Scandinavian Institute of Maritime Law Yearbook

2021

565

SIMPLY 2021

MarIus No. 565
Sjørettsfondet
Nordisk institutt for sjørett
Universitetet i Oslo

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ISSN: 0332-7868

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

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

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

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Print: 07 Media AS

Editor’s preface

This year’s issue of SIMPLY contains articles which all cover core areas of the Institute’ research and teaching activities, comprising:

- Thor Falkanger’s article giving an account of the recently enacted Norwegian rules on bare boat charter registry,
- Trine-Lise Wilhelmsen’s article on marine insurance discussing whether detainment of ships by states constitutes a marine or a war peril (the article is published with permission from Routledge as it forms part of the book under publication: *The Modern Law of Marine Insurance* Vol 5).

Then follows four articles which in one way or the other deals with the construction and/or application of maritime law conventions:

- Erling Selvig’s extensive article discussing key questions of global limitation rules and their national law implementation,
- My own article dealing with ever occurring questions relating to liability exception for nautical fault under the Hague-Visby Rules – and forming an extension of my article in last year’s issue of SIMPLY,
- Kristina Maria Siig’s article dealing with maritime law conventions and how they may fare within the context of technological developments, viz. the current herald of autonomous ships,
- Ayoub Tailoussane’s article giving an in depth account of the rules for collision avoidance (COLREGS), using as a steppingstone a recent English Supreme Court decision the Alexandra I – thus dealing with a topic which so far has received little scholarly attention in the Nordic maritime law discourse.

Trond Solvang

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Norwegian rules of 2020 on registration of bare boat charter parties

Thor Falkanger[1]

1 Professor emiritus, Scandinavian Institute of Maritime Law, University of Oslo

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1 The purpose of this article

In 2020, Norway enacted rules on the registration of bare boat charter parties: a vessel registered in a Norwegian register (we have two) may – while still retaining the Norwegian registration – be registered in the register of a foreign state, on the basis of a bare boat charter party. Conversely, a vessel registered in a foreign state – being on a bare boat charter party – may also be registered in a Norwegian register. In simple terms, this has the following effects: the public law rules are transferred to the state of the bare boat register, while the private law rules on ownership to and encumbrances on the vessel are not changed and remain as registered in the original register (the primary register). The purpose of this article is to provide an outline of the rules and their implications – after some introductory remarks on registration and the background for the new rules.[2]

2. The background for the new rules[3]

2.1 The purpose of the registration

Ship registration serves two objectives: it gives the state the possibility of controlling the public law aspects of shipping – with regard to both state obligations as well as rights. Consequently, ship registration should be obligatory. The other objective is of a private law character and is twofold: the contractual counterparty to the owner ought to be able to determine whether the person appearing to be the owner is really the owner, and whether there are other rights conflicting with his own *in rem* right to the vessel. A creditor of the owner has similar interests: Is the debtor the owner of the vessel, and what is the value of an attachment on the

2 The translations of Norwegian texts are the responsibility of the author.

3 For more details, see Falkanger, Bull & Brautaset, *Scandinavian Maritime Law* (4th ed. 2017) pp. 55 et seq.

vessel? These private law interests can hardly indicate an obligation to register ownership and encumbrances on the vessel.

2.2 Some historical facts

The first Norwegian ship register – to use the concept in its modern sense – was established by an act of 1901. It was structured on the principles of land registration, but with a far better system. In the years that followed, there was a kind of competition between the two registers regarding the best solutions. A major reconsolidation in the shipping sector came in 1973,[4] based on the modern land registration rules, and the 1973 rules have been transplanted into the Maritime Code of 1994.

2.3 The charter party issue

In 1973, an important issue was whether registration of charter parties should be allowed. The maritime committee's proposal, which was eventually enacted, was that neither voyage/time charter parties nor bare boat charter parties could be registered. This was due to considerations of specific performance: registration implies the right to demand specific performance of the contract. In Leie av skib (1969) p. 580 I have summarized this as follows:

> "Regarding ordinary charter parties the committee finds that regardless of the present legal regime the best argument *de lege ferenda* is that specific performance cannot be demanded. The committee acknowledges that circumstances are different for straightforward bare boat charters, but it is nonetheless proposed that such agreements cannot be registered, because 'it is legally-technically difficult to distinguish between bare boat charters and voyage/time charters'."

[4] By changes in the Maritime Code of 1893.

2.4 The international ship register (NIS)

At the time of the shipping crisis in the 1980s, the Norwegian rules on registration obligations were strict: registration required the vessel to be owned by either a Norwegian citizen or a Norwegian company (with detailed rules on shareholding etc.), and if these requirements were met, there was an obligation to register the vessel in the Norwegian register. De-registration and transfer to a foreign register was dependent upon official permission, which initially was not easily obtainable. The crisis prompted demands for a more flexible system – for reasons similar to those indicated below in favour of bare boat registration: minimizing costs, increasing revenue. The outcome was a new register: the International Ship Register (NIS). The rules applying to vessels registered in the NIS are – from the owner's point of view – better, see for the details Falkanger, Bull & Brautaset *op.cit*. pp. 69-71. However, there are some trading restrictions – first of all, trading between Norwegian ports is not allowed for vessels registered in the NIS, nor is regular passenger transport to and from Norway.

2.5 The amendments of 2020[5]

The background to the amendments in 2020 – finalized in an act of April 17 2020 No. 28 – are given and discussed in the *travaux preparatoires*.[6]

The main reason for bare boat registration is that from a commercial point of view it may be preferable for a vessel to sail under a particular flag – without the possibility of having the vessel registered in the relevant state in the traditional manner. In the hearing, previous to the 2020 amendment, it had been emphasized that, typically, this is a situation where the relevant state has a legal system that does not give sufficient

5 There is a number of contributions to the problems relating to registration of bare boat charter parties. Regarding the situation in Norway some years back there is a still very informative contribution by Mats E. Sæther, *Bareboat ("parallel-") registrering av skip – i jus og praksis*, Marius No. 297 (2003).

6 Prop. 32 L (2019-2020) and Innst. 148 L (2019-2020). To the following, see in particular Prop. 32 L (2019-2020) pp. 10-11.

security for those having ownership or legal rights in the vessel, or else that the relevant state has inadequate rules regarding the enforcement of claims.

Another reason for bare boat flagging-out is where the bare boat charterer has preferences relating to the flag of the vessel. Such out-flagging makes it possible for a Norwegian owner to charter out the vessel on terms satisfying the interests of the bare boat charterer, while at the same time securing the interests of the mortgagees, as their rights remain registered in the Norwegian register.

Furthermore, bare boat chartering may be used in order to obtain market access. Norwegian shipping interests have indicated that this is one of the main arguments for flagging out. One important factor in many cases is that operating costs (primarily crew costs) can be substantially reduced by having a non-Norwegian flag.

Regarding bare boat charters in a Norwegian register, the Norwegian shipping society has pointed out that this is of particular interest when banks require a Norwegian flag, or operators on the Norwegian shelf demands a Norwegian flag. Another possibility would be where a Norwegian shipping company bare boat charters a foreign registered vessel for service between Norwegian ports.

In the following, I shall discuss the consequences of the amendments; firstly with regard to flagging-in, as this topic is dealt with first in the Maritime Code (MC).[7]

[7] The Maritime Code of June 24 1994 No. 39.

3 Bare boat registration in Norway of foreign vessels (flagging-in)

3.1 Introduction

Before discussing the requirements for flagging-in, it is necessary to give an outline of the consequences of the registration, as the interpretation of the requirements will, it is submitted, depend to some extent on the consequences. The discussion in 3.1-3.5 concerns registration in the ordinary ship register (NOR); the discussion of whether the NIS rules are different is postponed to 3.6.

3.2 The consequences – public law and private law

The flagging-in is regulated in MC Section 40. The consequences of such registration are briefly stated in paragraphs three and four:

> "A vessel registered in accordance with this Section is subject to Norwegian jurisdiction and shall fly the Norwegian flag.
>
> Mortgages and other proprietary rights in a bare boat registered vessels cannot be registered."

In addition, paragraph five entitles the Ministry of Trade, Industry and Fisheries to impose further rules "on bare boat registration, hereunder requirements to the bare boat charter party, documentation and process". This has been done by amendments in Regulation 593/1992 on the registration of vessels in the Norwegian ordinary ship register (NOR).

The public law aspect is explained in the *travaux preparatoires* in this way:

> "The bare boat state has an exclusive right to exercise jurisdiction and control over the vessel, and as a result it will be subject to the law of the bare boat state regarding operation, security, manning and environment. The vessel will fly the flag of the bare boat state

> for the period that the vessel is on bare boat charter" (Prop. 32 L (2019-2020) s. 20).

What is not specifically mentioned, but is obviously included, is criminal law jurisdiction in conformity with the rules in the Penal Code.[8]

The private law consequences are summarized in the *travaux preparatoires*:

> "[O]wnership and rights remain registered in the primary state during the whole period the vessel is bare boat registered" (Prop. 32 L (2019-2020) p. 5).

"Rights" include voluntary rights (typically sales contracts and mortgages) as well as liens (maritime/enforcement liens) and conservatory attachments.

