well-established precedents for second-hand sales of vessels, while the sale of ships for recycling is not as deeply researched by the courts.

150 See Joseph Chitty, H.G. Beale, "Chitty on contracts: 1: General principles", Sweet & Maxwell, London, 2012, 31st ed., p. 917; See *Bunge Corporation v Tradax Export S.A.*, House of Lords, 1981, Vol. 2, Lloyd's Law Reports, available at: www.i-law.com (accessed 27.04.2021).

himself as discharged from further performance of the contract, and to claim damages for the losses incurred by the breach. A *warranty* is a stipulation which does not give the aggrieved party the right to rescind the contract, but only to claim damages. An *intermediate (innominate) term* is a third category, "the failure to perform which may or may not entitle the innocent party to treat himself as discharged, depending on the nature and the consequences of the breach".[151]

Construction of intermediate terms by courts has become widespread in recent years. It is generally agreed that "a court should not be over ready […] to construe a term in a contract as a condition".[152] In construing a term as an innominate, courts are not strictly limited by the wording used by the parties, judges look at the contract as a whole.[153] Therefore, in the event of a dispute, the court is likely to interpret and construe a term of a contract as an intermediate term. The remedies of the innocent party will be decided depending on the nature and the seriousness of the breach.

3.2.2 Buyers' failure to perform 'green' recycling

As described above, Recyclecon is a standard contract for the sale of vessels for green recycling. The Buyers under the Contract undertake and warrant that the vessel will be recycled at the ship recycling facility in accordance with SRFP and SRP (Clause 17). Despite this statement, there are no provisions in the Contract regulating situations where the Buyers breach these provisions.

The Sellers under the Contract are only granted the right to visit the facility to ascertain that the recycling is being conducted in accordance with SRFP and SRP.[154] They are not allowed to stop the work and demand

[151] Chitty, Beale, "Chitty on contracts: General principles", p.p. 917, 926.

[152] *Cehave M.V. v Bremer Handelgesellschaft (The Hansa Nord),* Court of Appeal, 1975, Vol. 2, Lloyd's Law Reports, p. 457, available at: www.i-law.com (accessed 27.04.2021).

[153] See *L. Schuler A.G. v Wickham Machine Tools Sales Ltd*, House of Lords, 1973, available at: https://www.bailii.org/uk/cases/UKHL/1973/2.html (accessed 27.04.2021); See *Aktion Maritime Corporation of Liberia v S. Kasmas & Brothers Ltd*, Queen's Bench Division (Commercial Court), 1987, Vol. 1, Lloyd's Law Reports, available at: www.i-law.com (accessed 27.04.2021).

[154] Recyclecon, Clause 18, sub-clause 6. See section 3.1.3 above.

the elimination of defects discovered in the yard's performance. Therefore, in the event of breach, Clause 17 and the entire agreement will be interpreted by the court in order to resolve a dispute on such a matter.

Interpreting a contract, the courts ascertain the meaning of the document from the position of a reasonable person.[155] When interpreting a term of a contract, the courts look at the language used by the parties.[156] Clause 17 states that the Buyers *warrant* recycling in accordance with SRFP and SRP. Thus, in case of breach of this provision, Buyers would argue that Clause 17 is a warranty, and the Sellers are entitled only to damages. However, according to the modern approach, a court will not be bound by the term 'warranty' used by the parties. The judges will look at the nature and the seriousness of the breach in order to decide on the Sellers' remedies.[157]

'Safe and environmentally sound recycling' in compliance with established requirements forms the basic *purpose* of the Recyclecon (Preamble and Clause 17). Performance of 'green' recycling constitutes Buyers' undertakings. The Sellers conclude the contract in order to recycle the vessel in a 'green' manner. Thus, the grave breach of the term on safe and environmentally sound recycling in accordance with SRFP and SRP would most likely be seen as "a performance totally different from that which the contract contemplated".[158] Consequently, in my opinion, the Buyers' failure to undertake sound recycling would represent a breach that goes to the 'root of the contract'.

When the failure "affects the substance and foundation of the adventure that contract is intended to carry out", the innocent party is entitled to "treat himself as discharged from his liability further to perform his own unperformed obligations under the contract and from

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155 See *Investors Compensation Scheme v West Bromwich Building Society,* House of Lords, 19.06.1997, available at: https://www.bailii.org/uk/cases/UKHL/1997/28.html (accessed 27.04.2021).

156 For more on the rules of interpretation of contracts, see Kim Lewison, "The interpretation of contracts", Sweet & Maxwell, London, 2011, 5th ed.

157 See the classification of contractual terms, section 3.2.1 above.

158 Chitty, Beale, "Chitty on contracts: General principles", p. 1029.

his obligation to accept performance by the other party".[159] So, it can be concluded that in a situation where Clause 17 would be construed as a condition, the Buyers' breach of this condition would entitle the Sellers to treat themselves as discharged from the contract. In such a case, the Sellers may elect between two options: to bring the contract to an end or to treat it as continuing. In either of these two scenarios, the Sellers, being an innocent party, have the right to sue the Buyers for damages.[160]

However, the court's decision may be different, depending on the *consequences of the breach*. Classification of contractual terms is not a rigid exercise. The modern approach is for the courts to look at the "events resulting from the breach, rather than the breach itself".[161] The consequences caused by the breach will be analysed by the courts in each particular case.

Therefore, it may be concluded that not any breach of Clause 17 would be considered as a breach of condition giving the Sellers right to rescind the contract. The judges will try to answer the question whether the events which had occurred as a result of the breach "deprived [the Sellers] of substantially the whole benefit"[162] which was intended in the contract. Therefore, if the Buyers' breach was slight, or if the Buyers rectified the deficiencies in their performance in such a way that the Sellers were not 'deprived from the whole benefit' of the contract, it is likely that the courts will construe Clause 17 as a warranty. In this case, the Sellers will only be entitled to damages.

Thus, it is not possible to conclude from the Standard Contract whether Clause 17 on the Buyers' duty to perform recycling in accordance with the Ship Recycling Facility Plan and the Ship Recycling Plan is a strict condition or a warranty. The term will be regarded as an innominate term. Depending on the facts and evidence of each particular case, the Sellers would or would not have the right to bring the contract to an end.

159 Ibid., p. 1693, p. 1724.

160 Ibid., p. 1693.

161 *The Hansa Nord,* No. 152 above, p. 466.

162 *Hongkong Fir Shipping Company Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir),* Court of Appeal, 1961, Vol. 2, Lloyd's Law Reports, p. 491, available at: www.i-law.com (accessed 27.04.2021).

Economic and practical considerations may also influence the Sellers' choice to only claim damages instead of terminating the contract. If the Sellers elect to bring the contract to an end due to the breach of condition by the Buyers, all primary unperformed obligations of both parties would be terminated. In a situation where in the middle of the recycling process the Buyers fail to exercise their obligations, and the Sellers decide to terminate the contract, the Buyers' obligation to continue recycling would come to an end. From a practical point of view, in such a situation, Sellers would have to conclude the contract with another buyer, arrange transportation of a half-dismantled vessel to another yard, etc. Therefore, it is most likely that the Sellers would choose to affirm the agreement, treat it as ongoing and claim damages as a remedy. The amount of damages will be decided by the court for each particular case.

3.2.3 Sellers' breach regarding description of the vessel and IHM

Recyclecon is a contract for the sale of vessels. Ships (including second-hand vessels) are under English law considered as goods. Contracts for the sale of goods are regulated by the Sale of Goods Act[163] (hereinafter – "SOGA"). When disputes arising from the sale of second-hand ships under Saleform are resolved under English law, ships are regarded as goods and the SOGA is applied.[164]

One might argue that Recyclecon differs from the sale of ships for further use. Under Recyclecon the Buyers do not only purchase the vessel but also undertake to exercise work – to perform recycling. Thus, the nature of the Recyclecon is of a mixed character. The contract can be considered as a sales contract and also as a contract for the supply of workmanship. In this sense, there are some similarities between Recyclecon and shipbuilding contracts (where there is also a mixed nature of the relationship).[165] Despite the hybrid character, it is established that

[163] Sale of Goods Act 1979, available at: https://www.legislation.gov.uk/ukpga/1979/54 (accessed 27.04.2021).

[164] See Strong, Herring, "Sale of ships: the Norwegian Saleform", p. 29.

[165] The builder under a shipbuilding contract undertakes not only to build the ship, but also to sell and deliver her to the buyer.

shipbuilding contracts under English law are contracts for the sale of goods, and, accordingly, the SOGA applies to these contracts.[166]

The SOGA defines a contract of sale of goods as "a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".[167] The term 'goods' includes all personal chattels other than things in action and money.[168] There is a number of cases where the SOGA was applied to second-hand sales of ships[169] and to shipbuilding contracts.[170] There are no provisions in the Act that exclude its application to the sale of ships for recycling. The Sellers under Recyclecon agree to transfer the property in the ship to the Buyers in exchange for the payment. The Buyers agree to buy the ship. Therefore, the Sale of Goods Act will be applicable to the sales of ships under Recyclecon.

Sections 12 to 15 of the SOGA provide for certain statutory implied terms as to title, compliance with description and quality or fitness to be applied to sales of goods. In the event of a dispute, such terms will be implied by the court in order "to establish what the contract would reasonably have been understood to mean having regard to the commercial purpose of the contract as a whole and the relevant available background of the transaction".[171]

The terms will be implied unless they are "negatived by express agreement or by the course of dealing between the parties, or by such usage as binds both parties to the contract".[172] Thus, the parties may agree

166 See Simon Curtis, Ian Gaunt, William Cecil, "The Law of shipbuilding contracts", Informa Law from Routledge, London, 2020, 5th ed., p. 1.

167 Sale of Goods Act 1979, Section 2 (1).

168 Sale of Goods Act 1979, Section 61.

169 *Ernst Behnke v Bede Steam Shipping Company Ltd*, King's Bench Division, 1927, Vol. 27, Lloyd's Law Reports, 24, available at: www.i-law.com (accessed 27.04.2021). *Dalmare SPA v Union Maritime Ltd*, Queen's Bench Division (Commercial Court), 2012, 3537, available at: www.i-law.com (accessed 27.04.2021); See Strong, Herring, "Sale of ships: the Norwegian Saleform", p. 29.

170 *McDougall v Aeromarine of Emsworth Ltd*, Queen's Bench Division (Commercial Court), 1958, Vol. 2 Lloyd's Law Reports, 345, available at: www.i-law.com (accessed 27.04.2021); See Curtis, Gaunt, Cecil, "The Law of shipbuilding contracts", p. 1.

171 Chitty, Beale, "Chitty on contracts: General principles", p. 985.

172 Sale of Goods Act, Section 55 (1).

to exclude application of statutory implied terms. In order for such an exclusion to be effective, the relevant provision of the contract must be clear and explicit.[173]

Recyclecon contains the entire agreement clause (Clause 23) which is aimed at preventing possible disputes for pre-contractual misrepresentations. It is stated that the Contract constitutes the entire agreement between the parties and no promise, undertaking, representation, warranty or statement by either party prior to the date of the Contract shall affect the agreement. Based on the existing case law, the wording of Clause 23, in my view, does not exclude the application of terms implied by statute or law, as there is no sufficient clarity in the wording of the Clause.[174] Therefore, it can be inferred that implied terms from the SOGA will apply to Recyclecon and give additional protection to the Buyers. The most likely case would be application to the Contract of the term on the vessel's correspondence with the description (s.13 of the SOGA).

3.2.3.1 Description of the vessel

Recyclecon regulates only Sellers' default in cases when the Sellers fail to deliver the vessel or execute legal transfer (Clause 21).[175] This Clause reflects typical approach in the sale of ships for second-hand use. When Buyers purchase the vessel for further trade, they physically inspect the vessel prior to the decision to buy her. In addition, under the Saleform, Buyers acquire the ship to Class standards,[176] which is a "general safeguard"[177] for the Buyers.

As described above, the way of conclusion of Recyclecon differs significantly from Saleform. The Buyers purchase the vessel based on

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[173] See *Dalmare SpA v Union Maritime Ltd* (*The Union Power*), Queen's Bench Division (Commercial Court), 2012, EWHC 3537, available at: www.i-law.com (accessed 27.04.2021); See *KG Bominflot Bunkergesellschaft fur Mineraloele mbH & Co KG v Petroplus Marketing AG* (*The Mercini Lady*), Court of Appeal, 2010, Case NA3/2009/1451, available at: https://uk-westlaw-com (accessed 27.04.2021).

[174] See *The Union Power* and *The Mercini Lady*, No. 173 above.

[175] See section 3.1.4.2 above.

[176] Saleform 2012, Clause 4.

[177] Strong, Herring, "Sale of ships: the Norwegian Saleform", p. 6.

the description provided by the Sellers. The sale is outright. The Buyers do not inspect the vessel. Therefore, description of the vessel is of great importance for the Buyers. It is stated in Clause 9 (a) that upon delivery, the vessel must comply with Part I of the Contract and Annex A. The Sellers shall not be held liable for any representations, errors, omissions and/or overall condition of the vessel upon arrival at the place of delivery except for the items specified in Part I and Annex A.[178]

A possible issue arising from the Contract is what remedies are available to Buyers if the vessel does not match the description provided by Sellers. As analysed above, the Buyers are entitled to cancel the agreement and claim damages if the Sellers fail to deliver the ship with everything belonging to her by the cancelling date (Clause 21). However, there are no express provisions entitling the Buyers to reject the vessel if the provided by Sellers description does not match the ship's condition. Moreover, the Buyers may discover that the vessel does not correspond with Part I and Annex A of the Contract during the process of recycling, i.e., after the delivery and payment of price. Therefore, it is necessary to analyse how the Sellers' breach to deliver the vessel in compliance with her description (on which the Buyers relied) could be evaluated by the court.

Under English law, a situation where "the buyer contracts in reliance on the description of the goods in contract without having seen them", is categorised as a *sale by description*.[179] As analysed above, the Sale of Goods Act will be applicable to the sale of ships for recycling. According to the SOGA, "where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description".[180] If the goods do not correspond with the description given by the seller, the buyer is entitled to "reject the goods and normally treat the contract as repudiated and to recover damages for any loss sustained as a result of the breach".[181] A commercial buyer does not have such right

[178] Recyclecon, Clause 2.

[179] Joseph Chitty, H.G. Beale, "Chitty on contracts: 2: Specific contracts", Sweet & Maxwell, London, 2015, 32nd ed., p. 1971.

[180] Sale of Goods Act, Section 13 (1).

[181] Chitty, Beale, "Chitty on contracts: Specific contracts", p. 1974.

if the breach is slight. In such case, the breach shall be treated not as a breach of condition, but as a breach of warranty.[182]

Historically, the courts applied the implied term on correspondence with the description strictly.[183] It was regarded as a condition, and any deviation was seen as entitling the Buyers to reject the goods. This approach has changed.

It is established now that absolute compliance with the description is not a strict condition. Not every term of a description identifying the subject of the contract will be a fundamental term, irrespective of the consequences of the breach. The misdescription will be considered a breach of condition only "if it is sufficient to make a fundamental difference to that which the party had contracted to take".[184] The courts will apply the test of a reasonable man and look at the consequences of the breach, rather than the breach itself.[185] The crucial question is whether "a reasonable person would regard the goods as distinct from those he contracted to buy".[186]

Buyers under Recyclecon contract for a particular vessel, based on her description. The purchase price for the ship will be calculated based on the tonnage of the vessel and the costs of her recycling. Thus, the misdescription could be considered as a grave one, by showing that the vessel in her actual state is of substantially less value than in comparison with the described condition (included in Part I and/or Annex A). Moreover, misdescription of the vessel may affect the Buyers' obligation to perform recycling in a safe and environmentally sound manner in accordance with

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182 Sale of Goods Act, Section 15 (A); See Chitty, Beale, "Chitty on contracts: 2: Specific contracts", p. 1962.

183 See *Arcos Ltd v E.A. Ronaasen & Son*, House of Lords, 02.12.1933, available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/1933/1.html&query=(ronaasen)+AND+(son)+AND+(1933) (accessed 27.04.2021).

184 *Reardon Smith Line Ltd v Yngvar Hansen Tangen (The Diana Prosperity),* Court of Appeal, 1976, Vol. 2, Lloyd's Law Reports, p. 67, available at: www.i-law.com (accessed 27.04.2021).

185 See *The Hansa Nord* (No. 152 above) and *The Hongkong Fir* (No. 162 above).

186 Aleka Mandaraka-Sheppard, "Modern Maritime Law, Volume 2: Managing risk and liabilities", Informa, London, 2013, 3d ed., p. 234.

SRFP and SRP.[187] The SRP is developed based on information provided by the Sellers. Consequently, if the provided description is significantly misleading, the Buyers may be not able to follow the Ship Recycling Plan and exercise the recycling.

Therefore, from my point of view, if misdescription is *commercially significant* to such an extent that the actual ship could be seen as a vessel substantially different from the one the Buyers contracted for, the Buyers may be entitled to the protection provided by Section 13 of the SOGA. While, when there is a slight non-conformity (e.g., misdescription as to the name, minor difference in the tonnage, etc.), the Buyers will not be entitled to rely on the SOGA and rescind the agreement.[188] Following the *Hongkong Fir* approach,[189] the court or arbitrator will look at the consequences of the breach in each particular case.

3.2.3.2 IHM

Another possible issue arising from potential inconsistencies in the information provided by Sellers is the accuracy of the Inventory of Hazardous Materials. As described above, the Sellers shall provide the final Part I and provisional Parts II and III of IHM to the Buyers as soon as possible after the contract.[190] Based on the IHM, the Buyers will prepare the Ship Recycling Plan.[191]

Recyclecon states that the Sellers do not guarantee that the information in IHM is full and correct, they provide the IHM "to the best knowledge but always without guarantee".[192] It is not specified what remedies the Buyers would have in a case of breach of this term. Here it is important to note that according to the Article 6 (5) of the European Ship Recycling Regulation, the recycling facility may *decline to accept* the ship for recycling if her condition does not correspond substantially with the particulars of the inventory certificate, including where Part I

187 Recyclecon, Preamble and Clause 17.

188 See *Diana Prosperity* case, No. 184 above.

189 No. 162 above.

190 Recyclecon, Clause 18, sub-clauses 2, 3.

191 Clause 18, sub-clause 5.

192 Recyclecon, Clause 18, sub-clause 4.

of the IHM has not been properly maintained and updated, reflecting changes in the ship's structure and equipment.[193]

In contrast to the ESRR, the Buyers under Recyclecon are not expressly entitled to reject the ship and cancel the contract due to the fact that the vessel's condition does not correspond with the IHM. Therefore, the consequences of the Sellers' breach to provide IHM to the best knowledge will be determined based on the general principles of English law and the SOGA.