3.4 The requirements for registration of the bare boat agreement[9]

In this 3.4 we provide an outline of the various requirements for bare boat registration according to MC Section 40.

8 See Penal Code (Act 28/2005) Section 4 letter c: The criminal legislation applies to acts committed "on Norwegian vessels including aircraft, and drilling platforms or similar moveable installations. If a vessel or installation is in or above the territory of another state, the criminal legislation applies only to an act committed by a person on board the vessel or installation". A vessel flying the Norwegian flag is in this respect "Norwegian" – see the United Nations Convention on the Law of the Sea (UNCLOS) of 1982 Art. 91. On reservations regarding requisitions, cf. Sæther *op.cit.* p. 43. This question is mentioned in Prop. 32 L (2019-2020) p. 19: The Ministry "agrees that it should be considered whether there is a need to amend the Act on Requisition [Act June 29 1951 No. 19] Section 1 under which ships may be requisitioned".

9 MC Section 20 paragraph one states that documents "relating to a maritime lien on a ship or the lease or chartering of a ship", cannot be registered, see 2.3 above. It has obviously been overlooked, that there is a need for some modification of the section.

3.4.1 What is a bare boat agreement?

As mentioned in 2.4 above, the borderline between a time charter and a bare boat charter may be difficult to draw. MC gives no definition or indication, but in the *travaux preparatoires* it says that a bare boat charter is a contract whereby

> "a lessee (a bare boat charterer) assumes the total responsibility for the operation of the vessel, its equipment and manning from the owner, and operates the vessel for his own account and at his own risk. The bare boat charter gives the charterer both commercial and technical command over the vessel, and thus the charterer is considered to be the owner [Norwegian "reder"[10]] in relation to the maritime code, the ship working law and the ship safety law" (Prop. 32 L (2019-2020) p. 7).

3.4.2 The length of the agreement

The registration is for the length of the charter, but initially for not more than ten years. The period may, however, be extended by the registrar for periods of up to five years upon request of the charterer submitted at the earliest six months before the expiration of the ongoing period. There is one restriction connected with the necessary consent from the primary register and third parties – see 3.4.6 below; such consent may be time limited, and if so, the registration period is correspondingly defined.

3.4.3 The bare boat charterer

The charterer may be either a person or a company, and requirements regarding nationality and domicile follow from the reference to MC Sections 1 and 4. The main rule is that a charterer, being a limited company, must have its head office in Norway, the majority of the directors have

[10] In the translation of the MC into English in MarIus No. 435 (2014), the preface explains that there is no equivalent English term: "The 'reder' is the person (or company) that runs the vessel for his or her own account, typically the owner or the demise charterer. Time charterers and voyage charterers are not considered 'reders'."

to be resident in Norway and 60 percent of the share capital with corresponding voting rights should be in Norwegian hands.

3.4.4 What kind of vessels?

Section 40 limits the type of vessel or construction that is eligible for registration. The vessel must have a length of 15 meters or more, and be a passenger or cargo vessel; e.g., a fishing vessel is excluded from registration.

3.4.5 Primary registration state is in principle irrelevant

A bare boat charter party for an unregistered vessel cannot be registered in Norway. Where the vessel is registered – whether in a state with strict and effective control or in a new "flag of convenience"-state with scant shipping competence – is immaterial.[11] However, in order to register in Norway a SOLAS-Confirmation is necessary: A "declaration of safety" issued by one of the approved classification societies must be presented.

Registration in Norway with transfer of jurisdiction must of course be coordinated with the state of the primary register. The solution is that consent is required from the primary register, see paragraph two no. 4 on "documentation from the ship register in the primary state showing that the vessel is temporarily allowed to be bare boat registered and fly the Norwegian flag". Whether such documentation will be given depends upon the law of the primary state, and the effect of the Norwegian registration will be within the limits set in the permission.

In addition, there has to be written consent from the owner and all holders of rights (paragraph two no. 3), which must be understood as being consent from those who, according to the primary register, are the owner and holders of rights.[12]

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11 The Danish rules are restrictive on flagging-out. Registration is accepted in all EU-and EØS-states and some named states. There is no similar restriction on flagging-in.

12 Prop. 32 L (2019-2020) p. 28.

3.4.7 Documentation and formal registration

Registration is dependent upon a request in writing being made by the bare boat charterer, together with:

- a copy of the bare boat charter party,
- documentation that the charterer complies with the nationality requirements in MC Section 1 (see 3.4.3),[13]
- excerpt from the primary register showing owner and holders of rights,
- documentation of consent from third parties (see 3.4.6),
- documentation from the primary register that bare boat registration is accepted (see 3.4.6).

If the ship register requirements are satisfied, the vessel will be a special entity in the register, and a certificate of nationality will be issued.[14]

A transcript from the register (headed: "vessel information"- Norwegian: "fartøysinformasjon") will, in addition to the technical details of the vessel, provide information on the primary register, the owner, the bare boat charterer and the date of the bare boat charter party, as well as on who is now ISM-responsible.[15]

The decisive moment for transference to Norwegian jurisdiction is the actual registration.

3.4.8 De-registration

Seven de-registration reasons are listed in MC 40a letters a-f.

Letter a prescribes de-registration when "the bare boat charter party ceases". This may happen for a number of reasons; some of them are also

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[13] For further details, see the home page of Sjøfartsdirektoratet (Norwegian Maritime Authority).

[14] Regulation 593/1992 Section7d. See also Section 7c that such certificate shall includes date of the expiry and the charterer's name and address.

[15] The ISM-code – International Safety Management Code – is based on IMO Resolution A.741 (18) of 4 November 1993 with an Annex, which provides the content of the actual code. The code implements a system of "internal control" for the shipowner.

covered in the following letters. Letter a appears primarily aimed at the basic rules on the time length of the registration, see 3.4.2.

Letter b says that de-registration shall take place when "the conditions for registration according to Section 40 paragraph one no longer exist". This includes the reasons related to letter a, as well as a number of other reasons. An example is where the charterer no longer fulfills the nationality requirements in MC Section 1 – a situation that may exist for a long period without being known to the register.

Letter c concerns a party's request for de-registration. Originally, the Ministry proposed that a request had to come from the charterer. However, the shipping industry pointed out that one of the greatest challenges regarding bare boat registration is that holders of rights fear that the charterer may prevent de-registration – typically, where the owner cancels the charter party and the charterer resists the cancellation. This was accepted by the Ministry, and the rule is now that de-registration may follow from a request by either the owner or the charterer.

We may have a situation where one of the parties gives notice of cancellation, while the other party denies that there are grounds for cancellation. Here the system appears to be that the notification is accepted, and the dispute has thereafter to be decided according to the rules governing the contract – see 4.3 below. On this point we would refer to what the *travaux preparatoires* say on disputes regarding flagging-out, and this must, it is submitted, have similar application regarding flagging-in.

Letter d requires de-registration when the vessel "according to the law of the primary state no longer has the temporary right to sail under the Norwegian flag".

Letters e and f concern notifications to the register. When a vessel is lost or scrapped, there is a duty on the owner to notify the register, no later than 30 days after the event, cf. MC Section 13. Such notice is grounds for de-registration. If notice is not given and the registrar becomes aware of this fact, de-registration will take place, however, not before the owner has had the opportunity to express his views.

A striking fact in Section 40a is that, except in letters c and e, there is no mechanism for activating the de-registration process,[16] and this makes it even more pressing to raise the question of the exact moment for re-establishing Norwegian jurisdiction. Is it when the deletion is made in the register, or when the material grounds for registration are no longer present? The question is discussed in Prop. 32 L (2019-2020) pp. 26-27 regarding flagging-out (see 4.3), but not regarding flagging-in. It is, however, reasonably clear that the Ministry was of the opinion that the time of deletion is decisive, as otherwise the 30 days notification-rule will not make sense. If this is accepted, we may have a situation lasting for a long period where Norway has given orders to the vessel and imposed fines, when e.g. the nationality requirements for the charterer have not been present. The guidance or restrictions that may follow from conventions and general international law, are not mentioned in the *travaux preparatoires*.[17]

When de-registration is effected, the *travaux preparatoires* say that the registrar "ought" to notify the primary register.[18] It is somewhat surprising that such a rule is not obligatory. Without information, the primary register state may believe that questions of seaworthiness etc. still are supervised by Norway.

16 In contrast, see MC section 40b imposing a duty on the owner to notify the register that the charter party has ended.

17 In, for example, the ordinary land register, the situation is that there are rules on deletion, e.g., deletion occurring at a defined period after registration. If such ground for deletion has been overlooked, no material rule is affected; as from the time that deletion could have been deleted, the encumbrance is considered as not being registered. And when deletion is dependent upon a notification, e,g., from the mortgagee that the mortgage shall be deleted, it is clear that the actual time of deletion is decisive. But as regards the state, e.g. in taxation matters, the question is who is *the real owner* (and in such assessment, registration is only one fact amongst many), and this is also the case when the creditors try to attach a debtor's assets.

18 Prop. 32 L (2019-2020) p. 31.

3.5 Drilling platforms and moveable constructions

A bare boat charter for a moveable drilling platform or construction may also be registered. Before indicating the rules, it is necessary to quote MC Section 507 first sentence on the general rules on registration:

> "Drilling platforms and similar mobile constructions which are not regarded as ships and are intended for use in exploration for, or exploitation, storage or transportation of, subsea natural resources or in support of such activities, are considered Norwegian if they are owned by any person mentioned in Section 4 paragraph one and have not been entered into the register of another country."

The possibility of registering bare boat charter parties for drilling platforms and other constructions must be read in conformity with this description. For example, a bare boat charter for an installation used in connection with aqua culture activities cannot be registered. Otherwise, the requirements for registration are the same as for passenger and cargo vessels, although with the modification that the nationality requirements in Section 4 are not as strict as those in Section 1.[19]

3.6 Registration of bare boat charter parties in NIS

Bare boat charter parties can be registered in the NIS, see the NIS Act (Act 48/1987) Section 14 – with rules similar to those applicable for the ordinary register (NOR), as described above. There is, however, one important exception regarding nationality, see Section 1, that is referred to in Section 14. If the bare boat charterer does not comply with the requirements of MC Section 1, registration is still possible if the charterer is:

- a limited company with its head office in Norway, or
- a partnership with a managing owner complying with the rules in MC Chap. 5, or

[19] The main rule is that the charterer must be a Norwegian national, or a partnership or a company that for at least 60 percent is owned by Norwegian nationals, or other company registered in Norway.

- when the owner does not satisfy the above requirements but has a representative, as described in MC Section 103, with authority to receive legal process service on behalf of the owner.

4 Norwegian registered vessels – bare boat registration in a foreign country (flagging-out)

4.1 Introduction

The rules on flagging-out from a Norwegian register are basically structured the same as the rules on flagging-in. Therefore, the description here is shorter, following the same order: first looking at vessels registered in NOR, then platforms and constructions, and finally some words on NIS-registration.

4.2 Vessel registered in NOR – requirements for flagging-out

MC Section 40c states that the same type of vessels, platforms or constructions described in 3 as being registered in Norway may, upon request from the owner, be given permission to bare boat registration in a foreign ship register. The time limitations are similar to those in MC Section 40 paragraph one (see 3.4.2). The right to grant extensions is in the hands of the registrar, and according to the *travaux preparatoires* it is also the registrar who has the competence to give the initial permission.[20] What the registrar must take into consideration before giving permission, is primarily whether the necessary documentation is adequate. He is not entitled to deny registration because he considers registration in state A as being "unfortunate".

[20] Prop. 32 L (2019-2020) p. 26,

A permission requires documentation (paragraph two):

- a copy of the bare boat charter party,
- a written consent to the flagging-out from the owner of the vessel and "all those having rights in the vessel", which probably means all those with registered rights, and
- documentation from the foreign register that bare boat registration there is accepted. There is no requirement as to what kind of rules are applicable in the selected register state and how effectively the rules are followed up.

The consequences of flagging-out are described in paragraphs three and four:

(i) For a temporary period, the vessel has the right to fly the flag of the bare boat register state. During such period, the vessel shall not be considered Norwegian, see MC Section 1 paragraph six. The vessel is not allowed to use the Norwegian flag, and furthermore, the vessel shall not have a Norwegian nationality certificate.

(ii) Paragraph four states that mortgages and other registered rights are not affected, and that such rights as are created during the flagging-out period may be registered in the Norwegian register.

Finally, paragraph five entitles the Ministry to issue regulations, similarly to those in Section 40 paragraph five.

The register transcript (headed: "vessel information"- Norwegian: "fartøysinformasjon") will, in addition to the technical details of the vessel, including the name of the owner, state that the vessel is also registered in a named state on the basis of a bare boat charter party for an identified period. The transcript will give information on the registered encumbrances– all in order of priority. One of the encumbrances is the bare boat charter party, with information on the charterer.

4.3 Permission expired

The parallel to de-registration in flagging-in situations (Section 40b), is that the flagging-out permission is no longer valid, cf. Section 40c. The

vessel is now entitled to fly the Norwegian flag and is within Norwegian jurisdiction in public law matters (paragraph two).

The permission expires:

(i) When the charter party ends. This may be due to a number of reasons: the time stated in the contract has expired, the contract is cancelled by the owner or the charterer, the vessel is lost, a forced sale has extinguished the contract, or the parties have amicably agreed to terminate the contract.

(ii) When the vessel no longer is "temporarily entitled to sail under the flag of the foreign register". Whether this will happen depends primarily upon the rules of the bare boat state.

The owner of the vessel is under a duty to notify the Norwegian register as soon as possible and at the latest 30 days after the end of the charter party. Here there is a subsidiary rule: where notification is not given in accordance with this, but the registrar becomes aware from other sources that the contract is ended, he may delete the charter party – but only after giving the owner the opportunity to express his view.

The owner may contend that the registration should be deleted, e.g. because the charter party is cancelled, but the charterer disagrees. According to MC Section 40c, deletion follows from the owner's notification, and protests from the charterer are irrelevant. The *travaux preparatoires*[21] say that contractual issues between the owner of the vessel and the bare boat charterer, including whether the bare boat charter party is rightfully cancelled, are matters that the parties will have to resolve *later* in the courts of the agreed venue.[22]

As indicated above, the question of the exact time of reestablishing Norwegian jurisdiction is discussed in Prop. 32 L (2019-2020) pp. 26-27. Do the rights and obligations for Norway exist from the end of the per-

21 Prop. 32 L (2019-2020) p. 27.

22 If the court decides that cancellation was unwarranted, the remedy is damages for the loss suffered by the charterer. In principle, there is also the possibility of demanding specific performance – when registration now is accepted, the contra arguments indicated in 2.3 are no longer valid. However, specific performance occurring a long time after the declaration of cancelling and deletion from the register appears to be practical only in very special circumstances.

mission period/end of the charter party, or is the moment of deletion decisive? The discussion makes it reasonably clear that the answer is the latter. Nor in this connection is international law mentioned.

4.4 Platforms and constructions

When platforms and constructions – as defined in 3.5 – are bare boat chartered, the rules on flagging-out are as stated in 4.2.

4.5 Vessels, platforms and constructions registered in NIS

The rules in NIS-Act Section 16 are similar to those in MC Section 40c. Permission to flagging-out for up to 10 years, with extension possibilities, can be given by the registrar when the owner presents a similar set of documents, and the effects are the same.

Section 17, on cessation of permission to flag-out, has rules similar to those in MC Section 40c.

5 Further on non-performance and enforcement of claims

5.1 Introduction

The question is how the system with two registers and the division of law – private law connected with the primary register, and public law with the bare boat register – affect questions of non-fulfilment of contractual obligations. We need to consider two aspects: the owner – charterer relationship, and the relationship between the owner and others than the charterer who have rights in the vessel. Finally, we consider questions on the enforcement of claims.

Obviously, the rules that may be relevant may well differ from country to country. Accordingly, it is necessary to limit the discussion – with the guiding principle: what can a Norwegian court decide?

5.2 Owner – charterer

When there is an alleged breach of the contractual terms – fundamental or of a minor character – the question of relevancy may depend upon the governing law. Here the parties have freedom to choose the law to be applied, and this is usually already decided in the charter party.

As mentioned above, de-registration may be at the owner's initiative – despite the charterer's protests. In a court trial on a later date, the decision may be that e.g. the cancellation was unwarranted. Here, the remedy is damages for the loss suffered by the charterer. In principle, there is also the possibility of demanding specific performance; since the registration of bare boat charter parties is now in principle accepted, the contra arguments indicated in 2.3 are no longer valid. However, specific performance which only occurs a long time after the declaration of cancelling and deletion from the register, appears practical only in very special circumstances.

5.3 Owner and mortgagees

In most instances, the vessel is mortgaged before the vessel is bare boat chartered, and it may be further mortgaged during the charter period. These encumbrances will be in the Norwegian register when flagging-out and in a foreign register when the vessel is flagged-in.

A mortgage may have clauses on the nationality of the vessel and/or restrictions regarding registration. Such clauses (covenants) may prevent bare boat registration or set limits (e.g., on period or state of registration). The mortgage agreement may include a number of other clauses to protect the interests of the creditor – all of them with the possibility of declaring foreclosure in the event of breach. In addition, there are of course general principles that in case of a breach may lead

to enforcement. Before we move onto some remarks on Norwegian law with regard to the enforcement of claims, it is first necessary to say a few words about liens.

5.4 Maritime liens and enforcement liens

In conformity with the Brussels Convention of 1967, a number of claims are secured by a maritime lien on the vessel (MC Section 51): wages to master and crew, port dues, damages as a result of collision etc., provided the "reder" is the debtor. The Norwegian word "reder" covers – as explained in 3.4.4 – the bare boat charterer.[23] In other words, the vessel may be encumbered – and as a first priority lien – by an act of the charterer. This is one of the owner's risks connected with bare boat chartering. According to the Norwegian rules, a maritime lien cannot be registered (MC Section 20). On the recognition in Norway of foreign maritime liens, see 5.5 below.