Recyclecon does not specify what is the nature of the stipulation regulating IHM (condition, warranty or innominate term). "In order to determine whether a contractual provision is a condition, an innominate term or a warranty, this must in each case be construed against the background of the contract as a whole and the factual matrix of which it forms a part".[194]

As a starting point, the Inventory of Hazardous Materials is the most important document for the planning and performance of ship recycling. The IHM reflects hazardous materials in the vessel's structure and equipment, including the location and weight of such materials.[195] Based on this information, the yard plans the process of recycling and prepares the Ship Recycling Plan. Moreover, the purchase price for the ship is agreed depending on the volume and location of hazardous materials and the difficulty of procedures that the yard will have to undertake to recycle the vessel.

An inaccurate IHM may result in an incorrect SRP. SRP is a technical and operational plan for the safe and environmentally sound recycling. It shall include procedures on how the recycling facility is planning to manage materials identified in the IHM.[196] Thus, if the IHM is misleading, it may make it impossible for the Buyers to meet their contractual obligations and to recycle the vessel in a sound manner. On the other

193 See section 2.3.3 above.

194 Curtis, Gaunt, Cecil, "The Law of shipbuilding contracts", p. 113.

195 Recyclecon, Clause 1.

196 Definition of SRP, Recyclecon, Clause 1.

hand, if there are slight discrepancies in the IHM, they are unlikely to affect the contractual undertakings.

Therefore, it can be concluded that in the event of a dispute, the court is likely to construe the Sellers' obligation to provide IHM to their best knowledge as an innominate term. Consequently, the Sellers' failure to do so "may or may not entitle the innocent party [Buyers] to treat himself as discharged, depending on the nature and the consequences of the breach".[197] If the breach caused minor problems that can be easily corrected, the Buyers will not have the right to treat the contract as at an end. However, if such a breach resulted in serious consequences for the Buyers, the Sellers' obligation to provide IHM will be considered as a condition, entitling the Buyers to terminate the contract.

In a situation where the Sellers' failure to provide information goes to the "root of the matter",[198] if this failure is so significant as to prevent the Buyers from fulfilling their promise to exercise sound recycling, then such a breach may entitle the Buyers to treat themselves as discharged from further performance. Another option for the Buyers is to affirm the contract and continue performance. Such a decision may be based on commercial considerations. In any event, regardless of the Buyers' choice (to affirm the contract or to rescind it), they are entitled to claim damages for the Sellers' failure.

It can be concluded, that neither Recyclecon, nor the general principles of English law do clearly classify the Sellers' duty to provide IHM "to the best knowledge". Sellers' breach of this obligation will be analysed by the courts on a case-by-case basis, and the relevant contractual terms will be construed with regard to particular circumstances.

[197] Chitty, Beale, "Chitty on contracts: General principles", p.p. 917, 926.

[198] Ibid., p. 1724.

4 How can a shipowner navigate the existing recycling framework?

Analysis of the public and contractual legal frameworks shows that the responsibility for the safe and sound ship recycling lies primarily with the shipowners. Recycling of vessels in violation of legal requirements can lead to public (violation of recycling regulations) and private (e.g., contractual liability, damage to third parties) liability. In addition, unsound ship recycling can cause reputational and financial losses.

Shipowners going for unsound ship recycling may face financial problems, as more and more shipping stakeholders show concern for the methods of ship recycling. Many large cargo owners, concerned about the sustainability of their business, analyse the shipowners' recycling policies when choosing a shipowning company to cooperate with. Even "fully compliant with legal requirements, a shipowner may be subject to reputational and financial risks if the ship recycling process is not in line with recognized regulations and standards".[199]

In this Chapter, I present possible solutions that can protect shipowners from the adverse consequences associated with the sale of ships for recycling. I focus on the shipowners' position due to the fact that the shipowners decide how to recycle their vessels, and it is they who can mainly be held accountable for this.

4.1 Strengthening of the contract for the sale of ships for recycling

Being primarily responsible for the safe and sound ship recycling, shipowners do not perform recycling themselves. Ships *are sold* for recycling, and the relevant contract of sale determines how the vessel will be recycled. Chapter 3 above demonstrated that the Standard Contract

[199] DNV, "Ship Recycling: Navigating a complex regulatory landscape", June 2020, p. 8, available at: https://www.dnv.com/maritime/publications/ship-recycling-navigating-complex-regulatory-landscape-download.html (accessed 27.04.2021).

for the Sale of Vessels for Green Recycling does not expressly regulate the relationship between the parties in such a way as to ensure 'green' ship recycling. Recyclecon is silent on many crucial matters, and the contractual responsibilities of the parties are not as clear as they should be. To secure themselves, shipowners can develop a better contractual structure, using Recyclecon as a skeleton.

The general observation is that parties should clearly refer in the contract to the relevant legislation which the recycling process should comply with.[200] In addition, the contract should contain more detailed provisions on the obligations of the parties.

First of all, Sellers can be given the right to demand regular reports from Buyers on how the ship is being recycled.[201] This will allow the shipowner to monitor the recycling process to ensure compliance with the standards and may serve as a good evidence in the event of future legal proceedings.

Secondly, Sellers may be entitled to stop the process of recycling if it is discovered that the work is not in compliance with the requirements of the contract. And Buyers should undertake to rectify the deficiencies.[202] As it was described above, Sellers under Recyclecon are allowed to visit the recycling facility to ascertain that the recycling of the vessel is being conducted in accordance with the SRFP and the SRP.[203] A more detailed provision in the contract can provide for the Sellers' right to have their representatives at the site throughout the whole process of demolition. These representatives, with special knowledge in the field of ship recycling, should supervise the process and be entitled to halt the work in a case of serious non-compliance. Without such a clause, a shipowner will not be able to protect himself from possible risks.

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200 If we are dealing with recycling of a European-flagged vessel, the Preamble of the Contract should include a wording that the Buyers undertake to recycle the vessel in accordance with the ESRR.

201 Accompanied by pictures from the yard.

202 We discussed in an interview with Mats E. Sæther that Nordisk Skibsrederforening (Nordisk Defense Club) recommends that its members use this approach.

203 Recyclecon, Clause 18, sub-clause 6.

Thirdly, it is possible to secure the Sellers by using performance bonds. These bonds issued by the Buyers to the Sellers serve as a guarantee against the Buyers' failure to fulfil their contractual obligations.[204]

Fourthly, clauses on reimbursement of costs can be included in the contract. If the Sellers' order to stop work is reasonable, Buyers should undertake to compensate possible Sellers' losses. Similarly, in a situation where it is established that the facility is unable to continue recycling in a sound way, the Buyers should indemnify the Sellers.

Another possible problem that shipowners should be aware of is a situation where a vessel is sold for further trading, but shortly after the sale the new owner sends her for recycling. If such a ship would be sold for demolition in violation of public regulations, the previous shipowner may be subject to liability. For these reasons, a shipowner can clearly document his intentions and include recycling clauses into the contract for second-hand sale of a ship. These clauses should provide for the buyer's obligation to sell the vessel for recycling in compliance with the relevant public legal framework and undertake duties similar to the described above.[205]

One might argue that Buyers will not agree to such onerous obligations. However, it is important to keep in mind that ship recycling is a business, and commercial motives will play a significant role. If a ship is sold for recycling by a prudent owner who wants to control the demolition process actively, such a vessel will most likely be prepared to the recycling in a proper way. IHM and necessary certificates will reflect her actual condition. Hence, the recycling facility will be able to plan and prepare for the process in such a way that no 'unpleasant surprises' shall happen. Furthermore, a shipowner seeking for sound recycling will be ready to receive a lower price for the vessel in exchange for a security that the process will be carried out safely. Therefore, the yard's (or cash buyer's) expenses will be reflected in the price paid for the ship. In this way, if all

[204] Releasing of such payments should be linked to the stages in recycling process, e.g., issuance of SRP, stages in cutting the vessel, etc.

[205] The former owner shall be entitled to monitor yard's work and stop it, the buyer shall undertake to indemnify the seller, etc.

the parties involved act conscientiously, their interests will be balanced. Buyers will receive their profits, and Sellers will be able to make sure that no possible negative consequences arise for them.

4.2 Active exercise of rights

Nowadays, the legal responsibilities and obligations of a shipowner selling his ship for recycling do not cease at the time of the transfer of ownership of the vessel.[206] Even in a situation where the ownership of the vessel is transferred through the chain of middlemen, the beneficial shipowner may be held liable for the damages suffered by third parties in the course of recycling.

In *HAMIDA BEGUM v MARAN*,[207] the courts decided that the sub-agent, who did not have any control over the recycling yard, may be held liable for the death of the yard's worker.[208] The judge pointed out that the sale of vessel was "legitimate and lawful",[209] but it was *wrongful*. The court concluded that, when arranging the sale of the ship, the defendant knew that the vessel would not be recycled safely. Thus, it was established that the defendant could be considered responsible for creating a danger

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[206] Before shipowners considered themselves free from risks after the ship was sold for recycling via cash buyers. See Nikos Mikelis, "The interface between Shipowner & Cash Buyer and Cash Buyer & Recycling Yard", 28.10.2013, p. 3, available at: http://www.gmsinc.net/gms/images/presentations/2013%20Ship%20Recycling.pdf (accessed 27.04.2021).

[207] *HAMIDA BEGUM v MARAN*, England and Wales High Court (Queen's Bench Division), EWHC 1846 (QB), 13.07.2020, available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2020/1846.html&query=(maran) (accessed 27.04.2021); *HAMIDA BEGUM v MARAN,* The Court of Appeal of England and Wales, EWCA Civ326, 10.03.2021, available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2021/326.html&query=(HAMIDA)+AND+(BEGUM)+AND+(v)+AND+(MARAN) (accessed 27.04.2021).

[208] The decision in *HAMIDA BEGUM v MARAN* was held considering the defendant's application to strike out the claim. The courts did not decide the case in full, but were merely answering the question whether the claimant, based on the facts presented, had a prospect of success. Both the court of first instance and the appeal court decided in favour of the claimant. The courts' findings are relevant for scrupulous shipowners.

[209] *HAMIDA BEGUM v MARAN*, England and Wales High Court (Queen's Bench Division), EWHC 1846 (QB), 13.07.2020, §61.

that caused harm to third parties (i.e., the death of the yard's worker in this case).

In addition to these findings of the court of first instance, the appeal court stated that the defendant "could, and should, have insisted on the sale to a so-called 'green' yard, where proper working practices were in place".[210]

The *HAMIDA BEGUM v MARAN* case demonstrates that the last operating (beneficial) shipowner, as well as agents, managers, brokers, insurers, etc., are at risk of liability as long as they participated in organising foreseeably unsafe and unsustainable ship recycling.[211]

To avoid such risks, shipowners should actively exercise their rights provided by the contract. As a Seller, shipowner can and should exercise due diligence towards the Buyer and the scrapyard. Shipowner can visit and inspect the recycling facility prior to demolition. Shipowner can request the SRFP and check it. The SRP should also be analysed for compliance with the characteristics of a particular vessel intended for recycling and her IHM. If the documents submitted by the Buyer are not satisfactory, shipowner should choose another Buyer (and/or another yard).

When selling a vessel for recycling, the shipowner should play an active role and ensure that the Buyer (yard or cash buyer) fulfils his contractual obligations. A simple inclusion of a standard clause on 'safe and environmentally sound' recycling will not protect the shipowner from possible adverse consequences.

Shipowners should not 'keep a blind eye' to the actual recycling process. To be in a strong position, shipowners should actively exercise their rights and, as described in section 4.1 of the thesis, incorporate additional provisions ensuring responsible recycling in the contract for the sale of ship.[212] Without these measures, the shipowner will bear the

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[210] *HAMIDA BEGUM v MARAN,* The Court of Appeal of England and Wales, EWCA Civ326, 10.03.2021, §67.

[211] These participants may be considered as aiding and abiding environmental crime, and thus, also punished.

[212] It is interesting to note that the judge of the Court of Appeal in *HAMIDA BEGUM v MARAN* to some extent confirmed the author's proposal to use performance bonds

burden of proving that there was no negligence on his side and that there were no indications that the recycling process would not be sustainable.[213] The shipowner's risks will be mitigated if the described additional measures are taken.

4.3 Trends in ship recycling, transparency

Today, ship recycling is given more attention in the society than before. The analysis of existing legal instruments regulating ship recycling (Chapter 2) showed that there are currently no *legally binding* international standards for the responsible ship recycling. Despite this fact, the *socially accepted* standards for the sale of ships for recycling are evolving as a result of 'push' from society.

As a party organising the recycling of vessels, shipowners are under the scrutiny of various environmental organisations. One of the most active is NGO Shipbreaking Platform.[214] This NGO collects data on recycling practices worldwide and makes this information public. The Platform's activities have triggered some "criminal investigations by EU enforcement authorities against shipping companies".[215] The Shipbreaking Platform publishes annual reports on the state of the recycling market,[216] keeps records of vessels dismantled globally and makes lists of shipping companies with the worst recycling practices. Such activities of the NGO

(see section 4.1 above): safe recycling "could have been achieved by the use of provisions within the MoA which […] could have endeavoured to link the inter-party payments to the delivery of the vessel to an approved yard". *HAMIDA BEGUM v MARAN,* The Court of Appeal of England and Wales, EWCA Civ326, 10.03.2021, §68.

213 The courts will look at the facts of the case. The price paid for the ship (per ton) can obviously indicate that the recycling was not planned to be responsible.

214 NGO Shipbreaking Platform, available at: https://shipbreakingplatform.org (accessed 27.04.2021).

215 NGO Shipbreaking Platform, "Impact Report, 2018, 2019", p. 14, available at: https://www.shipbreakingplatform.org/wp-content/uploads/2020/06/NGOSBP-Bi-Annual-Report-18-19.pdf (accessed 27.04.2021).

216 NGO Shipbreaking Platform, Annual Reports, available at: https://shipbreakingplatform.org/resources/annual-reports/ (accessed 27.04.2021).

can lead not only to reputational losses of the shipping companies, but also to financial risks.

Information published by NGO is taken into account by financial institutions. Many financial institutions over the last few years have started to 'screen' shipping companies in order to "contribute to a shift towards better ship recycling practices […], taking into account social and environmental criteria, not just financial returns, when selecting asset values or clients".[217] A group of European financers presented Responsible Ship Recycling Standards (RSRS).[218] These standards are aimed to stimulate "responsible ship recycling and minimize the dangers associated with hazardous materials on board of ships".[219]

According to the RSRS, eight European financial institutions have publicly acknowledged that ship recycling is "part of the shipping industry value chain".[220] These institutions undertake to finance new ships that only carry IHM in compliance with the ESRR. Relevant ship recycling standards shall be incorporated in the loan agreements.[221] When borrowing money from the bank, clients undertake to "maintain a safe, sustainable and socially responsible policy with respect to dismantling of vessels".[222] Borrowers shall ensure that vessels, "when they are to be scrapped, are recycled at a recycling yard which conducts its recycling business in a socially and environmentally responsible manner in accordance with the EU Ship Recycling Regulation".[223]

This initiative of the financers demonstrates the growing awareness of the importance of improving ship recycling practises. An example of the effect of this modern approach is the action taken by the Norwegian

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217 NGO Shipbreaking Platform, "Press Release – Platform publishes list of ships dismantled worldwide in 2019", 04.02.2020, available at: https://shipbreakingplatform.org/platform-publishes-list-2019/ (accessed 27.04.2021).

218 ING, "ING, ABN AMRO and NIBC present the Responsible Ship Recycling Standards", available at: https://www.ing.com/Sustainability/ING-ABN-AMRO-and-NIBC-present-the-responsible-ship-recycling-standards.htm (accessed 27.04.2021).

219 Ibid.

220 Ibid.

221 ING, Responsible Ship Recycling Standards, 2017, p. 4.

222 Ibid.

223 Ibid.

Bank, which in 2018 decided to exclude several shipping companies from the Government Pension Fund Global. The decision was explained by unsound recycling practices of these shipowners.[224]

To protect their companies from social condemnation and financial hardship, some prudent shipowners over the last few years have started making their ship recycling policies public. Ship recycling policy is an extensive statement on the company's approach to ship recycling, covering environmental and social issues. By disclosing these policies, companies show their commitment to promote sustainable ship recycling. Moreover, in the event of a dispute, the shipowner would be able to demonstrate what the company's attitude to ship recycling is.[225] With the present vagueness of international ship recycling standards, such a transparent responsible ship recycling policy may be seen as a 'best practice', which, in my opinion, might become standard in the future.

Transparency is also a key to the improvement of recycling standards. By sharing their knowledge, disclosing companies facilitate the exchange of useful information and mutual learning of parties concerned. "Transparency is crucial to give business partners, the public and environmental organizations the opportunity to make assessment of shipping companies' performance based on provided information".[226]

Twenty-seven stakeholders have joined Ship Recycling Transparency Initiative (SRTI).[227] The SRTI is an online platform where "shipowners share information on their ship recycling policies and practices that in turn helps key stakeholders make informed decisions".[228] Not only

[224] Norges Bank, "Decisions on exclusion and observation from the Government Pension Fund Global", 16.01.2018, available at: https://www.nbim.no/en/the-fund/news-list/2018/decisions-on-exclusion-and-observation-from-the-government-pension-fund-global/ (accessed 27.04.2021).

[225] It may serve as additional evidence of the shipowner's intention to recycle his vessels sustainably.

[226] Ship Recycling Transparency Initiative, "Testimonials", Statement of international environmental NGO Bellona Foundation, available at: https://www.shiprecycling-transparency.org/testimonials/ (accessed 27.04.2021).

[227] As of 27.04.2021. Ship Recycling Transparency Initiative, "SRTI Signatories", available at: https://www.shiprecyclingtransparency.org/srti-signatories/ (accessed 27.04.2021).

[228] Ship Recycling Transparency Initiative, "Report 2020", p. 3, available at: https://www.shiprecyclingtransparency.org/annual-report-2020/ (accessed 27.04.2021).

shipowners are signatories to the SRTI, cargo owners, banks, investors, insurers, etc., are also participating in this initiative. These players of shipping business do not want to be associated with unsound recycling practices and therefore evaluate the disclosed information about recycling when choosing their commercial partners.

These market trends demonstrate that the current state of play is very different from what it was 15–20 years ago. From my point of view, the changes are likely to evolve further. Shipowners should have responsible ship recycling policies in place and comply with these policies. By being transparent about their recycling practices, responsible shipowners will benefit in the long run. Sustainable recycling will attract more investors and clients, who would like to work with responsible shipowners. We can also assume that in the future, more and more stakeholders will become concerned about how the shipowners they cooperate with recycle their vessels. Therefore, shipowners with transparent sound recycling practices, in my opinion, will be in a better competitive position compared to companies that go for unsustainable recycling.