The number of maritime liens is limited and these encumbrances are characterized by the connection between the claim and the vessel. However, a vessel may serve as security for other claims – with or without a link to the vessel – created by the decision of the enforcement authority, see Code of Enforcement (Act 86/1992 – CoE) Chap. 7 on enforcement liens.

For now, it is sufficient to refer to CoE Section 7-1 on attachment of the debtor's property. Assuming that the object is the vessel and the charter party, an enforcement lien for claims against the owner is a lien on the vessel and is registered in NOR when the vessel is flagged-out. A claim against the bare boat charterer is a lien on the charter party and is registered accordingly in NOR (as an encumbrance on the rights flowing from the registered bare boat charter party).

[23] We have other claims secured *ex lege*, see e.g., the Liens Code (Act 2/1980) Chap.6, but they are of minor importance in our context.

5.5 Forced sale of the vessel by a Norwegian court

A demand for a forced sale may be presented for a number of reasons. We limit the scope for this discussion to late payment: a claim, secured by a mortgage, an enforcement lien or a maritime lien is not paid in time. We need not to go into the many and in some respects complicated rules in CoE. [24] It is sufficient to say that if there is "an enforcement ground" defined in CoE Section 11-2 (typically, a registered mortgage or a registered enforcement lien), the vessel may be sold at a forced sale under the auspices of a court. The competent court is the court where the vessel is or "is expected to arrive in the near future" (CoE Section 11-3) which means that the place of registration or the flag of the vessel is not material. However, if the flag is not Norwegian there are some "niceties".[25] In particular, MC Section 74 on the recognition of mortgages and liens on foreign vessels and Section 75 on choice of law should both be noted.

[24] For a short overview, see Falkanger, *Forced Sale of Vessels according to Norwegian Law*, SIMPLY 1999 (= MarIus No. 247) pp. 3-27.

[25] See article mentioned in the preceding note pp. 25-27.

Marine insurance cover for detainment of vessels by a foreign state – the *Team Tango* case[1]

Trine-Lise Wilhelmsen[2]

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1 This article was first accepted for publishing as ch. 9 in *The Modern Law of Marine Insurance* Vol 5 2022, edited by Rhidian Thomas, Informa Law from Routledge, 2022. The book is currently under publication. Re-publishing in SIMPLY is done with permission from Routledge.

2 Professor, Scandinavian Institute of Maritime Law, University of Oslo

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1 Introduction and overview

The topic of this article is marine insurance cover for the detainment of vessels by a foreign state, as illustrated by a recent Norwegian arbitration case – the *Team Tango* case.[3] It is well known that vessels entering foreign ports may be detained by the governing state, with or without an accepted legal basis for making such intervention. This may prevent the vessel from leaving the port and so lead to delay, resulting in loss of income under the vessel's freight contract. Detainment may also lead to damage to the vessel, and, if the vessel is not freed from the detainment, in the vessel being lost. The question will then be whether such delay, damage and total loss are covered under the vessel's hull and loss of hire insurance. Unfortunately, this issue has gained importance in recent years, because states have arrested foreign vessels in their ports on dubious legal bases and then detained them for lengthy periods, even ending up confiscating the vessel. The question of insurance cover for this peril is therefore an important issue for both the ship owners and the insurance community.

This question was on the agenda when the Nordic Marine Insurance Plan 2013 was amended in 2019.[4] A principal concern with this amendment was to extend the cover for intervention by foreign states, and also to clarify issues that had been disputed in the previous versions.[5] However, even with this amendment, the question of insurance cover for state intervention is difficult. This is illustrated by the arbitration award concerning the vessel *Team Tango*. *Team Tango* was insured under the

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3 Arbitration award from 10 April 2019. The arbitration tribunal consisted of previous Chief Justice of the Supreme Court Tore Schei (chairman), previous Supreme Court Justice Karin Bruzelius and professor Trine-Lise Wilhelmsen. The award is currently unpublished, but will be published in Nordiske Domme i Sjøfartsanliggende. The award is written in Norwegian, but is partly translated by the author for use in this article.

4 The Nordic Association of Marine Insurers (Cefor), 'The Nordic Marine Insurance Plan 2013, Version 2019' < http://nordicplan.org/The-Plan/> (accessed 21 October 2021).

5 Trine-Lise Wilhelmsen, 'Cover for Intervention by State Power in the Nordic Plan from 2019: a Fair and Timely Compromise?' (2018) JIML 24, 354-368; Trine-Lise Wilhelmsen, 'Marine Insurance for Intervention by State Power' (2019) MarIus 519, 151-198.

Nordic Marine Insurance Plan 2013 Version 2016, but the regulation of the disputed issue is similar to the regulation under the 2019 Plan and demonstrates some of the difficulties involved. The main issue in the *Team Tango* case was whether the detainment constituted a marine peril or a war peril, see 4 below. However, the assured also submitted that there was a combination of war peril and marine peril, and the case illustrates the relationship between the concept of peril and issues of causation in this situation, see 5 below. Furthermore, it is interesting to see how the case would have been solved under the UK conditions, see 6 below.

Before we address these questions, it is first necessary to give a presentation of the Nordic Marine Insurance Plan in 2, and then outline the amendment of the cover for intervention by foreign states in 3.

2 The Nordic Marine Insurance Plan 2013

The Nordic Marine Insurance Plan 2013 (NP) is an agreed insurance contract covering i.a. hull insurance, hull interest insurance and loss of hire insurance for vessels. It contains both insurance against marine risk, as well as insurance against war risk. The NP is used in all the Nordic countries and contains a comprehensive regulation which also provides provisions for questions ordinarily regulated under national insurance legislation.[6]

The NP is based on the Norwegian Marine Insurance Plan 1996 Version 2010 (NMIP 2010),[7] but some of the clauses are adjusted to conform to national background law in the other Nordic countries. Most of the clauses, however, including thereunder the clauses relevant for this

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6 The main textbooks on the NP are Sjur Brækhus and Alex. Rein, *Håndbok i Kaskoforsikring* (Oslo, Sjørettsfondet, 1993) and Trine-Lise Wilhelmsen and Hans Jacob Bull, *Handbook on Hull Insurance* (2nd edn, Gyldendal 2017)

7 The Nordic Association of Marine Insurers (Cefor), 'The Norwegian Marine Insurance Plan of 1996, Version 2010' <http://nordicplan.org/Archive/The-Norwegian-Plan-2010/> (accessed 21 October 2021).

article, are identical or similar to the previous clauses. Previous practice on these clauses is therefore still relevant.

As the NP is based on the NMIP 2010, it is necessary to outline the historical development of the NMIP, in order to understand the relationship between the NMIP and the NP and the different versions of the NP.

The first NMIP was published in 1871, and was later followed by several more Plans,[8] the most recent being the 1996 Plan. The NMIP 1996 was published in several versions, the most recent in 2010.[9] At this time, the Nordic Association of Marine Insurers (Cefor), which is responsible for the maintenance and publishing of standard marine insurance conditions in the Nordic market, decided that, instead of operating with a separate set of standard conditions in each of the Nordic countries, the maintenance effort should be concentrated on one common set of conditions. Cefor chose the Norwegian Marine Insurance Plan 1996 Version 2010 as the basis for a set of unified Nordic conditions. An agreement was entered into between Cefor and the Norwegian, Danish, Swedish and Finnish ship-owner associations on 3 November 2010 to construct the Nordic Marine Insurance Plan of 2013, which came into force in January 2013. The agreement established the Standing Revision Committee to be responsible for amending the NP every third or fourth year. The NP was amended in 2016 and again in 2019.[10] *Team Tango* was insured under the 2016 Version. The cover for interventions by foreign states was however, amended in the 2019 Version i.a. to clarify the previous clauses, and the arbitration case also refers to the Commentary to this version. Both versions will therefore be addressed in this article.

The NP is supplemented by extensive and published commentaries (the Commentary). Until 2007 the Commentary was published both in hard copy and on the website. From 2007 onward the Commentary has only been published on Cefor's website.[11] The references to the 2019 Com-

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

9 Version 1997, Version 1999, Version 2000, Version 2002, Version 2003, Version 2007 and Version 2010.

10 Wilhelmsen and Bull (n 4) 26.

11 Wilhelmsen and Bull (n 4) 27.

mentary in this article are to the pdf-download placed on this website for the 2019 Version.[12] The references to the 2016 Commentary are also to the version on the website.

The starting point for interpretation of the NP is of course the wording of the clauses. However, the Commentary is a relevant and highly significant legal source for the interpretation, cf. the following remark in the Commentary:

> 'The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. … Nevertheless the Commentary shall still carry more weight as a legal source than is normally the case with the Traveau Preparatoire of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Nordic Revision Committee, and it must therefore be regarded as an integral component of the standard contract which the Plan constitutes.'[13]

The opinion of the Plan Committee that the Commentary is a significant factor for the interpretation of the Plan has been accepted both by the Supreme Court[14] and also in arbitration cases.[15] It should also be noted that arbitration awards are more relevant as a legal argument for interpretation in marine insurance than is the case in many other legal disciplines.[16] The reason for this is that many marine insurance conflicts are solved by arbitration, and that those arbitration awards are often published. Cases concerning matters of principle will then be discussed by the Standing Revision Committee, which will either agree upon the award and include it as a legal source in the Commentary, or instead dis-

12 The Nordic Association of Marine Insurers (Cefor), 'Commentary' <http://www.nordicplan.org/Commentary/> (accessed 21 October 2021).