5 Conclusions

The purpose of this thesis was to analyse the public and contractual framework for the sale of ships for recycling, with a focus on the Standard Contract for the Sale of Vessels for Green Recycling (Recyclecon).

As for public legal regime, the research demonstrated that ship recycling (sale of ships for recycling) is regulated by complex legal instruments, addressing the industry under consideration from various perspectives. There are currently no internationally applicable binding standards governing ship recycling. Different legal mechanisms apply to the sale of ships for recycling, depending on the geographical location of a ship and the flag a vessel flies.

When a ship is sold for recycling, the parties to the contract should be aware of the relevant public regulations in order to avoid liability for violations of the existing legislation. The responsibility for unsound ship recycling is primarily assigned to the shipowners, and this responsibility lasts until the vessel is recycled properly.

The Standard Contract for the Sale of Vessels for Green Recycling "aims to improve standards overall by reflecting green practices and making liabilities and obligations as clear as possible".[229] However, the research showed that, in fact, Recyclecon mainly reproduces the standard terms for second-hand sales of ships and does not clearly regulate the parties' relationship, taking into account the specific purpose of this agreement (i.e., ship *recycling*). A mere conclusion of such a contract does not ensure safe and sound ship recycling, and consequently, does not safeguard its parties. Recyclecon is silent on possible breaches related to the failure to perform agreed 'green' recycling.

The sale of ships for recycling under English law is considered as a sale of goods, and the relevant rules are applicable to such a sale. The analysis showed that the application of English contract law to Recyclecon may clarify some controversial points. However, the study also demonstrated that the application of English law does not provide a clear answer to the question of how potential disputes can be resolved, since each case will be decided based on the specific circumstances.

Being responsible for the safe recycling of their vessels, shipowners are at great risk of negative consequences associated with unsound ship recycling. Such possible risks include both public and private liability. In order to mitigate such dangers, shipowners should develop a better contractual structure to regulate sales of ships for recycling, since Recyclecon does not cope with this job. Shipowners are advised to actively control the process of recycling and take other measures to secure themselves. To summarise, I can paraphrase a Norwegian proverb and say that a shipowner can be happy twice: once when he acquires a vessel, and on the day when his ship is recycled properly. And achieving this second goal is certainly a Herculean task.

[229] Michael Galley, "Shipbreaking: Hazards and Liabilities", Springer, Cham, 2014, p. 8.

Appendix I

BIMCO

RECYCLECON

STANDARD CONTRACT FOR THE SALE OF VESSELS FOR GREEN RECYCLING **PART I**

1. Place and Date of Contract (Cl. 1):		
2. Sellers/Place of business (state full style and address) (Cl. 1)	3. Buyers/Place of business (state full style and address) (Cl. 1)	4. Ship Recycling Facility (state full style and address) (Cl. 1)
5. Name of Vessel (Cl. 1, 6(b))	6. Type of Vessel (Cl. 1, 6(b))	7. Year and place built (Cl. 1, 6(b))
8. Flag (Cl. 1, 6(b))	9. Place of registry (Cl. 1, 6(b))	10. IMO number (Cl. 1, 6(b))

11. Light Displacement Tonnage (state metric or long tons) (Cl. 1, 8(a)) (a) Lightweight (b) Deductions (c) Contractual Weight ((a)-(b))	12. Purchase Price in figures and letters (state both lump sum price and the equivalent price per ton Contractual Weight)(Cl. 3) (a) Lump sum price (b) Equivalent price per ton Contractual Weight
13. Deposit (Cl. 4, 5) (a) State percentage of purchase price (b) State name and place of bank to which the deposit shall be paid	14. Sellers' bank (state name and place and bank account details to which the balance of the purchase price shall be paid) (Cl. 4, 5)
15. Place of closing (Cl. 1, 6)	16. Place of Delivery (Cl. 1 , 2, 9(a))
17. Earliest date of delivery (Cl. 10(a))	18. Cancelling date (Cl. 10(a))
19. Post-delivery assistance (Cl. 11) (a) State number of days: (b) State daily cost:	20. Dispute Resolution (state 22(a), 22(b) or 22(c)); if 22(c) agreed place of arbitration must be stated)(Cl. 22)
21. Notices to Sellers (state contact details) (Cl. 24(b))	22. Notices to Buyers (state contact details) (Cl. 24(b))
23. Numbers of additional clauses covering special provisions, if agreed	

It is mutually agreed between the party named in Box 2 and the party named in Box 3 that this Contract consisting of PART I including additional clauses, if any agreed and stated in Box 23, and PART II as well as Annexes "A" (Vessel Details), "B" (Excluded Items) and "C" (Statement of Completion) attached hereto, shall be performed subject to the conditions contained herein. In the event of a conflict of conditions, the provisions of PART I and Annexes "A", "B" and "C" shall prevail over those of PART II to the extent of such conflict but no further.

Signature (Sellers)	Signature (Buyers)

PART II
RECYCLECON Standard Contract for the Sale of Vessels for Green Recycling

Preamble

The party stated in Box 2 (hereinafter "the Sellers") has agreed to sell and the party stated in Box 3 (hereinafter "the Buyers") has agreed to buy the Vessel named in Box 5 on the following terms and conditions which, in particular, include an undertaking to recycle the Vessel in a safe and environmentally sound manner consistent with international and national law and relevant guidelines.

1. Definitions

"Banking Days" are days on which banks are open both in the country of the currency stipulated for the purchase price in Clause 3 (Purchase Price) and at the place of closing stated in Box 15.

"Buyers" means the party stated in Box 3.

"Contractual Weight" means the LDT less the Deductions stated in Box 11.

"Deductions" means the permanent ballast and other weight deductions stated in Box 11.

"IMO" means the International Maritime Organization.

"Inventory of Hazardous Materials" means a list of hazardous materials (as defined in Appendix 1 of the IMO 2011 Guidelines for the Development of the Inventory of Hazardous Materials (Resolution MEPC.197 (62)) or any subsequent amendment thereto) in the Vessel's structure and equipment, in operational wastes and stores on board the Vessel, including the location and weight of such materials.

"LDT" means the light displacement tonnage in tons stated in Box 11. (Box 11 to state whether metric or imperial measurement apply).

"Place of Delivery" means the place stated in Box 16.

"Recycling" means the activity of complete or partial dismantling of ships at the Ship Recycling Facility in order to recover components and materials for reprocessing and re-use, whilst taking care of hazardous and other materials, and includes associated operations such as storage and treatment of components and materials on site, but not their further processing or disposal in separate facilities.

"Sellers" means the party stated in Box 2.

"Ship Recycling Facility Plan" means a technical, operational and management plan for the safe and environmentally sound operation of the Ship Recycling Facility (as defined in the relevant guidelines to be developed by the IMO).

"Ship Recycling Facility" means a defined area that is an authorised site, yard or facility, as identified in Box 4, used for Recycling and that is designed, constructed, and operated in a safe and environmentally sound manner.

"Ship Recycling Plan" means a technical and operational plan for the safe and environmentally sound Recycling of the Vessel and also including how the type and amount of materials identified in the Inventory of Hazardous Materials will be managed and disposed of (as defined in the IMO 2011 Guidelines for the Development of the Ship Recycling Plan (Resolution MEPC.196 (62)) or any subsequent amendment thereto).

"Statement of Completion" means a written confirmation issued by the Ship Recycling Facility in the form as set out in Annex C (Statement of Completion).

"Vessel" means the vessel named in Box 5 details of which are set out in Boxes 6 to 11 and Annex A (Vessel Details) attached hereto.

PART II
RECYCLECON Standard Contract for the Sale of Vessels for Green Recycling

2. Outright Sale

The Vessel has been accepted by the Buyers and the sale is outright and definite subject only to the terms and conditions of this Contract. The Sellers shall not be held liable for any representations, errors, omissions and/or overall condition of the Vessel upon arrival at the Place of Delivery stated in Box 16 except for the items specified in PART I and Annex A (Vessel Details).

3. Purchase Price

The purchase price is the sum stated in Box 12 payable in United States Dollars based on the Contractual Weight.

4. Deposit

(a) As a security for the due fulfilment of this Contract, the Buyers shall lodge a deposit free of bank charges as stated in Box 13 to be placed with the bank stated in Box 14 in the joint names of the Sellers and the Buyers.

(b) Such deposit shall be made latest within five (5) Banking Days after the date of signing this Contract.

(c) Interest, if any, on such deposit shall be credited to the Buyers.

(d) Any fees or charges for establishing and holding such deposit shall be borne equally by the Sellers and the Buyers.

5. Payment

The Buyers shall release the deposit stated in Box 13 to the Sellers and shall pay the balance of the said purchase price in full free of bank charges to the Sellers' bank stated in Box 14 on delivery of the Vessel, but not later than three (3) Banking Days from the time the Sellers have tendered or retendered (as the case may be) notice of readiness for delivery in accordance with clause 8 (Notice of Readiness for Delivery).

6. Documentation

In exchange for the payment of the purchase price the Sellers shall furnish the Buyers with the following documents at the place of closing stated in Box 15, which shall be in English or with a certified English translation if in a language other than English:

(a) legal bill of sale transferring title of the Vessel and stating that the said Vessel is free from all encumbrances and maritime liens or any other debts whatsoever, notarially attested, legalised or apostilled as appropriate by the Consul or other competent authority;

(b) three (3) commercial invoices signed by the Sellers, stating the purchase price of the Vessel and her particulars as stated in Boxes 5-10 and Annex A (Vessel Details) as applicable;

(c) a certificate or transcript of registry evidencing the ownership of the Vessel on the date of delivery and that the Vessel is free from registered encumbrances and mortgages. Such certificate or transcript of registry shall be dated not earlier than five (5) days prior to Sellers tendering notice of readiness for delivery;

(d) a written undertaking from the Sellers to apply for and supply to the Buyers a certificate of deletion or closed transcript of registry latest thirty (30) days after delivery of the Vessel;

(e) a written undertaking by the Sellers to instruct the Master or their agents to promptly release and physically deliver the Vessel to the Buyers;

(f) the corporate authority of the Sellers according to which they decide the sale of the Vessel and a copy of the power of attorney authorizing the signature of the bill of sale; both documents to be notarially attested, legalised or apostilled as appropriate by the Consul or other competent authority;

PART II
RECYCLECON Standard Contract for the Sale of Vessels for Green Recycling

(g) a declaration according to which the Sellers guarantee that at the time of delivery the Vessel is free from all encumbrances and maritime liens or any other debts whatsoever;

(h) an incumbency certificate or other corporate document listing the directors of the Sellers; and

(i) power of attorney of the Buyers appointing one or more representatives to act on behalf of the Buyers in the performance of this Agreement, duly notarially attested and legalised or (as appropriate) apostilled.

At the time of delivery the Buyers and the Sellers shall sign a protocol of delivery and acceptance confirming the date and time of delivery of the Vessel. As soon as the full purchase price has been irrevocably credited to the Sellers' bank account stated in Box 14 the Sellers shall confirm in writing to the Buyers receipt of the full purchase price.

The Sellers shall make available to the Buyers copies, samples or drafts (as the case may be) of the documents listed in sub-clauses 6(a) to 6(i) within a reasonable time after the signing of this Contract, but no later than three (3) days prior to the date of the Sellers tendering notice of readiness for delivery.

7. Advance Notices of Arrival

The Sellers shall give to the Buyers fifteen (15), ten (10), seven (7), and three (3) days' notice of the expected time of arrival of the Vessel at the Place of Delivery.

8. Notice of Readiness for Delivery

When the Vessel is physically ready for delivery, the Sellers shall give to the Buyers a written notice of readiness for delivery. The notice of readiness shall be tendered during normal office hours at the Place of Delivery and, unless otherwise specifically provided elsewhere in this Contract, be accompanied by the following documents to the extent necessary:

(a) a certificate issued by a local marine surveyor confirming the LDT of the Vessel as per the original of the valid trim and stability booklet on board the Vessel, which has been sighted;

(b) a valid certificate issued by the relevant authorities on arrival at the Place of Delivery specifying that all the Vessel's cargo tanks, pump rooms and cofferdams are safe for entry and safe for hot work;

(c) a letter from the Sellers' local agents at the Place of Delivery stating that there are no pending dues against the Vessel at the time of delivery; and

(d) a letter signed and stamped by the Master stating that neither he nor the crew have any outstanding claims against the Vessel.

The Buyers shall either accept or reject the Notice of Readiness within one (1) Banking Day, failing which it shall be deemed accepted. A rejection of the Notice of Readiness shall be reasoned. In the event of a rejection, the Sellers may either maintain the original Notice of Readiness or make proper rectification and retender the Notice of Readiness.

9. Delivery

(a) The Vessel shall be delivered by the Sellers to the Buyers at the Place of Delivery under her own power with main engine and all generators in working condition, safely afloat, substantially intact, free of cargo, with anchors in place, unless otherwise described in Annex A (Vessel Details).

(b) If, on the Vessel's arrival, the Place of Delivery is inaccessible for any reason whatsoever including but not limited to port congestion, the Vessel shall be delivered and taken over by the Buyers as near thereto as she may safely get at a safe and accessible berth or at a safe anchorage which shall be designated by the Buyers, always provided that such berth or anchorage shall be subject to the approval of the Sellers which shall not be unreasonably withheld. If the Buyers fail to nominate such place within twenty-four (24) hours of arrival, the

PART II
RECYCLECON Standard Contract for the Sale of Vessels for Green Recycling

place at which it is customary for vessels to wait shall constitute the Place of Delivery.

(c) The delivery of the Vessel according to the provisions of sub-clause 9(b) shall constitute a full performance of the Sellers' obligations according to sub-clause 9(a) and all other terms and conditions of this Contract shall apply as if delivery had taken place according to sub-clause 9(a).

(d) All expenses incurred prior to delivery of the Vessel and all local fees/port disbursements relating to the Vessel, including repatriation of the crew shall be for the Sellers' account while all expenses after delivery of the Vessel, including import duties and other local taxes, if any, shall be for the Buyers' account.

(e) The Vessel with everything belonging to her shall be at the Sellers' risk and expense until she is delivered to the Buyers.

(f) The Vessel shall be delivered without any stowaways, contraband or arms and ammunition on board.

10. Earliest date of Delivery/Cancelling Date

(a) The Vessel shall tender notice of readiness for delivery in accordance with Clause 7 (Advance Notices of Arrival) on or after the date stated in Box 17 but latest on the date stated in Box 18 (hereinafter "the Cancelling Date").

(b) (i) Should the Sellers anticipate that notwithstanding the exercise of due diligence, the Vessel will not be ready for delivery by the Cancelling Date they may notify the Buyers in writing stating the date when they anticipate that the Vessel will be ready for delivery and propose a new date for the Cancelling Date. Upon receipt of such notification the Buyers shall have the option either to cancel the Contract according to Clause 21 (Sellers' Default) within two (2) Banking Days of receipt of such notice or of accepting the new date as the Cancelling Date. If the Buyers have not declared their option within two (2) Banking Days of receipt of the Sellers' notification or, if the Buyers accept the new date, the date proposed by the Sellers shall become the Cancelling Date.

(ii) If this Contract is maintained with the new Cancelling Date, all other terms and conditions hereof shall remain in full force and effect. Cancellation or non-cancellation by the Buyers in accordance with the provisions of sub-clause 10(b)(i) shall be without prejudice to any claim for loss and/or damages the Buyers may have against the Sellers under this Contract.

11. Post-Delivery Assistance

Following payment and delivery of the Vessel the Sellers shall assist the Buyers for a period not exceeding the number of days and at the daily cost stated in Box 19 with post delivery operations reasonably requested by the Buyers, provided the Sellers can arrange for crew as appropriate to remain with the Vessel for such period and obtain crew insurance cover. Such cost is payable by the Buyers to the Sellers on receipt of the Seller's invoice.

The Buyers shall assist in the safe disembarkation of the crew.

The Buyers shall indemnify and hold the Sellers harmless from any loss and/or liabilities incurred as a consequence of the post-delivery assistance.

12. Removals

(a) The Vessel shall be delivered with everything belonging to her on board without removals other than statutory certificates, hired equipment and those items stated in Annex B (Excluded Items). The Sellers shall also have the right to take ashore without compensation the following items: crockery, cutlery, linen and other articles bearing the Sellers' flag or name, as well as library, forms, etc., exclusively for use in the Sellers' vessels. Master's, Officers' and crew's personal belongings including slop chest and the Vessel's log book shall be excluded from the sale.

(b) Unless otherwise agreed, any remaining bunkers, lubricating oils, stores, equipment and spares used or unused

PART II
RECYCLECON Standard Contract for the Sale of Vessels for Green Recycling

on board at the time of delivery shall become the Buyers' property without extra payment.

(c) The Sellers shall, at the time of delivery, hand to the Buyers all plans, specifications and certificates, or copies hereof, as available and whether valid or invalid.

(d) The Sellers are not required to replace such material, spare parts or stores including spare tail-end shaft(s) and propeller(s), if any, which may be consumed or taken out of spare and used as replacement prior to delivery, but all replaced spares shall be retained on board and shall become the property of the Buyers.

13. Verification of Light Displacement Tonnage (LDT)

The Vessel's LDT shall be verified by the Vessel's valid trim and stability booklet, a copy of which shall be made available to the Buyers' representatives prior to the signing of this Contract.

The Sellers shall ensure that the original of the Vessel's trim and stability booklet is on board the Vessel at the time of tendering the notice of readiness in accordance with Clause 7 (Advance Notices of Arrival).

Should the Vessel's trim and stability booklet not be the builders' trim and stability booklet, the Buyers may request the builders' trim and stability booklet and any documentation relating to any subsequent modifications of the LDT, if available.

14. Charters, Encumbrances, Maritime Liens, Debts and Claims

The Sellers warrant that the Vessel, at the time of delivery, is free from all charters, encumbrances and maritime liens or any debts whatsoever.

Should any claims, which have been incurred prior to the time of delivery, be made against the Vessel, the Sellers hereby undertake to indemnify the Buyers against all consequences of such claims to the extent it can be proved that the Sellers are responsible for the aforementioned claims.

15. Charges

Any taxes, dues, fees and expenses connected with the purchase of the Vessel shall be for the Buyers' account, whereas similar charges connected with the closing of the Sellers' register shall be for the Sellers' account.

16. Buyers' Representatives

The Sellers agree to allow the Buyers to place up to three (3) representatives on board the Vessel once the deposit has been lodged in accordance with Clause 4 (Deposit) but not earlier than fifteen (15) days prior to expected delivery.

Whilst on board the Vessel, such representatives shall be at the sole risk, liability and expense of the Buyers and the Buyers shall indemnify the Sellers against any claim for loss and/or damages in this respect. The representatives must not interfere with the operation of the Vessel and they shall sign the Sellers' letter of indemnity prior to their embarkation.