13 Commentary (2019) 25.

14 ND 1956.323 NSC *Pan;* ND 1956.318 NSC *Bandeirante;* ND 1969.49 NSC *Grethe Solheim;* ND 1998.216 NSC *Ocean Blessing.*

15 ND 2000.442 NA *Sitakathrine.*

16 Trine-Lise Wilhelmsen, 'Choice of Forum in the Nordic Marine Insurance Plan – Regulation and Practice' (2019) MarIus 515, 71-95.

agree with it and make the necessary changes to the text or commentary to depart from it.[17]

3 The NP regulation of detainment by foreign state

The scope of cover in the NP is divided between insurance against marine perils and insurance against war perils. In formal terms, this distinction is made in two stages. The insurance against marine perils is based on the all risks principle, which states that the insurance covers all perils to which the interest is exposed, unless the peril is specifically excluded. Perils covered under the war risk insurance are then excluded from the marine risk cover. The relevant provisions in the NP Version 2016 reads as follows:

> **Clause 2-8. Perils covered by an insurance against marine perils**
> An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of:
> (a) the perils covered by an insurance against war perils in accordance with Clause 2-9,
> (b) intervention by a State power. A State power is understood to mean individuals or organisations exercising public or supranational authority. …
>
> **Clause 2-9. Perils covered by an insurance against war perils**
> An insurance against war perils covers:
> (a) war or war-like conditions, including civil war or the use of arms or other implements of war in the course of military exercises in peacetime or in guarding against infringements of neutrality,
> (b) capture at sea, confiscation and other similar interventions by a foreign State power. Foreign State power is understood to mean any State power other than the State power in the ship's State of registration or in the State where the major ownership

[17] ibid 84-92.

> interests are located, as well as organisations and individuals who unlawfully purport to exercise public or supranational authority. Requisition for ownership or use by a State power shall not be regarded as an intervention,
>
> …

None of the clauses specifically mentions detainment of vessels. Clause 2-8 (b) excludes however "intervention by State power", which, from a language point of view, includes "detainment" of the vessel by the state. From the wording of Clause 2-8 (b), such interventions are excluded both when made by the vessel's own state and also if made by a foreign state. However, this issue was disputed, and it could be argued that only interventions by the vessel's own state were excluded.[18] If this was correct, intervention by a foreign state was covered unless the intervention constituted a war peril, cf. Clause 2-8 (a).

Clause 2-9 sub-clause 1 (b) covered "similar interventions" to capture at sea and confiscation. It did not follow from the wording that any kind of motive was required for this, but it was stated in the Commentary that the concept of similar interventions required the intervention to be motivated by primarily political objectives and did not include interventions made as part of the enforcement of customs and police legislation.[19] It was disputed if such a motive was also required for capture and seizure.[20]

In order to clarify the cover for state interventions, both under the marine risk insurance and the war risk insurance, these clauses were amended in the NP Version 2019:

> Clause 2-8. Perils covered by an insurance against marine perils
>
> An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of:
>
> (a) perils covered by an insurance against war perils in accordance with Clause 2-9,
>
> (b) **capture at sea, confiscation, expropriation and other similar interventions by own State power provided any such inter-**

[18] Wilhelmsen (2019) (n 3) 185-188.

[19] Commentary (2016) to Cl. 2-9 sub-clause 1 (b), Wilhelmsen 2019 (n 3), 179-180.

[20] Wilhelmsen (2019) (n 3) 175ff.

vention is made for the furtherance of an overriding national political objective. …

Clause 2-9. Perils covered by an insurance against war perils
An insurance against war perils covers:
…
(b) **capture at sea, confiscation, expropriation and other similar interventions by a foreign State power, provided any such intervention is made for the furtherance of an overriding national or supranational political objective. …**

The result of the amendment is that detainment by a foreign state is included in the war risk cover for interventions by a foreign state, provided the detainment "is made for the furtherance of an overriding national or supranational political objective". If the foreign state detains the vessel for another reason, for instance due to breach of trade legislation on import or export, tax law or police regulation, this will be covered by the insurance against marine perils, because the exclusion in Clause 2-8 (b) is limited to interventions made by the vessel's own state. This means that detainment of vessels by a foreign state is covered by Clause 2-8 unless excluded by Clause 2-8 (a) or (b) or other exclusions not discussed here.

The amendment is, as mentioned, intended to clarify issues which were previously disputed and to make the requirement of an overriding political objective general for all interventions listed in Clause 2-9 sub-clause 1 (b). Even if it could be disputed whether detainment by a foreign state that was not motivated by an overriding political goal would be covered by the insurance against marine perils under the 2016 Version, it appears that the insurers in the *Team Tango* case accepted that it was. This issue was not addressed in that case, but it is relevant for the question of causation, see below in 5.

However, there is a very important distinction between war risk and marine risk cover:

Insurance against marine perils covers damage according to the NP ch. 12, total loss according to NP ch. 11, and loss of hire according to NP

ch. 16. The characteristic features of these rules are that total loss requires the vessel to be in fact lost to the assured,[21] and that cover for loss of hire is triggered by damage to the vessel.[22]

In addition to this "normal" cover for marine perils, the war risk insurance provides cover for total loss if "the assured has been deprived of the vessel by an intervention by a foreign State power, for which the insurer is liable under Cl. 2-9", and the ship is not "released within twelve months from the day the intervention took place". [23] In such cases it is "irrelevant for the assured's claim that the vessel is released at a later time".[24] This means that if detainment by a foreign state which is covered by Clause 2-9 sub-clause 1 (b) results either in the assured being deprived of the vessel or else in the vessel being prevented from leaving a port for a period of 12 months, the assured is entitled to compensation for total loss.

There is also additional cover for loss of hire under the war risk insurance. The insurer "is liable for loss due to the vessel being wholly or partly deprived of income because it is prevented from leaving a port or a similar limited area", regardless of any damage to the vessel.[25] Thus, if the vessel is detained in port due to a war peril, loss of hire will be covered, even if there is no damage to the vessel.

4 The *Team Tango* case

4.1 The factual background and main submissions

The case concerned the bulk vessel *Team Tango* (TT). TT was owned by a Greek company and registered in the Marshall Islands.[26] TT sailed on a voyage charter party contracted by the Swiss company Vertical. Vertical

[21] NP Cl. 11-1.

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

[23] NP Cl. 15-11 sub-clause 1.

[24] NP Cl. 15-11 sub-clause 4.

[25] NP Cl. 15-16 sub-clause 2.

[26] The arbitration award (n 1) 2.

sold 13 995 532 tonnage of fertilizer containing urea to the Nigerian company Elephant Group Limited (Elephant). The fertilizer was loaded onto TT in Ukraina. TT then sailed to Lagos, where the cargo was to be received by Elephant. TT arrived at Lagos on 18 July 2016, but then had to wait at anchor until it could go into port to discharge the cargo. While it was still anchored, the Nigerian navy boarded the vessel on 29 August 2016, with marine soldiers carrying weapons. TT was neither allowed to go into port to discharge the cargo, nor to leave the area. The detainment lasted until 14 December 2018, when TT was allowed into the port to discharge the cargo. TT sailed from Lagos on 10 January 2019.

It was undisputed that Elephant did not have the necessary permissions to import the cargo of urea fertilizer, because such import was prohibited by anyone other than two specified Nigerian companies. This was the reason for the vessel being boarded on arrival. The customs authorities went to court to forfeit both the vessel and its cargo in December 2016, but the ship-owner, Elephant and Vertical, intervened in April 2017 and the customs authorities' claim was denied by the High Court on 5 June 2017. The detainment also resulted in several other court cases, i.a. between Elephant and the Nigerian State and between Vertical and the Nigerian State, before the vessel was freed due to diplomatic intervention in December 2018.

It was also undisputed that one reason for the prohibition against the import of urea fertilizer was to prevent the terrorist group Boko Haram from gaining access to urea, in order to make bombs.

TT was insured with the Norwegian Hull Club (NHC) under the NP 2013 Version 2016 against both war risk and marine risk with hull insurance and hull interest insurance, and it claimed cover for total loss under the war risk insurance according to NP Clause 15-11, which provided cover for total loss if the vessel was detained for 12 months. As the vessel was allowed to sail in January 2019, it was clear that there was no cover for total loss under the marine risk insurance. If the detainment was a marine peril, the insurer would pay for any damage caused by the detainment. However, as the time lost was not caused by damage to

the vessel, but instead by the detainment, loss of income would not be covered.

The principal submission of the assured was that the detainment of TT constituted a war peril and thus triggered cover according to NP Clause 2-9 sub-clause 1 (b), cf. Clause 15-11. As a secondary submission, the assured pleaded that there was a combination of a marine peril and a war peril according to NP Clause 2-14, and that the war peril was the dominant cause of the loss. As the arbitration tribunal concluded that there was no war peril involved, it was not necessary to consider the secondary submission, but this is discussed further in 5 below.