17. Purpose of Sale

The Vessel is sold for Recycling only and the Buyers undertake and warrant that the Vessel will be recycled at the Ship Recycling Facility in accordance with the Ship Recycling Facility Plan and the Ship Recycling Plan.

18. Safe and Environmentally Sound Recycling

The Buyers shall on the Sellers' request (i) either provide a copy of the Ship Recycling Facility Plan or an attestation that the Ship Recycling Facility has a Ship Recycling Facility Plan and (ii) allow the Sellers to visit the Ship Recycling Facility to review the Ship Recycling Facility Plan and verify that the Ship Recycling Facility is compliant with the Ship Recycling Facility Plan.

PART II
RECYCLECON Standard Contract for the Sale of Vessels for Green Recycling

If not already provided, the Sellers shall provide the Buyers with Part I of the Inventory of Hazardous Materials as soon as possible after the date of this Contract.

The Sellers shall provide the Buyers with provisional Parts II and III of the Inventory of Hazardous Materials as soon as possible after the date of this Contract and final Parts II and III upon delivery of the Vessel.

The information contained in the Inventory of Hazardous Materials is given to the best of the Seller's knowledge but always without guarantee.

Following the receipt of Part I and the provisional Parts II and III of the Inventory of Hazardous Materials, the Buyers shall without undue delay provide the Sellers with the Ship Recycling Plan.

The Buyers shall ensure that after delivery the Sellers' representatives are allowed to visit the Ship Recycling Facility to ascertain that the Recycling of the Vessel is being conducted in accordance with the Ship Recycling Facility Plan and the Ship Recycling Plan.

The Buyers shall within two (2) weeks of completion of recycling of the Vessel provide the Sellers with a Statement of Completion as per Annex C (Statement of Completion).

19. Exemptions

Neither the Sellers nor the Buyers shall be under any liability if the Vessel should become an actual, constructive or compromised total loss before delivery, or if delivery of the Vessel by the Cancelling Date should otherwise be prevented or delayed due to outbreak of war, restraint of Government, Princes, Rulers or People of any Nation or the United Nations, Act of God, or any other similar cause beyond the Buyers' or the Sellers' control.

20. Buyers' Default

Should the deposit not be paid in accordance with the provisions of Clause 4 (Deposit), the Sellers shall have the right to cancel this Contract, and they shall be entitled to claim compensation for their losses and for all expenses incurred.

Should the purchase price not be paid in the manner provided for in this Contract the Sellers shall have the right to cancel the Contract, in which case the amount deposited together with interest earned, if any, shall be forfeited to the Sellers. If the deposit does not cover the Sellers' losses, they shall be entitled to claim further compensation for their losses and for all expenses incurred.

21. Sellers' Default

Should the Sellers fail to give notice of readiness in accordance with Clause 7 (Advance Notices of Arrival) or fail to execute a legal transfer or to deliver the Vessel with everything belonging to her by the Cancelling Date, the Buyers shall have the right to cancel the Contract, in which case the deposit in full shall be returned to the Buyers together with interest earned.

Whether or not the Buyers cancel this Contract the Sellers shall make due compensation to the Buyers for any loss and for all expenses incurred by their failure to give notice of readiness, to execute a legal transfer or to deliver the Vessel with everything belonging to her by the Cancelling Date, if such failure is due to the proven negligence of the Sellers.

22. BIMCO Dispute Resolution Clause

(a) This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

PART II
RECYCLECON Standard Contract for the Sale of Vessels for Green Recycling

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) This Contract shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Contract shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

(c) This Contract shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Contract shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding Sub-clauses 22(a), 22(b) or 22(c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Contract.

(i) In the case of a dispute in respect of which arbitration has been commenced under Sub-clauses 22(a), 22(b) or 22(c) above, the following shall apply:

(ii) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(iii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iv) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

PART II
RECYCLECON Standard Contract for the Sale of Vessels for Green Recycling

(v) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(vi) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vii) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(viii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(e) If Box 20 in Part I is not appropriately filled in, Sub-clause 22(a) of this Clause shall apply.

Note: Sub-clauses 22(a), 22(b) and 22(c) are alternatives; indicate alternative agreed in Box 20. Sub-clause 22(d) shall apply in all cases.

23. Entire Agreement

This Contract constitutes the entire agreement between the Sellers and the Buyers and no promise, undertaking, representation, warranty or statement by either party prior to the date of this Contract stated in Box 1 shall affect this Contract. Any modification of this Contract shall not be of any effect unless in writing signed by both the Sellers and the Buyers.

24. Notices

(a) Any notice to be given by either party to the other party shall be in writing and may be sent by fax, e-mail, registered or recorded mail or by personal service.

(b) The address of the Parties for service of such communication shall be as stated in Boxes 21 and 22 respectively.

ANNEX "A" (VESSEL DETAILS)

TO THE BIMCO STANDARD CONTRACT FOR THE SALE OF VESSELS FOR GREEN RECYCLING
CODE NAME: RECYCLECON

Vessel Details (Cl. 1, 2, 6(b), 9(a))

ANNEX "B" (EXCLUDED ITEMS)
TO THE BIMCO STANDARD CONTRACT FOR THE SALE OF VESSELS FOR GREEN RECYCLING
CODE NAME: RECYCLECON

Excluded Items (Cl. 12(a))

ANNEX "C" (STATEMENT OF COMPLETION)
TO THE BIMCO STANDARD CONTRACT FOR THE SALE OF VESSELS FOR GREEN RECYCLING
CODE NAME: RECYCLECON

STATEMENT OF COMPLETION OF SHIP RECYCLING

This document is a statement of completion of Ship Recycling for:

(*Name of the ship when it was received for recycling/at the point of deregistration*)

RECYCLECON Contract dated:

Particulars of the Ship as received for recycling

Distinctive number or letters:	
Port of Registry:	
Gross tonnage:	
IMO number:	
Name and address of shipowner:	
IMO registered owner identification number:	
IMO company identification number:	
Date of Construction:	

THIS CONFIRMS THAT:

The ship has been recycled in accordance with the Ship Recycling Plan at:

(Name and location of the Ship Recycling Facility)

and the recycling of the ship as required by the Contract was completed on:

Date of completion: (dd/mm/yyyy)
(Date of completion)

Issued at:
(*Place of issue of the Statement of Completion*)

Date of issue: (dd/mm/yyyy)
(*Date of issue*)

Signature:
(*Signature of the owner of the Ship Recycling Facility or a representative acting on behalf of the owner*)

Statement of Completion (Cl. 1, 18)

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Protection of Migrants at Sea

Iva Svalina

Contents

1. Introduction

Human migrations are an inevitable consequence of political and social movements that are constantly changing in today's world.

Around 3,5 % of the world's population are international migrants, which amounts to 272 million people.[1] One portion of these people are those most in need, such as people who are moving because of war, violence or the danger of serious human rights violations, who may be in a very vulnerable position. The last decade has revealed an unprecedented increase in the number of migrants who set out to cross the sea in order to migrate, primarily through the Mediterranean Sea, the main gateway to Europe.

Already in the first six months of 2021, about 813 died or went missing while trying to cross the Mediterranean Sea, which is almost five people per day.[2]

Since the analysis of the geopolitical context of migrations would go far beyond the scope of this thesis, the roots and explanations of current migration patterns will not form part of it. Rather, the thesis will analyse different ways of providing protection to migrants at sea to address whether existing legal norms provide a sufficient legal basis for their protection. Namely, this means that each chapter will be devoted to different forms of protection of migrants – through their right to be rescued at sea, through the criminalization of migrant smuggling and through substantive protection of migrants' rights. Since the analysis requires going beyond the rules of international maritime law, a certain part will be devoted to both the rules of international refugee law and international human rights law in the context relevant to the subject of this thesis. All these legal regimes necessarily interact when it comes to the protection of migrants at sea, but they also require a balance to be struck between them in order to provide adequate protection to those in need.

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1 World Economic Forum, "Global migration"

2 European Union Agency for Fundamental Rights, "Search and Rescue (SAR) operations"

The last chapter will be devoted to a brief analysis of the protection of migrants that exists in international and regional human rights systems with an emphasis on the complexities that may arise from the occurring situations.

2. Right to be rescued at sea

2.1 Introduction to the topic

The first pillar of protection of migrants at sea is the right of migrants to be rescued at sea, which coincides with the corresponding obligation of states to render assistance at sea. Although the duty to provide assistance at sea obliges states to render assistance to every person found at sea in danger of being lost, in recent decades this duty has most often been exercised towards migrants.

The next chapter will examine the main characteristics of such a duty and explore who is obliged to render it. Furthermore, jurisdictional issues that may arise from rendering assistance at sea will be analysed, together with the commercial and financial implications of that assistance.

2.2 General remarks on the duty to render assistance at sea

The obligation to render assistance to a person in distress at sea is a well-established maritime usage and a recognised duty under the rules of customary international law.[3] The codification of this duty can be found in Article 98 of the United Nations Convention on the Law of the Sea (in further text: UNCLOS), which states that the duty provides protection to '*any person*' and is defined as follows:

[3] Noussia, "The Rescue of Migrants and Refugees at Sea", 155–156.

> *'1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:*
>
> *(a) to render assistance to any person found at sea in danger of being lost;*
>
> *(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;*
>
> *…'*

This obligation is also enshrined in the International Convention for the Safety of Life at Sea (in further text: SOLAS Convention), International Convention on Maritime Search and Rescue (in further text: SAR Convention) and International Convention on Salvage. In all the aforementioned treaties this duty is not limited to a specific maritime zone, but rather has a broad geographical scope, despite the absence of a specific provision in UNCLOS regarding the duty to render assistance within the territorial sea.[4]

Although UNCLOS does not contain a definition of the term '*distress*', the term is defined in the SAR Convention as *'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance*.'[5] Because a large number of migrants is smuggled on small unseaworthy vessels, it seems persuasive to claim that these incompetent and overcrowded vessels fall under the '*distress*' provision.[6]

2.3 Duties of flag states and masters of ships

As seen in Article 98 of UNCLOS, the obligation to render assistance at sea is primarily placed on flag states. In practice, however, this obligation will mainly be performed by the masters of ships whose compliance with the obligation should be ensured by the relevant provisions in the

4 Ratcovich, "The Concept of 'Place of Safety'", 85.

5 Papastavridis, "Rescuing Migrants at Sea", 274.

6 *Ibid*., 275.

domestic laws of the flag states.[7] Given that masters sometimes neglect vessels carrying refugees in their vicinity,[8] the need for appropriate regulation by flag states seems even greater.

Nevertheless, the efforts of states in this area have not been sufficient, and the duty of rescue has only been partially translated into domestic legislation, although the International Maritime Organization and the UN Refugee Agency have continuously called upon states to take appropriate actions to oblige the masters of ships.[9]

Even though Article 98 of UNCLOS only mentions the duty of the master of the ship to proceed to the rescue of persons in distress with all possible speed, more detailed obligations of the master of the ship, upon receipt of the distress message, can be found in the SOLAS Convention.[10] The SOLAS Convention recognizes the possibility that providing assistance at sea may be unreasonable or unnecessary and in those circumstances the master of the ship may enter in the logbook the reasons for refusing assistance.[11]

If the master of a ship decides to provide search and rescue assistance, it is his responsibility to provide the necessary information to the rescue coordination responsible for the search and rescue region where the rescue takes place, including information on any assistance required and the preferred location of disembarkation of rescued persons.[12]

Since the master of a ship is obliged to provide assistance only if he can do so without endangering the ship, crew and passengers,[13] if he considers that rescue assistance can be done without this risk, he should ensure the general safety of the vessel throughout the whole rescue process.[14]

Although the obligation of flag states to render assistance at sea is indisputable, its enforcement in practice is practically impossible. Of

7 Noussia, "The Rescue of Migrants and Refugees at Sea", 158–159.
8 Røsæg, "Refugees as rescuees", 49.
9 Noussia, "The Rescue of Migrants and Refugees at Sea", 158–159.
10 *Ibid.*, 159.
11 Chapter 5, Regulation 10(a) SOLAS Convention
12 UN High Commissioner for Refugees (UNHCR), "Rescue at Sea", 10–11.
13 Article 98.1 UNCLOS
14 Noussia, "The Rescue of Migrants and Refugees at Sea", 161.

additional concern is the fact that one third of vessels in the world are registered under the flags of convenience and it is doubtful whether these states will be willing to impose legal consequences on vessels that do not comply with the obligation to render assistance at sea.[15]

2.4 Commercial implications of master's duty

Rescue of persons at sea can have serious financial impacts, and not only for the shipowner of the vessel which is providing assistance.

If the master of the ship proceeds to the rescue, this will often result in a deviation from the planned route, which can have significant consequences, especially in relation to contracts for the carriage of goods by sea. However, deviation from the route for the purposes of rescue or attempted rescue is recognized in most standard forms of contracts of carriage of goods as a justified deviation that will not impose liability for loss or damage to the carrier.[16] This puts a burden on the cargo owners who will have to bear the loss unless the loss is covered by insurance, which will also depend on many different factors.

Another problem that arises from the deviation of the ship from the planned route is a delay that can inflict a financial loss to many different actors.[17] This can cause even greater losses for shipowners than those related to individual transport, especially if the delay is followed by a loss of credibility in the market.[18]

Hence, the burden placed on the shipping industry in rescuing people at sea can be considered unsustainable,[19] and the financial reasons for refusing to provide assistance can seriously undermine attempts to create an effective system of assistance to those in need of assistance at sea.

To combat this problem, which in 2014 resulted in the deviation from the route of 650 merchant ships, the international community has focused

15 Barnes, "Refugee Law at Sea", 51.

16 Noussia, "The Rescue of Migrants and Refugees at Sea", 164–166.

17 *Ibid*., 168–169.

18 Røsæg, "Refugees as rescuees", 46.

19 Noussia, "The Rescue of Migrants and Refugees at Sea", 169.

its attention on minimizing the delays of vessels involved in rescue operations, by introducing the necessary amendments to the SOLAS and SAR Conventions,[20] which will be discussed further in the thesis.

2.5 Duty of the coastal state

Although the duty to render assistance logically binds flag states and imposes certain obligations on the shipowner and the master of the ship, coastal states also have certain obligations. This is evident from Article 98 para 2 of the UNCLOS which states:

> *'Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.'*

The obligations of coastal states are listed in more detail in the SOLAS and SAR Convention, the latter of which was the first international instrument that established a comprehensive system to cover search and rescue operations. The system established by the SAR Convention obliges States Parties to provide arrangements for appropriate search and rescue (in further text: SAR) services in their coastal waters, while encouraging them to conclude SAR agreements involving the establishment of SAR regions with neighbouring countries.[21] Established rescue coordination centres and rescue sub-centres should have the necessary arrangements within their search and rescue regions to receive distress alerts and have the necessary arrangements for communication with persons in distress that should be operational on a 24-hour basis.[22]

The establishment of this system, whose purpose is to ensure the coordination of all operations by the SAR organization, was considered

[20] IMO, "UN agencies meet", as cited in Noussia, "The Rescue of Migrants and Refugees at Sea", 168–169.

[21] IMO, "International Convention on Maritime Search and Rescue"

[22] Article 2.3.2. SAR Convention

a major step forward at the time. Namely, before its establishment, such a system did not exist, and in certain areas there were no organizations that could quickly provide assistance to those in need at sea.[23]

Following the adoption of the SAR Convention, the Maritime Safety Committee has divided the world's oceans into 13 search and rescue areas, within which each country has a demarcated SAR region for which it is responsible.[24]

Although the system covering the search and rescue obligations in the SAR Convention is detailed and provides a clear international legal duty for coastal states to organize the rescue of persons in distress at sea, the system appears to create more obligations of conduct than results. Accordingly, the obligation does not contain an additional duty – the obligation to ensure a place of safety for rescued persons. This has changed with the introduction of amendments to the SOLAS Convention and SAR Convention, as these amendments have obliged coastal states to also ensure a place of safety for rescued persons.[25]

2.6 Jurisdictional issues

The duty to render assistance at sea is not limited to a specific maritime zone and is primarily placed on flag states, while the nexus of jurisdiction between the people being rescued and the shipmaster of the vessel need not exist.[26] However, coastal states also have certain obligations established under UNCLOS, SAR and SOLAS Convention.

Since the obligation of coastal states under the SAR Convention is to coordinate and organize the rescue of persons in distress, the question arises whether the SAR Convention entitles coastal states to instruct foreign vessels not to assist in certain situations or in which matters to assist. However, no provision of the SAR Convention indicates that

[23] Noussia, "The Rescue of Migrants and Refugees at Sea", 162.

[24] UN Atlas of the oceans, "Search and rescue"

[25] Papastavridis, "Rescuing Migrants at Sea", 278., 287.

[26] Vella De Fremeaux, G. Attard, "Rescue at Sea and the Establishment of Jurisdiction"

coastal states have such a right.[27] This is not surprising given that the search and rescue areas established under the SAR Convention do not constitute the jurisdictional zones, but rather delimited zones in which states have certain search and rescue obligations.[28]

However, the situation is somewhat different when it comes to the territorial sea. Article 2 of UNCLOS states that the sovereignty of a coastal state extends, in addition to its land territory and internal waters, to its territorial sea, the air space over the territorial sea as well to its bed and subsoil. Although coastal states enjoy sovereignty in their territorial sea, the duty to render assistance at sea does not end when the vessel enters the territorial sea of coastal states.[29] Even though the vessel conducting rescue operations in the territorial sea does not need the permission of the coastal state,[30] the coastal state has the authority to give certain instructions on how to assist.[31]

Nevertheless, what has to be considered is that the power of the coastal state in the territorial sea is limited in such a way that foreign ships enjoy the right of innocent passage through the territorial sea, meaning that such a passage should not affect peace, good order or security of the coastal state.[32] If a vessel assisting another vessel is in innocent passage, the coastal state will not have jurisdiction to give instructions regarding assistance.[33]

Hence, the interplay between coastal states and flag states must be properly balanced because saving lives at sea will depend on their compliance with the rules of international law.

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27 Røsæg, "Maritime rescue operations in the Mediterranean"

28 Vella De Fremeaux, G. Attard, "Rescue at Sea and the Establishment of Jurisdiction"

29 Button, "International Law and Search and Rescue", 27.

30 *Ibid.*, 40.

31 Røsæg, "Maritime rescue operations in the Mediterranean"

32 Article 19.1. UNCLOS

33 Røsæg, "Maritime rescue operations in the Mediterranean"

2.7 Rendering assistance at sea by non-governmental organizations

All the shortcoming of maritime rescue can be well illustrated by the example of the Mediterranean Sea, where figures show that since 2015, more than 19,000 people have died or have been listed as missing in the Mediterranean and the Atlantic.[34] In addition to the shortcomings of European states when it comes to their rescue efforts, the EU policy aimed at balancing existing obligations towards migrants and the intention to maintain control over its borders has proved unsuccessful.[35]

To address the shortage of states when it comes to their rescue efforts, NGOs have begun to fill in for their lack of intervention and have become one of the main actors in the Mediterranean Sea. However, the work of NGOs did not receive much approval and was continuously exposed to criticism, such as that migrant smugglers from the beginning of greater involvement of NGOs, began to use more dangerous vessels, because they are counting on rescue from NGOs.[36]

Nevertheless, the involvement of NGOs in rescue operations highlighted an additional problem, the existing legal vacuum of international rules involving operations at sea, which are created for states but may also involve non-state actors, leading to the complexity of rescue operations.[37] An additional problem is created by the practice of countries that have initiated a number of criminal and administrative proceedings against NGOs and volunteers since 2018 for their participation in rescue operations at sea.[38]

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34 European Council, "Saving lives at sea"

35 Steinhilper, Gruijters, "Border Deaths in the Mediterranean"

36 Simoncini, "The migration crisis", 64.

37 *Ibid*., 69.

38 The European Union Agency for Fundamental Rights, "Search and Rescue (SAR) operations".

2.8 Final remarks

The protection of migrants at sea must primarily be achieved through rescue operations at sea. Although the rules contained in UNCLOS, the SOLAS Convention and the SAR Convention provide a solid legal basis for both masters of the ships, flag states and coastal states, in practice, rescuing of migrants at sea has proven to be far from undemanding. The reasons for this vary, ranging from the commercial implications which rendering of assistance can have, to the unwillingness of vessels to engage in rescue operations due to the reluctance of coastal states to provide a place of safety for migrants after they have been rescued. The situation is further complicated by jurisdictional issues and policies of some countries towards the involvement of NGOs in rescue operations, primarily in the Mediterranean Sea.

The terrifying statistical data, especially in the Mediterranean Sea, confirm that the existing system of protection of migrants at sea is deficient and that it is the responsibility of both the states and the entire international community to do something about it.

3. Protection of migrants at sea by criminalizing the migrant smuggling

3.1 Introduction to the topic

Smuggling of migrants at sea often involves the use of unseaworthy vessels, which puts migrants at great risk in their attempts to reach certain destination and have a better life. Furthermore, such vessels are often overcrowded and lack adequate supplies, such as food and water. Smugglers are often more preoccupied with the possibility of making a financial profit than caring for the lives of the people on board. Needless

to say, these vessels often sail without a flag and proper documentation, while their shipowners remain unidentified.

Therefore, the issue of protection of migrants at sea is necessarily related to the fight against crime – smuggling of migrants. This chapter will focus mainly on the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (in further text: Protocol for Migrant Smuggling), and in particular its jurisdictional provisions in addition to those contained in UNCLOS, in order to examine which states and under what conditions can act to prevent and combat migrant smuggling.

3.2 The crime of migrant smuggling

Smuggling of migrants is one example of the illegal movement of people by sea, in addition to the slave trade and human trafficking. The work of the United Nations in this area has been particularly significant so far, especially since the first and only legal instrument dealing with the smuggling of migrants and the much-needed protection of the rights of migrants at sea has been adopted under its auspices.[39]

With the adoption of the Protocol for Migrant Smuggling, which entered into force on 28 January 2004 and currently has 150 States Parties, smuggling of migrants has been recognized as a form of transnational organized crime.[40]

The crime encompasses both migrants who have been voluntarily smuggled and those who have been the subject of coercion,[41] and is defined as follows:

> *'Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a natural or a permanent resident.*"[42]

[39] Mussi, "Countering migrant smuggling", 489.

[40] United Nations Treaty Collection, "Protocol for Migrant Smuggling"

[41] Guilfoyle, *Shipping Interdiction*, 181.

[42] Article 3.(a) The Protocol for Migrant Smuggling

3.3 The aim of the Protocol for Migrant Smuggling

The aim of the Protocol for Migrant Smuggling is to prevent and combat the smuggling of migrants while protecting the rights of smuggled migrants and promoting cooperation between States Parties.[43] States Parties are obliged to enact legislative and other measures necessary to establish as criminal offences the smuggling of migrants, as well as the production, procurement, supply or possession of a fraudulent document which enables the illegal stay of migrants in the State concerned.[44] Furthermore, the Protocol recognizes that endangering the life or safety of migrants or inhuman or degrading treatment of them should be considered as aggravating circumstances in the adopted legislation of the States Parties.[45]

Although the Protocol does not explicitly oblige States Parties to investigate and prosecute persons suspected of having committed this crime, it may be said that this stems from the obligation imposed on States Parties to criminalize acts related to the smuggling of migrants.[46] In this regard, it is also worth mentioning that the Protocol emphasizes that migrants shall not be prosecuted for the fact that they were the object of any of the above-mentioned criminal offences.[47]

Further emphasis on the need to protect migrants who have been the object of smuggling is evident from the obligations imposed on States Parties by Article 16 of the Protocol for Migrant Smuggling. Emphasis is placed on the need to protect the right to life of these migrants and their right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, with corresponding obligations of States Parties to provide appropriate assistance to migrants whose lives or safety were endangered by smuggling.

It follows from the above-mentioned Article 16 and Article 5 of the Protocol for Migrant Smuggling, which stipulates that smuggled migrants

43 Article 2. The Protocol for Migrant Smuggling
44 *Ibid.*, Article 6.1.
45 *Ibid.*, Article 6.3.
46 Ratcovich, "The Concept of 'Place of Safety'", 116.
47 Article 5. The Protocol for Migrant Smuggling

should not be held criminally liable for the fact that they have been the object of smuggling, that these migrants should be taken to a place of safety. As to this day, there exist no definition of the term '*place of safety*', which will be further discussed in Chapter 4.3. Therefore, these provisions will also be helpful for its interpretation, in particular by clarifying that disembarking migrants where they may be subjected to certain conduct that may amount to 'penalty', would be contrary to the Protocol for Migrant Smuggling.[48]

3.4 Jurisdiction for the crimes of migrant smuggling

3.4.1 Jurisdiction under UNCLOS

3.4.1.1 In general

The question of jurisdiction at sea when it comes to the issue of migrants at sea is a complex matter, not only because the rights and obligations of states differ in each jurisdictional zone, but also because the crime of migrant smuggling usually affects several states at the same time. The international law rules on jurisdiction at sea are mainly contained in UNCLOS and therefore need to be examined in more detail.

Territorial jurisdiction of the state means that the state has the right to regulate certain conduct on its own territory and the right to investigate and prosecute crimes committed. This difference between the scope of prescriptive jurisdiction and the scope of enforcement jurisdiction also exists in other circumstances when the state may establish jurisdiction, namely in cases of extraterritorial jurisdiction. While states may in some cases regulate extraterritorial conduct and investigate and prosecute crimes committed abroad, the general right of states to enforce the prescribed law outside their territory does not exist. However, the rules regarding the enforcement jurisdiction are somewhat different in maritime situations and contain two exceptions to the general rule.[49]

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48 Ratcovich, "The Concept of 'Place of Safety'", 117.

49 Guilfoyle, *Shipping Interdiction*, 7–9.

The first exception to the rule that enforcement jurisdiction is territorial concerns the right of flag states to exercise jurisdiction over criminal offences committed on board of their flag vessels on the high seas.[50]

The second exception concerns situations where a non-flag state may exercise jurisdiction over criminal acts committed on board of other flag vessel in international waters. That kind of interdiction consists of two different steps – *'boarding'* and *'seizure'* of the vessel. *'Boarding'* a vessel involves various actions – stopping the vessel, boarding the vessel and searching the vessel to find evidence that the prohibited conduct has occurred. Further steps, such as arresting people on board and seizing the vessel or cargo, are a part of actions referred to as *'seizure'* of the vessel.[51]

Which state and under what circumstances it will have the right to exercise jurisdiction will largely depend on the maritime zone in which the vessel is located. In international waters, government vessels of a non-flag state generally may not board the vessel without the prior consent of the flag state of the vessel. The consent of the flag state will also be required for certain interdictions of the coastal state, where the coastal state does not have explicit jurisdiction over certain acts. However, the consent of the flag state will normally only contain a permission to board the vessel, but not the seizure of the vessel, and therefore the jurisdiction of the states may become concurrent when the right to board the vessel is granted.[52]

In order to understand when states can interdict a vessel without the permission of the flag state, the jurisdictional rights of states in the territorial sea, the contiguous zone and on the high seas must be examined.

3.4.1.2 Territorial Sea

As stated in Article 2 of UNCLOS, the sovereignty of a coastal state extends to its territorial sea, hence there exist a right of prescriptive and enforcement jurisdiction of the state in its territorial sea.

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50 Guilfoyle, *Shipping Interdiction*, 8–9.

51 *Ibid.*

52 *Ibid.*, 9–10.

Consequently, if a military vessel belonging to a coastal state were to intercept a vessel illegally transporting migrants in its territorial sea, migrants on that vessel would be said to be *de facto* present in the territory of that coastal state from the moment of interception. From that point on, coastal states would have certain rights and obligations towards migrants, in particular the duty to act in accordance with the principle of *non-refoulement*,[53] a principle which will be further discussed in Chapter 4.2.3.

However, the power of the coastal state in the territorial sea is limited in such a way that foreign ships enjoy the right of innocent passage through the territorial sea, meaning that such passage should not affect peace, good order or security of the coastal state.[54] Among other examples of passages affecting the peace, good order or security of the coastal state, '*the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State*'[55] is mentioned in UNCLOS. However, it is the obligation of the coastal state to give due publicity to such laws and regulations[56] in order to give passing vessels the opportunity to satisfy the requirement for their passage to be considered innocent.

It follows from the previous paragraph that states can take not any, but only the necessary measures to prevent the passage of the ship which could intervene with its immigration rules.[57]

When it comes to the criminal jurisdiction of coastal states under the provisions of UNCLOS, it is necessary to mention some general remarks.

The right of a coastal state to exercise criminal jurisdiction on a foreign ship exists without restrictions if the ship is passing through the territorial sea of the state after leaving its internal waters.[58] However, the right of innocent passage limits the state's enforcement jurisdiction within

[53] Šošić, "Izbjeglice na moru" ["Refugees at Sea"], 631.
[54] Article 19.1. UNCLOS
[55] *Ibid*., Article 19.2.(g)
[56] *Ibid*., Article 21.3.
[57] *Ibid*., Article 25.1.
[58] *Ibid*., Article 27.2.

its territorial waters,[59] whereas the coastal state should not exercise its criminal jurisdiction over a foreign ship passing through its territorial sea in respect of crimes committed on board of the ship during its passage, besides in exceptionally prescribed cases. One of these prescribed cases will be if the consequences of the crime extend to the coastal state or the crime disturbs the peace of the country or good order in the territorial sea.[60]

It should be noted that the provision uses the term '*should not*', which means that states are not explicitly prohibited from exercising criminal jurisdiction in these cases.[61] Nevertheless, states are usually reluctant to interfere in the internal affairs of other states, so they usually adhere to this provision, which is why Churchill and Lowe described it as a '*codifying usage*'.[62]

However, there is an explicit prohibition regarding the exercise of criminal jurisdiction over a foreign ship passing through territorial waters without entering the internal waters of the coastal state in the case where the crime was committed before the ship entered the territorial sea.[63]

Returning to the issue of migrants, the question arises as to what is the right of the coastal state when it comes to a foreign vessel trying to disembark smuggled migrants contrary to the immigration laws and regulations of the coastal state. As mentioned, the passage will not be considered innocent if the loading or unloading of people is contrary to the immigration laws and regulations of the coastal state, which means that the intention to disembark smuggled migrants contrary to the regulations of the coastal state would fall under this provision.

This would give the state the right to prevent the passage of the vessel, but also to exercise its criminal jurisdiction, as this would be one of the exceptions under which the coastal state can exercise its jurisdiction.[64]

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59 Guilfoyle, *Shipping Interdiction*, 11.

60 Article 27.1. UNCLOS

61 Guilfoyle, *Shipping Interdiction*, 11.

62 Churchill, Lowe, *The Law of the Sea*, 95-9, as cited in Guilfoyle, *Shipping Interdiction*, 12.

63 Article 27.5. UNCLOS

64 Elserafy, "The Smuggling of Migrants", 26–27.

Contrary to the above situation, the question arises about the position of the coastal state in relation to a foreign vessel that smuggles migrants, but is destined to another state. A direct answer to this question is difficult to find in the UNCLOS provisions, as it is still debated whether Article 19(2), which defines when the passage shall not be considered innocent, contains an exhaustive list or not. At this point, the provisions of the Protocol for Migrant Smuggling could be helpful, as they oblige states to cooperate in preventing and combating smuggling of migrants by sea, but also require the coastal state to obtain the flag state consent before taking any action against a foreign vessel which smuggles migrants.

3.4.1.3 The contiguous zone

In the contiguous zone, states can exercise certain controls necessary to:

> *'a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;*
> *b) punish infringement of the above laws and regulations committed within its territory or territorial sea.*[65]

The coastal state's ability to prevent infringement logically applies to incoming vessels, but not to vessels whose disembarkation is intended to take place in another coastal state, while the coastal state's ability to punish infringement applies to vessels that have already left the territorial sea.[66] However, as argued by some legal scholars, it would not be necessary for a vessel to commit an infringement in the territorial sea, but the provision also covers offences that violates the laws and regulations of the coastal state in the territorial sea, but committed in the contiguous zone.[67]

Although the precise scope of this provision, regarding the interpretation of the term '*prevent*', has not been agreed among legal scholars, state practice seems to confirm the rights of the coastal state to prevent infringement of its immigration laws and regulations by giving them the right to interdict and remove vessels from the contiguous zone.

65 Article 33. UNCLOS

66 Elserafy, "The Smuggling of Migrants", 29–31.

67 Guilfoyle, *Shipping Interdiction*, 12–13.

However, while taking these actions, states should act in accordance with the *non-refoulement* principle.[68]

3.4.1.4 The High Seas

While vessels are on the high seas, they shall be subject to the exclusive jurisdiction of their flag state,[69] unless certain exceptions referred to in Article 110 of UNCLOS are met. However, in order to alleviate the exclusive jurisdiction of flag states, states have concluded a series of bilateral and multilateral treaties that allow the exercise of certain rights by non-flag states.[70]

In the case of vessels which cannot claim the nationality of any country or which use the flags of two or more states as they consider convenient and are therefore assimilated with a stateless ship, each state may exercise the right to visit those ships in accordance with Article 110 of UNCLOS. Whether there is a right to seize the vessel after its inspection and what are the conditions for exercising that right is still controversial in international practice, since this is not defined by UNCLOS provisions.[71] As migrants are often transported in smaller vessels without a prominent flag of the state, it is to be expected that this provision will be used frequently in practice. Nevertheless, while exercising their rights, states must act in accordance with the *non-refoulement* principle, as it has been established that this principle applies to any territory in which a state can exercise effective jurisdiction, including even extraterritorial jurisdiction.[72]

With regard to the specific rules of jurisdiction of non-flag states regarding the smuggling of migrants, it should be noted that UNCLOS does not regulate or provide additional rules on jurisdiction, although some states have argued that smuggling of migrants can be considered modern slavery and fall under Article 110 which gives non-flag states

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68 Elserafy, "The Smuggling of Migrants", 29–31.

69 Article 92. UNCLOS

70 Guilfoyle, *Shipping Interdiction*, 19.

71 *Ibid.,* 17–18.

72 See *infra* Chapter 4.2.3.6.

certain rights in respect to foreign vessels.[73] However, the Protocol for Migrant Smuggling deals extensively with the jurisdiction of states in the case of migrant smuggling, but in practice does not differ from the provisions of UNCLOS, since the exercise of jurisdiction of a foreign state depends on the consent of the flag state.

3.4.2 Jurisdiction under the Protocol for Migrant Smuggling

The interdiction of vessels involved in the migrant smuggling occurs either unilaterally or based on existing treaties. It is precisely the Protocol for Migrant Smuggling that gives the right to maritime interdiction in certain cases.[74] As UNCLOS lacks provisions dealing with the issue of migrant smuggling, it is inevitably important that the Protocol for Migrant Smuggling lays down more detailed rules and clarifies the rights and obligations of non-flag states when it comes to enforcing jurisdiction over vessels involved in migrant smuggling.

Since there exists the obligation of States Parties to cooperate to prevent and suppress smuggling of migrants by sea, Article 8 of the Protocol establishes the further right of a state which has reasonable grounds to suspect that one of its flag vessels is engaged in smuggling of migrants by sea, to request the assistance of other state in order to combat smuggling. The requested state should render such assistance *'to the extent possible within their means'*.

In an example to the contrary, when a state has reasonable suspicions that a vessel flying the flag of another State Party is involved in the smuggling of migrants by sea, it may notify that flag state, request confirmation of registry and request approval to take appropriate measures against that vessel. It is the right of the flag state to authorise the requesting state to board the vessel, search the vessel and take appropriate measures when evidence of smuggling is found.[75] Therefore, the possible actions of the non-flag state depend on the authorisation of the flag state and,

[73] Elserafy, "The Smuggling of Migrants", 33–34.
[74] Guilfoyle, *Shipping Interdiction*, 181.
[75] Article 8.2. The Protocol for Migrant Smuggling

in addition to authorised measures, States Parties can take additional measures only if such measures are necessary to eliminate imminent danger to human life or if they are permitted by relevant bilateral or multilateral treaties.[76]

It appears from this provision that the flag state has preferential jurisdiction to prosecute the offence committed, unless it has decided to permit the interdicting state to prosecute instead.[77] However, it follows from the United Nations Convention against Transnational Organized Crime (in further text: UNTOC) that a State Party may, if the alleged perpetrator is in its territory and the State Party does not extradite him, establish its jurisdiction over acts covered by UNTOC.[78] Since the provisions of UNTOC apply *mutatis mutandis* to the Protocol for Migrants Smuggling, unless the Protocol states otherwise, it appears that a State Party which is authorised to remove an offender from a flag vessel acquires jurisdiction after transmitting offender to its territory.[79]

The last example of a situation that may occur is when a State Party has a reasonable suspicion that a vessel is stateless and involved in the smuggling of migrants by sea, which entitles that state to board and search the vessel. If its suspicions are confirmed, the State Party may take appropriate measures in accordance with the relevant provisions of domestic and international law.[80] Uncertainties regarding this provision are not unknown, as the question of the scope of the right of states to exercise jurisdiction over stateless vessels also concerns some other treaties.[81]

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76 Article 8.5. The Protocol for Migrant Smuggling
77 Guilfoyle, *Shipping Interdiction*, 186.
78 Article 15.4. UNCLOS
79 Guilfoyle, *Shipping Interdiction*, 186.
80 Article 8.7. The Protocol for Migrant Smuggling
81 Guilfoyle, *Shipping Interdiction*, 185.