The starting point for the decision is NP Clause 2-9 sub-clause 1 (b), stating that war insurance covers "capture at sea, confiscation and other similar interventions by a foreign State power". The tribunal addressed this issue in four steps: the first step outlined the legal starting points, the second the security situation in Nigeria at the time, the third Elephant's failure to obtain import regulation, and the fourth the concrete legal assessment.

4.2 The legal starting points[27]

Clause 2-9 sub-clause 1 (b) contains no reference to "detainment". The legal basis for war risk cover would therefore be the expression "other similar interventions". In relation to the interpretation of this phrase, the tribunal referred to the following remarks in the Commentary:

> … the term implies a limitation as regards the nature of the interventions covered. The wording is aimed at excluding from the war-risk cover the types of interventions that are made as part of the enforcement of customs and police legislation. …
>
> That difficult borderline problems may arise is demonstrated by two arbitration awards (… relating to the Germa Lionel award and ND 1988.275 NV Chemical Ruby) … These decisions show that cover under the war-risk insurance is contingent on the shipowner being divested of the right of disposal of the ship, the authorities

[27] The arbitration award (n 1) 9-11.

> clearly exceeding the measures necessary in order to enforce police and customs legislation, and the intervention being motivated by primarily political objectives. [28]

The tribunal thereafter refers to the 2019 Version, where the expression "provided any such intervention is made for the furtherance of an overriding national or supranational political objective" is added to "similar interventions". The tribunal referred to the Commentary 2019, stating that this qualification refers to all the interventions that are covered according to Clause 2-9 sub-clause 1 (b), and that these must be delimited against measures necessary to enforce i.a. police and customs legislation.[29] The tribunal further referred to the following in the Commentary 2019:

> It does not matter whether such police or customs intervention is caused by illegal acts performed by a third party, for instance the charterer or the master or crew. Further, it is not decisive whether the State intervention is based on the legislation of the country or may be seen as abuse of power or corruption, if the intervention does not have an overriding national or supranational political objective. However, if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or if the intervention has the character of abuse of power or corruption.[30]

The tribunal stated that cover under the war risk insurance presumes that the peril striking the vessel is a war peril, and that the peril in this case struck the vessel on 29 August 2016 when the vessel was boarded by five marine guards carrying weapons. The fact that the boarding was made by marine soldiers, was not, however, decisive, since detainment of vessels in Nigeria was always made by marine soldiers, regardless of the legal basis for the detainment.

---

[28] Commentary (2016) to Cl. 2-9 sub-clause 1 letter b.

[29] Commentary (2019) 57.

[30] Commentary (2019) 58.

The tribunal further emphasized that the expression "similar interventions" was analyzed in arbitration cases and legal theory,[31] and referred to Wilhelmsen and Bull (n 4) 99 summarizing four previous arbitration cases on this question:

> This means that the expression «similar interventions» includes interventions made by the State only if the intervention is made for the furtherance of overreaching political goals. In addition, the intervention must normally be typical for war and times of crises and represent a sanction against breach of security rules and/or explained by foreign policy considerations. It is not sufficient that the intervention can be explained by the general political situation in the State. A State intervention which is tied to regulation or control of the normal commerce and shipping is not covered by the war risk insurance. This is true even if there is an abuse of authority, unless the abuse in reality is motivated by overreaching political motives.

The tribunal also refers directly to ND 2016.251 *Sira* where the arbitrator makes the following summary of the relevant legal sources for the interpretation of the expression "similar intervention":

> For the intervention to be covered under the war risk insurance, the intervention must be made for the furtherance of overreaching political goals. Such interventions are interventions typical for war and times of crises, and can often be explained by foreign policy considerations. The reason for the intervention may be a warranted or not warranted suspicion that the ship has breached rules to protect the security of the State involved. It is not decisive that the general political situation in the State involved has been contributory to the intervention.
>
> A State intervention which is tied to regulation or control of the normal commerce and shipping is not covered by the war risk insurance. Relevant interventions will first and foremost be tied to breach of or suspicion of breach of customs, currency, or police legislation. It is normally not decisive if such intervention due to its

[31] The *Germa Lionel* award 11 June 1985 (unpublished); ND 1988.275 NA *Chemical Ruby*; the *Wildrake* case (a case that was settled); ND 2016.251 *Sira;* Brækhus and Rein (n 4) 73-76; Wilhelmsen and Bull (n 4) 94-97.

> duration represents abuse of authority. However, this can be different if the abuse of authority takes the form of a regular police act or similar act, but in reality is part of an action motivated primarily by overreaching political objectives. [32]

Lastly, the tribunal refers to a passage from ND 1988.275 NA *Chemical Ruby* stating that "a common characteristic feature" for an intervention to be covered by war risk insurance is that the intervention is made "for the furtherance of overriding political goals" typical for war and times of crisis, in contradiction to State intervention in connection with regulation and control of ordinary trade and shipping".

The tribunal concluded that the decisive question is whether the arrest of *Team Tango* was motivated by overriding political goals typical for war and times of crisis. In order to determine this issue, it was necessary to investigate the security situation in Nigeria and Elephant's failure to obtain import permission for the cargo.

4.3 The security situation in Nigeria

When TT arrived in Lagos in July 2016, the security situation in Nigeria was characterized by a conflict between the authorities and the terrorist group Boko Haram that had already lasted for several years. The ship owner and the insurer agreed that the situation could be described as "war" according to political science definitions. Boko Haram had taken control over a significant area in the north east parts of Nigeria, as well as bordering areas in neighboring countries. The Nigerian authority, however, won most of the occupied land back in a successful counter attack against the group in 2014-2015. As a result, Boko Haram went into hiding and started "terror bombing" using so-called "Improvised Explosive Devices" (IED) against institutions, the military and civilians. The bombings were intensive, represented a serious security problem and had a destabilizing effect on society. It was therefore an important goal for the authorities to hinder Boko Haram from getting hold of material

[32] Here referencing the translation in Wilhelmsen and Bull (n 4) 98.

for the bombs. The political effort to control Boko Haram was intensified after the presidential election in 2015, where i.a. the national security advisor (NSA) was changed and his agency (ONSA) was strengthened.[33]

The tribunal referred to a series of documents starting from 13 August 2015 that demonstrated how important it was for the Nigerian authorities to prevent Boko Haram from having access to raw material for making bombs.[34] The main aim was to prevent Boko Haram from stealing urea from different storage facilities in Nigeria in order to make bombs. Among the proactive measures taken to prevent this was the suspension of the "issuance of EUC for importation of Urea Fertilizer", "discourage the local manufacture, distribution and sale of Urea Fertilizer in the country", as well as identifying fertilizers that cannot be used as raw material for bombs.[35] Another measure was a temporary embargo on importation of Urea and Potassium Nitrate Fertilizers.[36] This embargo was sustained by the NSA and stopped the Nigerian company Notore Chemical Industries Ltd (Notore) from obtaining permits to import Urea Formaldehyde.[37] The temporary prohibition on the import of urea was continued through January and February 2016, even though the authorities also acknowledged that import of urea was necessary for Nigerian food supply. It was also emphasized that the prohibition was necessary to prevent urea from going astray.[38]

The minister of agriculture (NAFDAC) decided in March 2016 that only two named companies should be allowed to import and produce urea fertilizer. This would ease control and perhaps also protect local companies.[39] The decision was upheld in August 2016,[40] where the NSA

[33] The arbitration award (n 1) 2-3.

[34] The arbitration award (n 1) 12-14.

[35] Letter from ONSA to several civilian and military institutions (13 August 2015).

[36] Minutes from meeting between ONSA and representatives for public institutions and representatives for the fertilizer producers 18 November 2015, dated 3 December 2015).

[37] Letter from Department of agriculture (NAFDAC) to Notore Chemical Industries Ltd (13 January 2016).

[38] Letters from ONSA to the minister of agriculture (29 January 2016 and 16 February 2016); letters from ONSA to i.a. NAFDAC (26 February 2016 and 3 March 2016).

[39] Letter from NAFDAC to ONSA (3 March 2015).

[40] Meeting with fertilizer producers (4 August 2016).

described the increasing use of IED by terrorists and urea as a raw material for these bombs, and that free import of urea resulted in a lack of control and eased access to the urea for illegal purposes. Free import also created difficulties for local producers as well as having a negative impact arising from the use of foreign currency.

The arbitration tribunal concluded that even if protection of local production may have been an issue, the measures concerning urea were mainly explained by political considerations of security, and that it was a key goal to prevent Boko Haram from having access to urea for making IEDs.