3.5 Final remarks

Legal rules that impose specific obligations on states to prevent and combat the migrant smuggling cannot be observed isolated from international rules on the law of the sea, and in particular its jurisdictional provisions. The analysis of the jurisdictional powers of the states sought to point out that the current rights of the states to interdicts vessels potentially involved in the smuggling of migrants are very limited. This is primarily visible on the high seas, where even the Protocol for Migrant Smuggling does not introduce a special legal basis for the jurisdiction over a foreign vessel, but makes it dependent on the approval of the flag state of the vessel. However, wider opportunities for action by states may arise from situations involving stateless vessels. Nevertheless, when acting in accordance with these rules, the rules deriving from international refugee law and international human rights law must be respected.

However, the issue of migrant smuggling cannot be viewed in isolation from the wider social and economic picture, and it is inevitable that smuggling of migrants will continue for as long as migrants will not have the opportunity to safely and legally access foreign countries. Regardless of the level of cooperation between states and the ever-increasing penalties for migrant smugglers, it seems inescapable that smuggling will persist until effective action is taken to address the root causes of migrations.

4. Substantive protection of migrants at sea

4.1 Introduction to the topic

The protection of the rights of migrants at sea is achieved not only by rescuing migrants at sea and by the efforts and coordination of states in preventing and combating the criminal offense of smuggling of migrants, but also by substantive protection of the rights of migrants. This applies

both to the protection of the fundamental human rights of migrants throughout the rescue operation and to their right to be taken to a place of safety after the rescue operation.

The first part of this chapter will deal with the protection of the fundamental human rights of migrants with significant emphasis on the principle of *non-refoulement*. Since the principle has a different scope of application in international refugee law and international human rights law, depending on whether the principle applies to migrants, refugees or asylum-seekers, the difference between these terms will be examined before going further into the differences and scope of application of the *non-refoulement* principle under international refugee law and international human rights law.

The second part of the chapter will focus on the concept of '*place of safety*', in particular to the analysis of amendments to the SAR Convention and SOLAS Convention, but also on the IMO Guidelines on the Treatment of Persons Rescued at Sea in order to determine whether current international legal rules provide a sufficient basis to ensure the protection of migrants after their rescue.

4.2 Protection of fundamental human rights

4.2.1 In general

In order to prevent persons who do not have the right to stay within their territory, states apply a number of measures, from those aimed at controlling state borders to repatriation and expulsion of aliens from its territory. Nevertheless, this right of states comes into the focus of the international community especially when it comes to the need to protect the fundamental rights of migrants.[82]

States should act as guarantors of human rights and ensure that people within their jurisdiction are not deprived of those rights. Because human rights include a wide range of different rights, including civil, social and

[82] Mussi, "Countering migrant smuggling", 489.

cultural rights, which are largely interdependent, denying the enjoyment of one right can often affect the enjoyment of another.

From the fact that states can exercise jurisdiction in international areas, it follows that fundamental human rights should also be guaranteed to persons in distress at sea.[83] The right to life, liberty and security of the person[84] are examples of these rights, but also rights and obligations that apply specifically to asylum-seekers or are related to the situation of assistance provided at sea.[85]

The principle that is fundamental to the protection of refugees, asylum-seekers and migrants is the principle of *non-refoulement*. This principle aims to alleviate the differences that exist between the right of states to exercise sovereignty and prevent illegal entry into their own territory and the need to protect these vulnerable groups of people. As the application of this principle differs somewhat for refugees and asylum-seekers and for migrants, it is first necessary to examine the difference between the terms '*refugee*', '*asylum-seeker*' and '*migrant*'.

4.2.2 Refugees, asylum-seekers and migrants

4.2.2.1 The terms

The terms '*migrants*' and '*refugees*' are often used as synonyms in public discourse, which is a misconception that cannot be considered irrelevant. This misconception even led to the announcement of the well-known television channel Al Jazeera that they will replace the term '*Mediterranean migrant crisis*' with the term '*Mediterranean refugee crisis*', in order to prevent possible misconceptions related to the use of the wrong term.[86]

However, these terms have a specific meaning associated with certain rights that belong to each category of persons – refugees, asylum-seekers and migrants, and their misuse can lead to the denial of rights to one of these groups.

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83 Barnes, "Refugee Law at Sea", 61.

84 Article 3. Universal Declaration of Human Rights

85 Barnes, "Refugee Law at Sea", 61–62.

86 Habitat for Humanity, "Refugees, Asylum Seekers & Migrants"

4.2.2.2 Refugees

The term refugee is described in the Convention relating to the Status of Refugees (in further text: The Refugee Convention), as amended by the 1967 Protocol relating to the Status of Refugees (in further text: Protocol), where it is stated that the term refugee shall mean any person who:

> *'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'*[87]

Therefore, refugees are people who have crossed an international border to find security in another country, fleeing war, violence, and persecution. It is particularly surprising that even 68 % of refugees displaced across borders come from just five countries – Syria, Afghanistan, Myanmar, South Sudan, and Venezuela.[88]

The most important legal instrument determining the rights and obligations of refugees is the aforementioned Refugee Convention with its 1967 Protocol. According to the latest available data, 149 United Nations Member States are currently parties to The Refugee Convention, its Protocol or both, while 44 United Nations Member States are not parties, including some of the major refugee-hosting countries.[89]

4.2.2.3 Asylum-seekers

The distinction between the terms '*refugee*' and '*asylum-seeker*' can often be confusing, especially given that every refugee is initially an asylum-seeker, while not every asylum-seeker will be recognized as a refugee.

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87 Article 1. A.(2) The Refugee Convention

88 USA for UNHCR, "What is a Refugee?"

89 Janmyr, "From State Petitions to Protection Space"

However, an asylum-seeker is a person who claims to be a refugee and that there exists a well-founded fear that returning to his or her country could lead to its persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, but whose asylum application has not yet been decided.[90]

4.2.2.4 Migrants

There is no universally accepted definition of '*migrant*', but it is a common understanding that the term refers to a person who chooses to relocate, not because of the risk of persecution, but for any other reason, such as work or education. Therefore, it is said that migrants can return home safely if they want, unlike refugees.[91]

The distinction between these terms is important in relation to the subject of this thesis, because certain protection is limited only to persons who fall under the provisions of the terms '*refugee*' and '*asylum-seeker*'. Since the focus of this chapter is on the *non-refoulement* principle, the importance of the distinction between these terms will be seen when examining the difference between the *non-refoulement* principle under international refugee law and international human rights law.

4.2.3 The *non-refoulement* principle

4.2.3.1 In general

Although there exists the duty to render assistance at sea, the duty is not followed by a corresponding right to disembark the rescuees and the question of disembarkation will generally be decided within the discretion of the port states, which could have negative impacts for the rescue operations.[92] It is at this point that the well-known obligation of states to ensure the enjoyment of fundamental human rights to every person within its jurisdiction, at all times, becomes extremely important.

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90 Habitat for Humanity, "Refugees, Asylum Seekers & Migrants"

91 IOM, "Who is a migrant?"

92 Røsæg, "Refugees as rescuees", 55.

Persons rescued at sea may claim to be refugees or asylum-seekers or to fear persecution or ill-treatment if disembarked at a particular location. This will impose an obligation on all actors involved in the rescue process to adhere to certain principles existing in international law, of which the principle of *non-refoulement* is of particular importance.[93]

The right of individuals to seek and enjoy asylum for persecution has already been mentioned in Article 14 of the Universal Declaration of Human Rights (in further text: UNHR), an instrument that marked a turning point in the field of international human rights protection.

To date, however, there is no corresponding legally binding obligation, in any of the treaties with universal scope, of the principle set out in Article 14 of UNHR, nor it is likely that this article reflects customary international law. Precisely because of the absence of this provision, primary protection against persecution under international refugee law is provided through the imposition of a *non-refoulement* obligation, whose principle can be described as '*the cornerstone of asylum and of international refugee law*'.[94]

4.2.3.2 The *non-refoulement* principle under international refugee law

The Refugee Convention defines the principle of *non-refoulement* in Article 33 para 1 as follows:

> '*No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*'

It follows from this provision that the *non-refoulement* principle under international refugee law clearly protects only '*statutory refugees*', i.e. persons who fall under the term '*refugee*' as provided for in the Refugee Convention. Since the determination of refugee status is declarative in

93 UN High Commissioner for Refugees (UNHCR), "Rescue at Sea", 8.

94 UNHCR, "Note on the Principle of Non-Refoulement", as cited in Ratcovich, "The Concept of 'Place of Safety'", 108.

nature, which means that '*a person does not become a refugee because of recognition, but is recognized because he or she is a refugee*', the provision also covers persons whose status have not yet been formally declared. This is particularly important for asylum-seekers, as they should not be expelled or returned while awaiting the determination of their status, considering that such persons may be refugees.[95]

It is the responsibility of the state's authorities to thoroughly examine whether an individual located in their territory enjoys protection under the *non-refoulement* principle. Considering that Article 33 para 2 of the Refugee Convention does not offer protection to refugees if there are reasonable grounds for states to consider a refugee as a danger to their security or if a refugee poses a danger to the community because of his or her previous conviction of a particularly serious crime and that the terms '*danger to the security*' and '*particularly serious crime*' are not defined in the Refugee Convention, the discretion enjoyed by states in the application of this principle may seem significant.[96]

Nonetheless, the obligation of states to provide protection to individuals under the *non-refoulement principle* does not extend to the obligation of states to grant asylum to those individuals, although some legal authors have tried to argue otherwise. On the contrary, states enjoy discretion in assessing whether to accept or reject an asylum application, and they can only violate their obligations if they prevent an individual from seeking protection.[97]

Even though the principle of *non-refoulement* does not impose an obligation on states to grant asylum to a particular individual, states should ensure fair and efficient asylum procedures, and if they decide not to grant asylum to the applicant, they should continue to act in a manner that does not conflict with states' obligations under the *non-refoulement* principle.[98] This means that the state should relocate the asylum-seeker

[95] Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations, Para 6.

[96] Trevisanut, "The Principle of Non-Refoulement", 667.

[97] *Ibid.*

[98] Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations, Para 8.

to a safe third country or it should find another temporary protection solution that will not violate *the non-refoulement* obligation.[99]

4.2.3.3 The *non-refoulement* principle under international human rights law

The principle of *non-refoulement* is expressed not only in the provisions of international refugee law, but also in international human rights law, according to which states are obliged not to expel or return any individual if they would thereby expose him to serious human rights violations, such as torture or other cruel, inhuman or degrading treatment or punishment.[100]

Therefore, the enjoyment of the application of the *non-refoulement* principle under international human rights law also exists for '*de facto refugees*'.[101] '*De facto refugees*' were recognized on the international level in Recommendation 773 (1976): Situation of de facto refugees of the Council of Europe Parliamentary Assembly. The Parliamentary Assembly acknowledged that a considerable number of persons do not fall under the provision of Article 1 of the 1951 Refugee Convention and that these people need more favourable treatment than aliens in general. They were defined as people:

> '*who are unable or unwilling for political, racial, religious or other valid reasons to return to their countries of origin*'.

Accordingly, the protection provided under international human rights law is much broader than that provided under international refugee law, as it covers all individuals, including migrants, who fall under the scope of the *non-refoulement* protection.

The principle of *non-refoulement* is explicitly included in a number of international human rights instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, while at the

[99] Lauterpacht, Bethlehem. "The scope and content", 76.

[100] Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations, Para 17.

[101] Trevisanut, "The Principle of Non-Refoulement", 665–666.

regional level it is included in the European Convention for the Protection of Human Rights and Fundamental Freedoms, American Convention on Human Rights and African Charter on the Protection of Human and Peoples' Rights.[102]

Although international refugee law imposes certain limitations on the principle, it does not affect the obligations of states under international human rights law in which no exceptions to this principle are allowed. Therefore, rescued persons who do not fall under the definition of '*refugee*' provided for in the Refugee Convention may still be protected by the *non-refoulement* principle under other international and regional human rights instruments.[103]

4.2.3.4 The *non-refoulement* principle as a rule of customary international law

In the *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, the UN High Commissioner for Refugees expressed the view that the *non-refoulement* principle, as expressed in the Refugee Convention, so as the complementary duty of *non-refoulement* under international human rights law, meet the criteria to be considered a rule of customary international law. The conclusion was the result of the recognition that not only the state practice of the signatory states to the Refugee Convention and its Protocol, but also the state practice of the non-signatory states shows that they adhere to the *non-refoulement* principle.[104]

The customary international law character of the *non-refoulement* principle was also acknowledged at the regional level, in the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, adopted by Latin American countries.[105]

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[102] Trevisanut, "The Principle of Non-Refoulement", 667–668.

[103] UN High Commissioner for Refugees (UNHCR), "Rescue at Sea", 9.

[104] Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations, Para 14-15.

[105] *Ibid*., Para 16.

4.2.3.5 Application of the *non-refoulement* principle to persons rescued at sea

Although the *non-refoulement* principle is irrefutable, the application of the principle to persons rescued at sea is rather vague. Even though rescued persons at sea are primarily under the jurisdiction of flag states, there are no specific obligations of flag states regarding the treatment of rescuees on board, other than the obligation to respect general human rights obligations, including the principle of *non-refoulement*.[106] Since the jurisdiction of flag states will cease after individuals are disembarked in the ports of certain coastal states, there will exist the corresponding obligation for coastal states. However, coastal states often evade their obligations by trying to prevent rescued persons from seeking right of asylum by preventing them from disembarking.

Therefore, the ability of the master of the ship to act in accordance with the *non-refoulement* principle will depend to a large extent on the willingness of coastal states to allow disembarkation on their territory.

While it would be consistent with humanitarian considerations to allow at least disembarkation of the vessel, refusing entry of vessels carrying migrants into the port would not in itself automatically constitute a breach of the *non-refoulement* principle.[107]

Recent practice has shown that states have even started to carry out '*de-territorialized border control*', which means that certain measures, such as intercepting vessels carrying irregular migrants on the high seas and diverting them to third countries, are being taken outside state's own territory to prevent the arrival of irregular migrants. This practice, certainly, raises concerns about the possibility of respecting the principle of *non-refoulement*.[108] As this practice is clearly linked to the question of the territorial scope of application of the *non-refoulement* principle, which is widely debated matter in practice, it needs to be further examined.

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106 Barnes, "Refugee Law at Sea", 63.

107 *Ibid.*, 64.

108 Trevisanut, "The Principle of Non-Refoulement", 662–663.

4.2.3.6 Territorial scope of application

By conducting a broad analysis of the *non-refoulement* obligation under the Refugee Convention, taking into account the ordinary meaning of the terms in Article 33, the context analysis and the object and purpose of the Refugee Convention, UNHCR concluded that the principle applies to any territory where the state can exercise effective jurisdiction, including even extraterritorial jurisdiction.[109] UNHCR found further arguments to support its view in the complementary legal regime – international human rights law, as the principle under international human rights law has a similar nature of obligations. Namely, the extraterritorial application of the *non-refoulement* principle in human rights treaties has been established at the international and regional level, as the principle under international human rights law applies to any person within the effective control and authority of certain state.[110]

As stated by Martin Ratcovich, this explanation from UNHCR can be considered the most influential and clearest explanation of the geographical scope of the *non-refoulement* principle.[111] The conclusion of the UNHCR that the *non-refoulement* principle can be applied even extraterritorially is particularly important because, as noted above, states have recently started carrying '*de-territorialized border controls*' to prevent irregular migrations, and in this way, their acts are limited by the need to respect the principle of *non-refoulement*.

The question which arises here is whether the extraterritorial effect of the *non-refoulement* obligation also includes the obligation to determine the status of the asylum-seekers. Namely, some state practice has shown that states tend to push migrants at sea back to international waters before determining their potential status of asylum-seekers, while claiming that they acted in accordance with the *non-refoulement principle*. However, the obligation to determine refugee status may exist when the return of migrants would result in *de facto refoulement*, meaning that the return to international waters would leave them no alternative but to return home,

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109 Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations

110 *Ibid*.

111 Ratcovich, "The Concept of 'Place of Safety'", 109–110.

as in the case when their return to a third country would lead to *chain refoulement*, meaning that their return to a third country would result in them being send back home. It would seem that in other circumstances, states are allowed not to determine the status of asylum-seeker without violating the *non-refoulement* principle. This consequently leaves room for questions regarding the conditions under which such an initial screening is carried out in order to ensure that acts of states do not lead to a breach of the *non-refoulement* principle.[112]

Although the protection granted to rescuees at sea may seem comprehensive, with a number of rules of international maritime law, supplemented by rules of international refugee law and international human rights law, practice has often shown all the shortcomings of certain provisions and the need for further clarification. One of the key examples of this is the 2001 Tampa affair, which showed well how states can use the vagueness of certain provisions to try to avoid the obligations arising from rescue at sea.

4.3 Right to be disembarked at the place of safety

4.3.1 Events prior to the introduction of the 'place of safety' concept

As stated, the duty to render assistance at sea is not accompanied by a corresponding right to disembark the rescuees, which leaves the possibility for port states to decide at their discretion whether to allow disembarkation. However, a broad review of existing treaty law governing the treatment of people rescued at sea[113] was launched after the occurrence of the Tampa affair,[114] which showed all the weaknesses of the lack of obligation of states to allow disembarkation of rescued people on their territory and raised the question where should migrants rescued at sea be taken.

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112 Ratcovich, "The Concept of 'Place of Safety'", 112–113.

113 *Ibid.*

114 See *infra* Chapter 4.3.5.2.

The work was initiated by the IMO Assembly with the adoption of Resolution A.920(22) on the review of safety measures and procedures for the treatment of persons rescued at sea, followed by close cooperation with various United Nations specialised agencies and programmes in the inter-agency group established in 2002. The conclusions of the inter-agency group formed the basis for significant amendments to the SOLAS and SAR Convention in 2004 at a session of the Maritime Safety Committee.[115]

These amendments introduced the term '*place of safety*' into maritime search and rescue obligations, and *travaux préparatoires* confirms that the term was introduced as a concept that should cover not only the interests of maritime law, but also international refugee law and the right of states to control immigration into their territories.[116]

4.3.2 Amendments to the SAR and SOLAS Convention

The '*place of safety*' is mentioned in two rules of the Annex to the SAR Convention where it is stated:

> *'2 'Rescue'. An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety'*[117]*;*
>
> *'… The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.'*[118]

[115] IMO, "Guidelines on the Treatment of Persons Rescued At Sea"

[116] Ratcovich, "The Concept of 'Place of Safety'", 118.

[117] Article 1.3.2. Annex of the SAR Convention

[118] *Ibid*., Article 3.1.9.

The provision explicitly mentions the duty of states to cooperate in order to relieve masters of ships of their responsibilities, mainly for the purpose of mitigating the possible commercial implications of rendering assistance at sea. Therefore, the primary responsibility for disembarking survivors from the assisting vessel and delivering them to the place of safety rests with the party responsible for the search and rescue region. The obligations of the RCC in ensuring the cooperation of the arrangements under the amendments to the SAR Conventions are broad and include, *inter alia*, the obligation to identify the most appropriate places for the disembarkation.

The text of the 2004 Amendment to the SOLAS Convention contains a corresponding provision, with the correlated aim of providing survivors with a place of safety within a reasonable time. The Amendment to the SOLAS Convention also places an obligation on the State Party, which is responsible for the SAR region in which the survivors were recovered, to provide a place of safety or to ensure that the place of safety is provided.

Therefore, these amendments introduced for the first time the obligation of the parties to cooperate and coordinate with the aim of disembarking the survivors to the place of safety within a reasonable time, which means that in addition to the existing obligation of conduct, the obligation of result was finally introduced.[119]

Although the amendments to the SOLAS Convention and SAR Convention introduced the concept, it remained undefined and to this day there is no definition of the term '*place of safety*', the lack of which consequently leads to different interpretations of this term in practice.

As mentioned,[120] The Protocol for Migrant Smuggling can be helpful in determining the meaning of the term '*place of safety*', although the problem remains that the number of States Parties adhering to the Protocol for Migrant Smuggling is less than the number of States Parties bound by the SOLAS Convention and SAR Convention and therefore certain states need not follow its rules.[121]

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[119] Papastavridis, "Rescuing Migrants at Sea", 278–279.

[120] See *supra* Chapter 3.3.

[121] Ratcovich, "The Concept of 'Place of Safety'", 117.

However, the SOLAS and SAR Convention state that the interpretation of the principle should be based on the specificity of each case and the IMO Guidelines on the Treatment of Persons Rescued at Sea (in further text: IMO Guidelines), adopted in conjunction with the 2004 Amendments to SOLAS and SAR Convention. By allowing the interpretation of the principle on the specifics of each case, the Amendments gave those applying the principle the right to decide each situation on a case-by-case basis.[122] Furthermore, the Amendments refer applicants to the IMO Guidelines, which are not legally binding but may provide an important basis for interpreting of the obligations set out in the SOLAS and SAR Convention.

4.3.3 IMO Guidelines on the Treatment of Persons Rescued at Sea

The purpose of the IMO Guidelines is to help governments and shipmasters to understand and fulfill their obligations stemming from international law regarding the treatment of persons rescued at sea.

With regard to the shipmasters' obligations, the IMO Guidelines state that the shipmasters should meet the immediate needs of the survivors and treat them humanely and should endeavor to ensure that the survivors do not disembark where their safety would be compromised.[123] In the case of asylum-seekers and refugees who claim that there exist a well-founded fear of persecution, it is emphasized that it is necessary to avoid disembarkation in a territory where their life and freedom would be endangered.[124]

Concerning the governments, the IMO Guidelines recommended extensive number of measures that should ensure that the respective rescue co-ordination centres and other national authorities can sufficiently fulfill their duties. RCCs should be able to make timely decisions by being ready to act independently or have ready-made processes in place

[122] Ratcovich, "The Concept of 'Place of Safety'", 102.
[123] IMO Guidelines Annex Para 5.1
[124] *Ibid*., Para 6.17

to involve other authorities and have effective plans of operation and arrangements to respond to all incidents occurring within its SAR region or even incidents outside its own region, if necessary, until a responsible or better positioned RCC can act.[125]

Furthermore, governments and responsible RCCs should try to reduce the time survivors will remain aboard the assisting ship and speed up arrangements for disembarking survivors, as IMO Guidelines recognize that ships should not be subjected to unnecessary delays and financial burdens due to their involvement in rescuing distressed people at sea.[126]

The IMO Guidelines devoted several passages to clarifying the term '*place of safety*', emphasizing that it should be a place where the lives of survivors are not endangered, where their basic human needs can be met and where it is possible to arrange transportation to the next or final destination of the survivors. Moreover, it is stated that the place of safety may be on land, aboard a rescue unit or other suitable vessel or facility at sea, but that the assisting ship should not be considered a place of safety as it should be relinquished of its responsibilities as soon as alternative arrangements can be made. Finally, the IMO Guidelines emphasized that each case is unique, therefore the choice of a place of safety must be decided on the basis of various important factors in each case.[127]

4.3.4 Meaning of the 'place of safety'

According to Martin Ratcovich, the customary *non-refoulement* principle is an integral part of the concept of place of safety. This is supported by the following article of the IMO Guidelines[128]:

> *'The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would*

[125] IMO Guidelines Annex Para 6.4, Para 6.5

[126] *Ibid.*, Para 6.8, Para 6.9

[127] *Ibid.*, Para 6.12–6.18

[128] Ratcovich, "The Concept of 'Place of Safety'", 114–115.

> *be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea."*[129]

In conclusion, the place of safety can be viewed as a concept consisting of different components, which must be taken into account when deciding in each case.

It should be a place that can be reached within a reasonable time and it should be a place where disembarked individuals are protected from violations of their fundamental rights, such as the right to life and the prohibition of discrimination. It should also be a place where disembarked individuals are protected from danger, risk or injury and where their basic human needs can be met.[130]

However, it is necessary to emphasize that the place of safety does not have to be the intended final destination of the survivors, but will usually be the '*next port of call*'. This can, for example, mean the nearest port of call, when the urgency of the situation requires the disembarkation to take place as soon as possible or the next scheduled port of call, when there is no special urgency.

4.3.5 Jurisdictional issues

4.3.5.1 In general

A coastal state has absolute sovereignty over its internal waters,[131] which means that states have the right to exercise jurisdiction over all foreign vessels located in its internal waters.[132] Because ports fall within the internal water zone, states may prohibit vessels carrying migrants, whether smuggled or rescued, from accessing their ports.

Even though the freedom of merchant vessels to enter ports is often mistaken for their right to enter ports, coastal states have no obligation to ensure free access to their ports, although in practice ports will remain

[129] IMO Guidelines Annex Para 6.17.

[130] Ratcovich, "The Concept of 'Place of Safety'", 120–121.

[131] Article 2. UNCLOS

[132] Elserafy, "The Smuggling of Migrants", 23.

open, mainly for commercial reasons. State practice, in this regard, confirms that there exists no rule of customary international law that limits states' control over access to their ports.[133] Although the right of entry may be provided for in a particular treaty, it is to be expected that even in that case states will retain the right to deny entry when its vital interests are at stake.[134]

Thus, the state responsible for the SAR region in which the survivors were found has no obligation to disembark the survivors on its territory. Even though there have been certain initiatives in the last decade to change this, no initiative has been successful, largely due to the reluctance of states to commit to disembarkation on their own territory.[135]

The only exception to the right of states to control access to their ports exists in the cases of distress, which will be discussed further in the thesis.

4.3.5.2 The Tampa affair

4.3.5.2.1. Facts of the case

In August 2001, the Australian Search and Rescue asked the master of MV Tampa, a Norwegian cargo vessel, to assist an Indonesian ferry in danger of sinking in the waters between Christmas Island and Indonesia, carrying 433 asylum-seekers. After picking up the passengers, the master intended to disembark the rescuees in Indonesia, but after pressure from passengers who said they needed medical assistance and threatened to jump overboard if no help was provided, the master decided to proceed to the asylum-seekers' desired destination – Christmas Island, Australian territory.[136]

Upon arrival to Australian territorial waters, the MV Tampa was denied right to entry into territorial waters, but the master of MV Tampa decided to enter the waters without permission to ensure the safety of the vessel and the people on board. In response, forty-five Australian troops boarded the MV Tampa and requested the master to return the vessel

133 de La Fayette, "Access to Ports in International Law", 2–3.

134 Barnes, "Refugee Law at Sea", 57–58.

135 Papastavridis, "Rescuing Migrants at Sea", 279.

136 Guilfoyle, *Shipping Interdiction*, 198–199.

out to the sea. Since the master refused due to lack of food and safety equipment on board, the troops provided medical assistance to those on board and took control of MV Tampa, while the refugees immediately initiated asylum proceedings. Asylum-seekers were eventually transferred to an Australian vessel and taken to New Zealand and Nauru, countries with which Australia has reached an agreement on the reception and processing of refugees.[137]

4.3.5.2.2. The importance of the Tampa affair

The Tampa affair has raised a number of questions, in regards to the right of Australia to preclude the MV Tampa from passing through its territorial sea, but also whether the MV Tampa could be characterized as a vessel in distress and enter the Australian port, as well as whether Australia has violated its obligations under international refugee law.[138]

It was not questionable whether Australia had complied with its search and rescue obligations, mainly because the provisions determining the scope of coastal state search and rescue operations were vague enough to give Australia, as well as other states, wide discretion in their implementation. In this regard, Australia claimed to have fulfilled its obligations when the persons were transferred to the vessel MV Tampa.[139]

However, preventing MV Tampa from passing through its territorial sea and thus violating its right to innocent passage was legally contentious to say the least. At the time of MV Tampa's passage, there was no applicable law in force in Australia that could have render Tampa's passage non-innocent due to non-compliance with Australian immigration laws and regulations. It seems difficult to see how the other examples from Article 19.2. of UNCLOS could be applicable in this case. Even if Australia claimed that the passage of Tampa posed a security threat, it is difficult to discern a valid argument by Australia to defend it. Nevertheless, given that coastal states can exercise their sovereignty in coastal waters unless they are subject to certain restrictions and that the restrictions relevant to

137 Guilfoyle, *Shipping Interdiction,* 199–202.

138 *Ibid*., 200.

139 Barnes, "Refugee Law at Sea", 53.

this case can be considered ambiguous, it would probably be concluded that Australia had the authority to act to prevent its security, even though it is difficult to see how asylum seekers *per se* would oppose Australian security. However, the measures taken by the Australian government in response to the Tampa passage, including the carrying of weapons, can also be reconsidered given that it is difficult to find a justification for such unlawful use of force.[140]

Regarding the *non-refoulement* principle, the question could be asked whether Australia had to first establish that the return of MV Tampa to the high seas would not violate the *non-refoulement* obligation, since in the contrary, it should have accepted the rescuees as asylum-seekers on its territory. Nonetheless, the *non-refoulement* principle does not prevent states from returning the vessel to international waters and consequently to another state, as long as this does not cause *de facto refoulement* or *chain refoulement*.

Although Nauru was not a party to the Refugee Convention at the time of the Tampa affair, there was no reason to believe that Nauru would not adhere to the *non-refoulement* principle, which means that it could not be said that Australia has violated its obligations under the *non-refoulement* principle.[141]

A few remaining remarks regarding the conduct of the Australian government will be analysed in relation to the port of refuge in the following chapter.

4.3.5.3 Port of refuge

As mentioned above, the duty to render assistance at sea is not accompanied by a general obligation of port states to allow the disembarkation of a vessel carrying rescuees. However, there exists a situation in which this obligation may appear to have been imposed on the port state, i.e. the right of a foreign vessel to enter the territorial waters and ports of other states in situations of *force majeure* or distress, regardless of violation

[140] Barnes, "Refugee Law at Sea", 55–57.

[141] Røsæg, "Refugees as rescuees", 70.

of local immigration laws, customs, etc.[142] This right constitutes part of an internationally accepted practice, although it is not regulated in the UNCLOS,[143] and could be applied to a vessel overloaded with rescuees, as that vessel could be characterized as a vessel in distress.[144]

Nonetheless, the scope of this right is not entirely clear. Firstly, there does not appear to exist an obligation of the coastal state to grant the right to disembark the rescuees, but rather an obligation to provide shelter for the vessel and people on board.[145]

Secondly, the right of entry into port is of an exceptional nature and should not encompass situations where there are other possibilities available to prevent extremely urgent situations. In this regard, the Norwegian government and the owner of Tampa claimed that Tampa became unseaworthy after picking up the rescuees, as it did not meet the safety requirements set out in the SOLAS Convention. However, unseaworthiness cannot be equated with distress and does not imply the application of the rules of the port of refuge, unless such unseaworthiness also poses a threat to human life.[146]

Furthermore, the strategy used by the Australian authorities to assist MV Tampa while the vessel was still at sea outlines a possible exception to the port of refuge right and the possibility for states to discharge their obligations by providing adequate assistance to a vessel in distress before entering the port.[147]

It seems that humanitarian concerns, which should likely govern the action of states in situations of distress, are not accompanied by precise, adequate provisions which impose concrete obligations on states, but rather quite ambiguous ones. In this regard, states do not violate international law when, in accordance with their rights, they

142 Røsæg, "Refugees as rescuees", 57.
143 IMO, "Places of refuge"
144 Røsæg, "Refugees as rescuees", 57–58.
145 *Ibid*., 57.
146 Barnes, "Refugee Law at Sea", 59–60.
147 Røsæg, "Refugees as rescuees", 58.

sometimes interpret broadly security considerations that should govern their activities in coastal waters.

4.4 Final remarks

After rescuing migrants at sea, the often-challenging part follows – trying to bring rescued migrants to a safe place. This is further complicated by the fact that coastal states are not required to allow disembarkation of the rescuees, except in situations of *force majeure* or distress, which may sometimes include rescued migrants within their scope. However, the provisions of international law of the sea cannot be viewed in isolation from the obligations arising for states under international refugee law and international human rights law.

In this sense, the principle of *non-refoulement*, which applies somewhat differently to refugees and asylum seekers on the one hand and migrants on the other, occupies a central place. This principle has been acknowledged as a principle of customary legal character in both international refugee law and international human rights law. Further strengthening of the principle comes from the recognition that it applies extraterritorially. This is probably crucial for at least setting certain limits on recent state practice of exercising de-territorialized border controls, but it also seems to depend on how states conduct initial screening of rescuees to ensure that their further actions do not lead to a breach of that obligation.

However, the principle of *non-refoulemen*t seems to strengthen its application over time, which can certainly be attributed in part to the valid inputs of the human rights mechanism established under the United Nations system. Nonetheless, the work of the United Nations reflects well the fact that the human rights of migrants at sea are not sufficiently protected and that there is still a need for states to be reminded of their duty to provide assistance to those in need at sea and to deliver them to the place of safety.[148]

[148] See Resolution 70/235. on Oceans and the law of the sea

5. Protection of the rights of migrants at sea through international and regional human rights systems

5.1 Introduction to the topic

The previous chapters show a number of shortcomings in the practice of states when it comes to the protection of migrants at sea. This is precisely why individuals have increasingly begun to seek protection at the international level, through mechanisms established by international and regional human rights treaties. An important role in this regard can be attributed to the Committee Against Torture, established by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Human Rights Committee established by the International Covenant on Civil and Political Rights and the European Court of Human Rights whose role is the interpretation and application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (in further text: European Convention on Human Rights).

The practice of these bodies in relation to migrants at sea is comprehensive and its analysis would go beyond the scope of this thesis. However, in order to show the practical aspects of the protection of migrants at sea, or at least the attempts to protect migrants at sea at international and regional level, the work of the Human Rights Committee and the European Court of Human Rights (in further text: ECtHR) will be examined in more detail in regard to specific cases. The aim of this analysis will be to show how many different legal issues can arise from just one situation and how, although sometimes human rights violations in such situations seem very obvious, identifying and establishing human rights violations in such situations is not without challenges.

The following chapter will examine the first judgment of the European Court of Human Rights concerning interception at sea – *Hirsi Jamaa and Others v. Italy*. The aim is to gain a better insight into the significant role

that the ECtHR can often have in protecting migrants at sea, but while mainly focusing on the ECtHR's findings on matters of jurisdiction. Furthermore, the recent views of the Human Rights Committee set out in *A.S. and others v. Italy*[149] and *A.S. and others v. Malta*[150] will be analysed for the same purpose and with a similar focus on jurisdictional issues.

5.2 European Court of Human Rights

5.2.1 In general

The role which the ECtHR has for more than 70 years in interpreting the European Convention on Human Rights is of utmost importance. Because its decisions are binding on States Parties, they have often resulted in changes in the legislation or practice of States Parties, all of which have improved the protection of human rights in Europe.

When it comes to the protection of migrants at sea, the first judgment that dealt with interception at sea[151] and that was of immense importance was *Hirsi Jamaa and Others v. Italy*, therefore the next chapter will be devoted to the analysis of this case.

5.2.2 *Hirsi Jamaa and Others v. Italy*

5.2.2.1 Facts of the case and findings of the court

The case concerned individuals belonging to a group of about 200 migrants, nationals of Somalia and Eritrea, who were travelling from Libya to Italy. When they were intercepted by the Italian coastguard on the high seas but within the SAR region of Malta, they were returned to the Libyan authorities in the port of Tripoli.

The return was carried out according to the existing agreement between Italy and Libya, which was seen as an example of the pushback

149 Human Rights Committee, *Views concerning Communication No. 3042/2017*
150 Human Rights Committee, *Decision concerning Communication No. 3043/2017*
151 Dembour, "Interception-at-sea"

policy conducted by Italy under the explanation of the need to combat the migrant smuggling.[152]

When some of the individuals alleged that the Italian government had violated some of the rights protected by the European Convention on Human Rights, the Italian government argued that it could not be held liable for the alleged violations because Italy had no jurisdiction over the applicants as required by Article 1 of the European Convention on Human Rights, and was therefore not obliged to protect those rights and freedoms. The issue of jurisdiction has provoked a heated debate in the case[153] and will therefore be examined in more length than the other arguments put forward by the applicants.

To begin with, Italy claimed to have fulfilled its international legal obligations to save lives at sea, but that saving lives did not create a link that would establish Italian jurisdiction and trigger its obligations under the Convention, as Italian authorities did not board the vessel[154] nor did they exercise '*absolute and exclusive control*'[155] over the applicants.