4.4 Elephant's import of urea

The import of goods to Nigeria is regulated by the Nigerian Customs and Excise Management Act. The act provides authority to prohibit the import of specific goods and to require special permission for imports. Cargo being imported against the rules is forfeited or may be detained or seized. The act also allows for the forfeiture of a vessel used to import prohibited goods.[41]

The import of fertilizer into Nigeria requires import permission from the National Administration for Food and Drug Administration and Control, as well as an End-User Certificate, which in 2015-2016 was awarded by the NSA/ONSA. Elephant had a permission to import urea that had expired in 2015, and so applied for a renewed import permit for fertilizer from NAFDAC on 14 April 2016.[42] The application concerned three types of fertilizers:

1. Prilled Urea – 100,000mt
2. NPK 15-15-15 – 150,000mt
3. Single Super Phospate – 25,000mt.

41 The arbitration award (n 1) 3.

42 The arbitration award (n 1) 14.

NAFDAC granted permission to import two types of fertilizer, but not urea, on 27 May 2016, and stated:

> 'This permit does not authorize the importer to clear the chemical substances from the Nigerian Ports without first obtaining a 'permit to clear' from the Chemical Permit Section of the Chemical Evaluation and Research Directorate, National Agency for Food And Drug Adrninistration and Control. lt is an offence to, import or c!ear the chemical substances without obtaining the required permits.'

The legal basis for denial of import of urea is given in a letter from NAFDAC to the NSA on 10 February 2017: 'the third (3rd) · request being for Urea was denied because of the ban on importation of Urea fertilizer.'

The tribunal concludes that the refusal was based on regulation and practice that first and foremost were in effect due to considerations of national security.

4.5 The assessment of the concrete reason for the arrest of the vessel

The last step in the decision was to assess the concrete reason for the navy to take control over the vessel and detain the vessel and cargo. The tribunal points out that Elephant had not received import permission for urea from the NAFDAC, did not have EUC, and did not notify the navy on arrival, as required in the legislation. There were also other permissions that were not in order.

The tribunal found it self-evident that the lack of necessary permissions and notifications gave the Nigerian authorities a legal basis for detaining the vessel and cargo. Even so, the question was whether the overriding political considerations for control of urea meant that the detainment must be considered a war peril. The tribunal repeated the starting point from the *Chemical Ruby* case: that, for an intervention to constitute a war peril, the intervention must be made for the furtherance of political goals, typical for war and times of crisis, and that the inter-

vention should not be connected to regulation and control of normal trade and shipping.

This assessment was not completely clear in this case, but the main point for the tribunal was that Nigeria had import regulation for fertilizer and for a long list of other commodities, where permission etc. was required. This kind of regulation was not specific to Nigeria or for states in war or crisis. The reason for import regulations could differ from country to country. If the rules are not followed, for instance because the required permissions are not obtained or notification not sent, it is quite normal for the authorities to intervene by detaining vessel and cargo. In most states, breach of such rules would result in confiscation, criminal punishment and other economic sanctions.

The assured had argued that the war peril struck the vessel when *Team Tango* was ordered to change anchor position and naval guards were placed onboard. The tribunal found that it was not proved that the intervention against the vessel was motivated by considerations of security. For the Nigerian authorities the situation must have appeared to be an attempt of illegal import, because Elephant had tried to avoid all import requirements and control measures. Intervention against illegal import was not something that per se pointed to more than enforcement of rules for trade and import. The detainment of vessel and cargo would be a normal sanction against breaches of such regulation. It was not extraordinary for the navy to have boarded the vessel, because Nigeria did not have a functional police or custom institution to control and detain vessels in breach of import regulation or other breaches of shipping trade.

Even so, the tribunal accepted that it could be argued that the time period of the detainment, close to 2 years and 5 months, meant that the intervention was a result of overriding political goals typical for war and time of crisis. The starting point in NP is that the peril strikes at a certain period of time. In relation to NP Clause 2-9 sub-clause 1 (b), this occurs when the intervention takes place. The length of the intervention is decisive for whether it results in total loss according to NP Clause 15-11, but not for the character of the casualty. The tribunal still found that the

length of the time period could shed light on the kind of peril that struck the vessel in the first place.

The tribunal referred to documents presented in the case explaining that the NSA accepted that the vessel was not involved in the illegal import, and that "they may be looking at discharging the cargo into a controlled area by them and afterwards, the vessel can sail", but that "because the cargo is bulk and they do not have facilities to discharge it, this might constitute a challenge, but they hope this can be overcome, working with the Ministry of Agriculture".[43] The NSA was also concerned about "what effect any directive to release the vessel might have on the ongoing court proceedings".[44]

It was clear that Elephant in all the court proceedings had opposed any solution that would not result in the cargo being discharged to storage facilities under Elephant's control. The tribunal found it probable that this resulted in significant delay in the discharge of the cargo and thus also in freeing the vessel. The tribunal also pointed out that the cargo was eventually discharged and the vessel was freed because of diplomatic intervention, even if the claim from Elephant was still pending before the Nigerian Supreme Court.

The tribunal found that even if the underlying reason for denial of an import permit to Elephant was an overriding goal typical for war and times of crisis, this was too remote to be the decisive cause for detainment of the vessel. The main causative factor was that the import of urea was in breach of the established import regulation, and that detainment is a regular sanction against such breach, independent of any overriding political goal. Based on this, the timing aspect of the detainment appeared to be a consequence of non-compliant performance from Elephant.

The tribunal thus concluded that it had not been established that the vessel was detained due to political goals typical for war and times of crisis. The overriding political goal behind the regulation and prac-

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43 Email from the ship owner's legal adviser in Nigeria, Femi Atoyebi, to Alexandra Davison in North of England P&I (23 March 2017).

44 Email from the ship owner's legal adviser in Nigeria, Femi Atoyebi, to Alexandra Davison in North of England P&I (23 March 2017 and 30 March 2017).

tice with regard to the import of urea was overshadowed by Elephant breaching the regulation when they tried to import the cargo without the required permits, together with Elephant's obstructive behaviour when they refused to participate in the discharge of the cargo so that the vessel could sail. Thus, the intervention could not be considered to be motivated by overriding political goals typical for war and times of crisis, and the claim for compensation for total loss under the war risk insurance was denied.

The assured had argued that it was not correct that the assured should carry the risk for Elephant's actions. The tribunal remarked that the decisive question for the interpretation of the expression "similar intervention" is whether the intervention is for the furtherance of overriding political goals typical for war or times of crisis. With regard to this assessment, it would not be correct to disregard causative factors tied to the behaviour of those responsible for the import. In this context, the risk for Elephant's behaviour rested with the assured. [45]

5 The *Team Tango* case as a question of causation

5.1 Problem and overview

The assured pleaded as a secondary submission that the war risk was the dominant cause according to NP Clause 2-14. As the court viewed the *Team Tango* case as being a question of whether the intervention constituted a marine peril or a war peril, there was no need to go into this issue. The approach of the court is also supported by the passage in the Commentary that "if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or

[45] The arbitration award (n 1) 15-18.

if the intervention has the character of abuse of power or corruption."[46] From this, it may be deduced that in the case of a "double objective" one should always look to the "real character" of the intervention.

However, in the last part of the judgment, the tribunal uses causation terminology when it states that the "main causative factor" was the import of urea contrary to the established import regime of the country, and that the overriding political goal was "too remote". It is clear that Elephant's breach of the import regulation was the direct or immediate cause of the detainment. It appears, however, that the ban on import of urea was mainly caused by the authority's goal of preventing Boko Haram from gaining access to urea as a raw material for making bombs. The tribunal accepted that this constituted an overriding political goal typical for war and times of crisis. It may therefore be argued that the overriding political goal was the cause of the ban that again was the cause of Elephant's breach, and thus that the detainment was the result of a combination of a war peril and a marine peril. This situation is regulated by NP Clause 2-14, which reads:

> If the loss has been caused by a combination of marine perils, cf. § 2-8, and war perils, cf. § 2-9, the whole loss shall be deemed to have been caused by the class of perils which was the dominant cause. If neither of the classes of perils is considered dominant, both shall be deemed to have had equal influence on the occurrence and extent of the loss.

This leads to the question of whether an alternative approach to the situation could be to treat the case as an issue of causation, i.e. as a question of a combination of a marine and a war peril.

This approach is interesting, both because it demonstrates the close relationship between the definition of the perils insured and causation, and because the judgment according to the tribunal was not completely clear and was also questioned afterwards by the assured. It would therefore be of interest to see if another approach could support the tribunal's decision.

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46 Commentary (2019) 58.

In order to discuss this question, it is necessary first to analyze whether detainment of a vessel as an intervention according to Clause 2-9 sub-clause 1 (b) is a peril or rather constitutes the "casualty" or the "insured event", see 5.2. Following on from that, the concept of "combination of causes" is then discussed in 5.3, before the *Team Tango* case is analyzed in light of previous cases with similar causation issues as those of the *Team Tango* case in 5.4 and 5.5.

5.2 Is an intervention by a state a peril or an insured event?

NP Clause 2-8 and Clause 2-9 regulate "perils" covered by insurance against marine perils and war perils respectively. The relevant peril in this case, according to NP 2016 Clause 2-9 sub-clause 1 (b) is "other similar interventions by a foreign State power", but it is accepted in the arbitration award that the addition in NP 2019 "provided any such intervention is made for the furtherance of an overriding national … political objective" shall be applied. The peril is thus described as a combination of the intervention and the objective for the intervention. If it is decided that the intervention is a war peril, there is no room for analyzing the reasoning behind it as a question of combination of perils. That discussion is already over when determining the "real cause" for the intervention.