The ECtHR decided to approach the issue of jurisdiction by adopting an '*objective*' assessment, emphasizing that there exist two different grounds for the application of the European Convention on Human Rights: *de jure* and *de facto* jurisdiction.[156] As regards *de jure* jurisdiction, the ECtHR attached considerable importance to the rule contained in Article 92 of UNCLOS, which states that a vessel on the high seas falls under the exclusive jurisdiction of the flag state and therefore there exist extraterritorial jurisdiction of states in case of acts carried out on the board of those vessels.[157] Furthermore, the ECtHR also found that Italy, while fulfilling its rescue duty on the high seas, had relocated the applicants to its military ships, whose crew consisted only of Italian personnel, and that the migrants '*were under the continuous and exclusive de jure*

152 Moreno-Lax, "Hirsi Jamar and Others v Italy", 578.
153 *Ibid*., 579.
154 *Ibid*.
155 *Hirsi Jamaa and Others v. Italy*, Para 64.
156 Papanicolopulu, "Case of Hirsi Jamaa and Others v. Italy", 420.
157 *Hirsi Jamaa and Others v. Italy*, Para 75–77.

and de facto control of the Italian authorities' from interception until they were handed over to the Libyan authorities.[158]

In the present case, the ECtHR appears to have made a significant turn from the minimum level of control it considered necessary to invoke the application of Article 1 of the Convention in its previous judgments. This seems to be attributed to the fact that the ECtHR found a strong existence of *de jure* control from Italy and that there was therefore '*the lesser the need to prove detailed de facto control*'.[159]

Furthermore, in previous cases, the ECtHR has distinguished between cases where states have taken '*active steps to bring the applicants within (its) jurisdiction by arresting them and holding them*' and those in which applicants '*choose(s) to seek refugee with the authorities*',[160] while in this case the ECtHR found that it was irrelevant '*whether the migrants came under Italian jurisdiction as a result of voluntary or involuntary intervention of bordering policing or rescue-at-sea*'.[161] All these findings can be considered as an important addition to the jurisprudence on the extraterritorial application of human rights.[162]

As to the alleged rights, the applicants argued that there has been a violation of Article 3 of the Convention prohibiting torture, inhuman or degrading treatment or punishment, because they were returned to Libya where they were exposed to the risk of inhuman and degrading treatment, but also exposed to the risk of arbitrary repatriation to Eritrea and Somalia, their respective countries.

The Italian government argued that the transfer of the applicants to Libya was the result of a bilateral agreement signed between Italy and Libya aimed at combating clandestine immigration, especially on the frequently used migration route between Africa and Europe. The cooperation between Mediterranean states in controlling migration associated with clandestine immigration was repeatedly encouraged by the European

158 *Hirsi Jamaa and Others v. Italy,* Para 81.

159 Moreno-Lax, "Hirsi Jamaa and Others v Italy", 582.

160 *Al-Saadoon and Mufdhi v United Kingdom*, as cited in Moreno-Lax, "Hirsi Jamaa and Others v Italy", 582.

161 Moreno-Lax, "Hirsi Jamaa and Others v Italy", 582.

162 *Ibid.*, 596.

Union.[163] Therefore, resolving this case could seem very important for the overall European Union's policy towards migrants, even if the EU was not a party to the agreement between Libya and Italy.[164] Nevertheless, the ECtHR concluded that Italy could not violate its responsibilities merely to fulfill its obligations under the bilateral agreement with Libya, even if that agreement contained explicit provisions requiring Italy to return migrants intercepted on the high seas to Libya.

The Italian government further claimed that Libya could be considered a safe host country, which the ECtHR disagreed with, as evidence showed that Libya, in material time, had resorted to and tolerated practices that were incompatible with the principles of the European Convention on Human Rights.[165]

The Italian government also argued that the applicants had not expressed their intention to apply for political asylum in Italy, but only not to be handed over to the Libyan authorities, which cannot be interpreted as an asylum application. The ECtHR rejected this argument and concluded that the '*Italian authorities knew or should have know that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention*'[166] and found that there had been a violation of Article 3 of the European Convention on Human Rights on account of the fact that applicants have been exposed to the risk of inhuman and degrading treatment in Libya.

Furthermore, the applicants claimed that their transfer to Libya meant their exposure to the risk of being returned to Eritrea and Somalia where they would be subjected to torture and ill-treatment. UNHCR confirmed that there existed no international protection system in Libya to protect applicants from the risk of '*chain refoulement*', which, together with other evidence, reinforced the ECtHR's decision that there had been a violation of Article 3 of the Convention given that '*the Italian authorities knew or should have known that there were insufficient guarantees protecting*

163 *Hirsi Jamaa and Others v. Italy*, Para 93–94.

164 Dembour, "Interception-at-sea"

165 *Hirsi Jamaa and Others v. Italy,* Para 124–128.

166 *Ibid*., Para 131.

the parties concerned from the risk of being arbitrarily returned to their countries of origin'.[167] Although none of the applicants were returned to their countries of origin, this was considered irrelevant, since the risk of returning was the fact that mattered.[168]

In addition, the applicants alleged a violation of Article 4 of Protocol No. 4 of the Convention, which prohibits collective expulsion. By examining the facts of the case, the ECtHR found that the Italian authorities had failed to examine the individual situation of each applicant before transferring them to Libya and the violation of Article 4 of Protocol No. 4 was established.[169]

As the last invoked argument, the applicants claimed that Article 13 of the European Convention on Human Rights, which protects the right to an effective remedy, had been violated in the present case, as the applicants had been deprived of the opportunity to appeal against their return to Libya and the ECtHR agreed with them.[170]

5.2.2.2 Additional remarks

In conclusion, the main significance of this judgment is that it clearly sets out the obligation of states to comply with their human rights obligations while taking certain interception measures at sea.

Moreover, the judgment made debatable practice of signing bilateral and multilateral treaties by European states for the purpose of combating clandestine immigration. Additionally, the ECtHR confirmed that the obligation of *non-refoulement* arises not only when a formal application for political asylum is made, but in any case, when the authorities knew or should have known about the risk associated with deportation.[171] Furthermore, the ECtHR confirmed that the existence of a repatriation risk was sufficient to establish a violation of the applicants' rights, even if no such repatriation had occurred.

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167 *Hirsi Jamaa and Others v. Italy,* Para 156.

168 Dembour, "Interception-at-sea"

169 *Hirsi Jamaa and Others v. Italy*, Para 185–186.

170 *Ibid.,* Para 205–207.

171 Dembour, "Interception-at-sea"

5.3 The Human Rights Committee

5.3.1 Introduction

The mechanisms established under the nine international human rights treaties, adopted under the auspices of the United Nations, provide different procedures for complaints of violations of certain human rights provisions to the bodies established under those treaties. One of the existing procedures is an individual communication procedure that allows individuals to submit their complaints or communications about alleged violations to existing human rights treaty bodies.[172] One of these bodies is the Human Rights Committee established by the International Covenant on Civil and Political Rights, whose competence to receive individual communications derives from the Optional Protocol to the International Covenant on Civil and Political Rights (in further text: the Optional Protocol). If the communication submitted meets all the requirements set out in the Optional Protocol, the Human Rights Committee shall examine it and forward its views to the State Party and to the individual who submitted it.[173]

The next chapter will examine two proceedings initiated by the same applicants and resulting from the same accident, but in relation to two different States Parties – Italy and Malta. As the request was declared inadmissible in relation to Malta, greater emphasis will be placed on the decision of the Human Rights Committee in the case against Italy.

Italy, like many other countries, has come a long way from responding to the migrant crisis in the Mediterranean Sea through significant engagement in search and rescue operations to a response that includes enhanced border controls and, in some cases, attempts to absolve from responsibility for the lives of migrants at sea. One of the arguments that states often invoke in order to absolve themselves of responsibility is that

[172] UN Human Rights Office of the High Commissioner, "Human Rights Bodies – Complaints Procedures "

[173] Optional Protocol to the International Covenant on Civil and Political Rights, Article 5.

they lack jurisdiction on the high seas and *A.S. and others v. Italy* will faithfully show how such an attitude can influence the conduct of states.[174]

5.3.2 *A.S. and others v. Italy*

5.3.2.1 Facts of the case and findings of the Committee

In 2017, one Palestinian national and three nationals of Syrian Arab Republic submitted the application on their own behalf and on behalf of thirteen of their relatives for alleged violations of certain human rights protected by the International Covenant on Civil and Political Rights by Italy as a State Party. The case referred to a terrible accident that happened in 2013, when the vessel shipwrecked in the Mediterranean Sea, 113 km south of Italy and 218 km from Malta, causing the death of more than 200 people. The vessel was travelling from Libya and was reportedly carrying more than 400 people, mostly Syrian refugees trying to escape the threats to their lives they faced in Syria. A few hours after the start of the voyage, the vessel was shot by a vessel flying the Berber flag and it began to sink in international waters, but within the search and rescue zone of Malta.[175]

Although the Italian emergency services were contacted immediately around 11 a.m. when the accident happened, and several times after that, only at 1.17 p.m., the emergency service operator explained that their vessel was currently in the Maltese search and rescue zone and forwarded the phone number of the Rescue Coordination Centre of Malta. Despite subsequent calls and efforts by the sinking ship to speed up the rescue, the first rescue boat – the AFM Malta patrol boat, arrived at the site only around 5.50 p.m., while the Italian ship ITS Libra, which was nearby during the whole period, arrived at the site around 6 p.m. The authors claimed that the Italian and Maltese rescue centers tried to transfer responsibility for taking over the rescue operations to each other and, especially in this case, that the Italian authorities had not complied

[174] Citroni, "No More Elusion"

[175] Human Rights Committee, *Views Concerning Communication* No. 3042/2017, Para 1.1, Para 2.1, Para 2.2

with their obligation to cooperate with the Maltese authorities in saving lives at sea. Had the Italian authorities acted in accordance with their obligation to provide assistance to the vessel in distress at sea, the rescuing boats would have come to the vessel two hours before it sank.[176]

Following the accident, some migrants tried to initiate or encourage the initiation of proceedings against those responsible, but an effective investigation was not conducted. Therefore, the authors of the communication argued that no effective remedy was available to them, that their relatives' right to life had been violated and that they had been subjected to inhuman and degrading treatment because the authorities had not investigated the death of their relatives.[177]

However, an important discussion in the proceedings concerned the issue of Italian jurisdiction, since under Article 2 of the International Covenant on Civil and Political Rights, States Parties are responsible for protecting and ensuring the rights protected by the covenant to all individual subjects within their territory and subject to their jurisdiction. Although the shipwreck occurred outside the territories of both Italy and Malta, the authors of the communication argued that the complaint fell within the jurisdiction of both states because both were in communication with the vessel in distress and activated certain procedures, but also because the Maltese authorities were responsible for SAR area where the vessel was located, while the Italian authorities exercised *de facto* control over that area.[178]

The Italian authorities argued that Italy could not be held liable for alleged violations as they occurred outside its territorial sea and the SAR area, and as the responsibility belonged to Malta, the country responsible for the SAR area in which the vessel was located at the time of the accident. The Human Rights Committee did not accept this argument and stated that the obligation of all States Parties is to ensure the rights provided by the International Covenant on Civil and Political Rights to

[176] Human Rights Committee, *Views concerning Communication No. 3042/2017,* Para 2.1–2.4

[177] *Ibid.,* Para 1.2

[178] *Ibid.,* Para 2.7

everyone under the power or effective control of a state, even if the event does not occur in the territory of that State Party.[179]

To analyse whether the event could fall under the power or effective control of Italy as a State Party, the Human Rights Committee analysed the specific circumstances of the case and concluded that a '*special relationship of dependency*' had been established between Italy and individuals on board of the vessel in distress. The special relationship of dependency consisted of both factual elements, such as that ITS Libra was located near the vessel in distress, that MRCC Rome was continuously involved in the rescue operation and that initial contact was made to the MRCC Rome, but also of legal obligations under the law of the sea, '*including a duty to respond in a reasonable manner to calls of distress pursuant to SOLAS Regulations and a duty to appropriately cooperate with other states undertaking rescue operations pursuant to the International Convention on Maritime Search and Rescue*'.[180]

Consequently, individuals were '*directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy*' and '*were thus subject to Italy's jurisdiction for the purposes of the Covenant*'.[181]

This was the first time that the Human Rights Committee had invoked the concept of a *'special relationship of dependency'* to establish extra-territorial jurisdiction of the state, which could have significant impact on the responsibilities of states when performing maritime search and rescue of migrants at sea in the future.[182]

Before further commenting on the findings of the Human Rights Committee regarding the jurisdiction, it should be noted that the Human Rights Committee found that there was a violation of the right to life of individuals on board as Italy failed to act in accordance with the due diligence obligation to protect lives, but also that the lack of effective

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179 Human Rights Committee, *Views concerning Communication No. 3042/2017,* Para 4.4, Para 7.4

180 *Ibid.*, Para 7.8

181 *Ibid.*

182 Human rights at sea. "The Right to Life"

investigation and punishment of those responsible violated the victims' right to an effective remedy, as well as their right not to be subjected to inhuman or degrading treatment or punishment.

5.3.2.2 Additional remarks

The decision adopted by the Human Rights Committee was far from unanimous, with disagreements among members over extraterritorial jurisdiction in the case. Dissenting opinions were constructed in a way that called into question the excessive stretching of the application of extraterritorial jurisdiction[183] and argued that a distinction must be made *'between situations in which states have the potential to place under their effective control individuals who are found outside their territory or areas already subject to their effective control'* and from *'situations involving the actual placement of individuals under effective state control.'*[184]

However, the decision has been criticised not only within the Human Rights Committee, but also outside it, among legal scholars. One of the scholars explained that a '*special'* relationship of dependency could have been established if Italy went beyond its general obligations under, for example, SOLAS and SAR Convention, because it made a promise to migrants before they embarked on a journey. As this did not happen in this particular case, Italy was in a position that any other state could have had if it had been close to the vessel and could have saved it.[185]

On the other hand, as explained in the concurring individual opinion of Gentian Zyberi, a member of the Human Rights Committee, when considering the concept of extraterritorial jurisdiction and whether a State Party has exercised power and control, specific circumstances at sea must be taken into account, such as that there exists shared responsibility for SAR operations between states. Therefore, while assessing the conduct

[183] Human rights at sea. "The Right to Life"

[184] *Views concerning Communication No. 3042/2017*, Individual opinion of Yuval Shany, Christof Heyns and Photini Pazartzis, Para 2

[185] Milanovic, "Drowning Migrants"

of states in SAR operations, states must be required to '*make best efforts within the means available*'.[186]

In conclusion, this case will hopefully have some impact on future international jurisprudence, but the question also arises as to how certain issues will be addressed in future proceedings. One is the concept of '*special relationship of dependency*' where it remains to be seen whether this concept can set a precedent for future situations and change the concept of state responsibility when it comes to rescuing migrants at sea.[187]

Still, the interpretation of extraterritorial jurisdiction given in the case raises legitimate concerns about the future actions of states by which they may try to evade their obligations, for example by ignoring distress calls, in order to subsequently avoid establishing a special relationship of dependency with a vessel in distress and risk as being considered to have jurisdiction over people rescued at sea.[188]

5.3.3 *A.S. and others v. Malta*

In parallel proceedings against Malta, the Human Rights Committee decided to reject the claim because individuals had not exhausted all available domestic remedies before filing the individual application.[189]

Nevertheless, even if the application was declared inadmissible, the Human Rights Committee decided to '*send a reasonably clear signal regarding the applicability of the Covenant to persons in distress at sea*'[190] and explained why Malta had jurisdiction over the individuals who submitted the communication. The Committee focused on the fact that the accident occurred in the SAR area of Malta and that Malta had formally accepted rescue coordination, thus exercising effective control over the rescue, potentially resulting in a '*direct and reasonably foreseeable*

186 *Views concerning Communication No. 3042/2017*, Individual opinion of Gentian Zyberi, Para 3

187 Human rights at sea. "The Right to Life"

188 *Ibid.*

189 Human Rights Committee, *Decision concerning Communication No. 3043/2017,* Para 6.9

190 Milanovic, "Drowning Migrants"

causal relationship between the States parties' acts and omissions and the outcome of the operation'.[191] This implies that the Human Rights Committee concluded that '*Malta could have acted in such a way as to substantially improve or change the situation of the complainants, had committed to do so, and that it therefore should have acted in such a way, i.e. had an ICCPR obligation to do so.*'[192]

However, it is unclear whether the Committee would consider individual communication justified even if Malta did not initiate rescue coordination, simply because the accident occurred in the SAR area of Malta, or the ability of states to act in a given situation can invoke the jurisdiction of the state even if there are no extraneous obligations arriving from international law, such as the one establishing SAR areas.[193]

5.3.4 Remarks on the extraterritorial jurisdiction

Both *Hirsi Jamaaa and Others v. Italy* and the views expressed by the Human Rights Committee in the aforementioned cases can be considered as an important contribution to the establishment of extraterritorial jurisdiction. While the ECtHR focused on exercising of *de juro* and *de facto* control from the Italian authorities and accepted lower level of *de facto* control, as the foundations of *de juro* control were firmer, the Human Rights Committee focused on establishing a '*special relationship of dependency*' based on both factual and legal notions. Although these concepts are somewhat different, they both seem to share a similar idea, but other than that, they may have both left more open issues than those resolved when it comes to the extraterritorial application of human rights treaties.

[191] Human Rights Committee, *Decision concerning Communication No. 3043/2017*, Para 6.7
[192] Milanovic, "Drowning Migrants"
[193] *Ibid.*

5.4 Final remarks

In a world where the rights of all migrants, including migrants at sea, are frequently violated, the existence of international and regional systems for their protection is vital. The work done under the auspices of the United Nations, through various mechanisms established under international human rights treaties, has been crucial to the development of certain rights in practice. The rights of migrants at sea are no exception to this rule. At the regional level, the role and work of the European Court of Human Rights is increasingly pronounced and accompanied by growing expectations that the European Court of Human Rights should provide protection in certain areas where such protection has not yet been provided or that it should increase protection which is part of the already established case law of the court.

Without these international and regional mechanisms and their decisions, the opportunity to provide certain protection to migrants at sea would certainly be less. Yet sometimes such decisions are accompanied by the reluctance of existing bodies to oblige states to do more than what has been required of them so far. In this sense, some progress and decision-making that states may not welcome must be expected from these extremely important bodies and mechanisms.

6. Conclusion

Previous chapters have shown that a certain system of protection for migrants at sea exists. However, it seems inevitable not to state that protection should be significantly greater. It is questionable whether this would significantly reduce migratory flows by sea without addressing at the same time the roots and reasons for such migrations.

Without other options for achieving safety and respect for fundamental human rights, the perils at sea do not seem insurmountable from the perspective of these people. Although countries have recently

begun to turn to tighter border controls to tackle the migrant crisis, it seems difficult to argue that this could be a good short-term or long-term strategy. On the contrary, what we often see is that such policies further undermine the already violated rights of migrants through their repeated infringements on the way to countries or at the borders of countries that should provide protection to migrants.

Accordingly, instead of a holistic approach to the migrant crisis, states seem to have chosen a different path. A holistic approach that considers economic and social roots and tries to address them as a long-term goal, or is oriented towards better cooperation between countries when it comes to sharing the burden of finding solutions for tackling the crisis as a short-term goal, would probably require more effort from states, but it could be a step forward in reducing the migrant crisis. Nevertheless, all the steps taken must place the need for humanitarian protection of migrants as the main priority.

As shown in previous chapters, there exist rules of international refugee law and international human rights law that should complement the rules of international maritime law when it comes to the protection of migrants at sea. In practice, however, these rules are often interpreted in a way that limits their protection. Although the existing human rights systems seek to increase humanitarian protection in their practice, without the willingness of the states, we can expect a continuous number of victims who will not manage to secure a safer life for themselves.

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