This approach is less clear, however, if it is analyzed in light of Nordic terminology on the scope of cover for a marine insurance contract. Nordic marine insurance makes a distinction between the perils insured against, i.e. marine perils and war perils as defined in Clause 2-8 and Clause 2-9, the insured event or casualty, which occurs when the peril strikes the insured interest,[47] and the damage or loss.[48] The requirement for causation connects the peril to the insured event, and the insured event to the loss.[49]

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[47] NP Cl. 2-11 sub-clause 1: 'The insurer is liable for loss incurred when the interest insured is struck by an insured peril during the insurance period'.

[48] Wilhelmsen and Bull (n 4) 78-79. See also Hans Jacob Bull, *Forsikringsrett* (Universitetsforlaget 2008) 205-209 for the similar terminology in Norwegian insurance law generally.

[49] Wilhelmsen and Bull (n 4) 115-116.

The tribunal states that the peril struck *Team Tango* when the vessel was boarded in August 2016 and ordered to shift its place of anchorage. The boarding thus constituted the insured event. It should be noted that a peril can strike the vessel before either damage or loss occur.[50] This is the core difference between defining the casualty through the "peril strikes" principle and the "damage occurred principle", which is the normal rule in Norwegian insurance law.[51] An intervention of the vessel does not necessarily result in loss of or damage to the vessel, but even so the intervention may still qualify as an insured event. The loss in the *Team Tango* case was total loss of the vessel defined according to Clause 15-11 sub-clause 1 occurring once the vessel had been detained for 12 months. It was clear that this requirement was fulfilled in this case, as the vessel was detained for more than two years. But if the intervention constitutes the insured event, it may be argued that the relevant peril or cause is the objective behind the intervention. With this terminology, the regulation in Clause 2-8 and Clause 2-9 defines not only the relevant marine and war perils, but also to some extent how the peril must materialize or strike the vessel, i.e. the insured event.[52]

This distinction between the motive as a peril and the intervention as the casualty/insured event is also supported by the relationship between the all risks principle in Clause 2-8, and the regulation in Clause 2-9 sub-clause 1 (b). NP Clause 2-9 sub-clause 1 (b) lists several types of interventions as "perils", and the same interventions are, according to the Commentary,[53] covered by the all risks principle in Clause 2-8. The same intervention cannot be both a war peril and a marine peril, but it can qualify as an insured event under both insurances, if caused by different perils. The element that determines whether such intervention is covered under marine insurance or war insurance is therefore not the intervention itself, but the reason for it. With this line of reasoning, the

[50] ibid 130 ff.

[51] ibid 129-130. See also Trine-Lise Wilhelmsen, 'Periodisering av Forsikringstilfellet – Finnes det en «Patentløsning»' (1997) *Ånd og rett Festskrift til Birger Stuevold Lassen*, 1077ff.; Bull (n 46) 237ff.

[52] Such overlap in insurance clauses is not uncommon, see Bull (n 46) 205-206.

[53] Commentary (2019) 43. See also Wilhelmsen (2019) (n 3) 185-188 for Version 2016.

peril that makes the distinction between the marine risk and war risk insurance is the motive behind the intervention, and not the intervention itself. A combination of "war related motive" and "marine related motive" can then be addressed as a combination of perils.

5.3 The regulation of combination of perils

NP Clause 2-14 states that losses caused by a combination of perils "shall be deemed to have been caused by the class of perils which was the dominant cause". If neither of the classes of perils is considered dominant, both shall be deemed to have had an equal influence on the occurrence and extent of the loss, cf. Clause 2-14 second sentence. The starting point is therefore that the whole loss shall be attributed to the "dominant cause", even if caused by a combination of perils. The concept of "cause" means that the peril must be a necessary condition for the casualty.[54] This means that the overriding political goal of controlling the import and use of urea must be a necessary condition for the detainment to be caused by a war peril.

The expression "combination of perils" applies first and foremost to the situation where there is a combination of two independently acting causal factors which result in a casualty. However, the expression also includes the situation where the first cause is a necessary condition for the second cause to occur.[55] This appears to be situation here, where the overriding political goal to prevent Boko Haram from gaining access to urea caused the ban on the import of urea, and the ban on import was a necessary condition for Elephant's breach. As Elephant did have permission to import urea before the ban, it is presumed that such permission would have been obtained if the authorities had not prohibited the import.

[54] Brækhus and Rein (n 4) 254; Bull (n 46) 244; Trine-Lise Wilhelmsen, 'Årsaksprinsipper og tolkningsprinsipper i forsikringsretten' (2011) *TfE* 4, 228-258, 235; Wilhelmsen and Bull (n 4) 116.

[55] Wilhelmsen and Bull (n 4) 119. See also Commentary (2019) 83-85; Ole Steen-Olsen, 'Om adækvans og samvirkende skadesårsager ved forsikring mod tidstab' (1977) *TfR* 90, 230–280, 260. The terminology is also presumed in ND 1989.263 NA *Scan Partner.*

The starting point in Clause 2-14 is that the dominant-cause rule shall apply. This is in line with the general approach in Norwegian insurance law and means that the loss shall be attributed to the cause that is "dominant" or "main", i.e. carries most weight in the chain of events.[56] If neither of the classes of perils is considered dominant, both shall be deemed to have had equal influence on the occurrence and extent of loss. The natural understanding of the expression "dominant cause" is that a relatively considerable predominance is required, in order to characterize a peril as the "dominant cause".[57] This is further elaborated on in the Commentary to the provision: 'It is not sufficient to reach the conclusion – perhaps under doubt – that one peril is slightly more dominant than the other; it is precisely the arbitrary choice between two causes which carry approximately the same weight that should be avoided. On the other hand, a 60/40 apportionment should probably constitute the upper limit for an equal distribution. If we get close to 66 %, one of the groups of perils is after all considered twice as «heavy» as the other ….'[58]

As already mentioned, the provision applies to a situation where the two perils or causes interact in a chain of events leading to the casualty, which appears to be the case in the *Team Tango* case, where the political security consideration to prevent Boko Haram from access to urea resulted in a ban on import of urea for other than two named Nigerian producers. It also appears however, to be a situation with combination of causes after the casualty had first occurred, since the length of time of the detention was at least partly caused by Elephant's actions to prevent loading outside Elephant's control. As the considerations on causation in these two situations are somewhat different, they are discussed separately below.

[56] Commentary (2019) 80; Wilhelmsen (n 52) 239; Wilhelmsen and Bull (n 4) 117.

[57] Wilhelmsen and Bull (n 4) 124-125.

[58] Commentary (2016) to Cl. 2-14.

5.4 Was the detainment caused by a war peril or a marine peril?

There are no cases concerning NP Clause 2-14 according to the NP or NMIP 1996, but there are two relevant arbitration cases concerning the similar clause in the NMIP 1964, both concerning the Iran-Iraq war. According to the Commentary, these cases are relevant for the assessment, according to the NP 2016/2019.[59] The first case is ND 1989.263 NA *Scan Partner*.[60]

> The supertanker *Barcelona*, which was employed as a storage ship at an Iranian oil terminal in the Persian Gulf, was hit by several bombs when the terminal was attacked by Iraq. *Scan Partner*, a towing and fire extinguishing ship chartered by the terminal, attended the fire extinguishing two days after the bombing. Twenty hours later, *Scan Partner* was sprayed with oil resulting from an explosion onboard the *Barcelona*. The oil started burning, and *Scan Partner* sustained a total loss in the fire. It was not clear whether the explosion on *Barcelona* was due to the detonation of a blind shell from the air attack, a bomb explosion following a gas explosion, or a gas explosion.
>
> *Scan Partner* was insured against marine perils and war perils according to the NMIP 1964. The marine insurer claimed that the loss was caused by a war peril, and that, if the loss was caused by a combination of a war peril and a marine peril, the war peril constituted the dominant cause of the loss, cf. NMIP 1964 § 21 second sentence.
>
> The arbitration tribunal emphasized that if the explosion was caused by the detonation of a blind shell from the air attack 14 May, the war risk insurer would be liable for the loss, cf. NMIP § 16 (a), cf. § 22 (a). The result would be the same if it was a blind shell that first exploded 17. May and immediately resulted in a gas explosion onboard *Barcelona*. However, the tribunal did not find it probable that the explosion onboard the *Barcelona* was caused by a bomb, or a combined bomb/gas explosion that would constitute a war risk.

59 Commentary (2019) 86.

60 Here referred from the translated version in Wilhelmsen and Bull (n 4) 125-126, which is based on the presentation in Brækhus and Rein (n 4) 270-271.

> The fact that the vessel was situated in a war area was not per se sufficient for the loss to be caused by a war peril. The bombing of *Barcelona* constituted a war peril, and this bombing was a necessary condition for *Scan Partner* to be present at the site. However, the chain of causation from this peril had to be limited, i.a. based on the closeness in time and place between the bombing and the total loss. The distance in time between the two occasions was three days and during this period many other events occurred. Therefore, it was not straightforward to state that the total loss of *Scan Partner* was caused by a war peril. The tribunal also argued that *Scan Partner* was lost during the extinguishing of the fire, in which the vessel had a duty to participate in accordance with the charter party. In this respect, it was not relevant whether the fire was caused by bombing or was due to another cause. Thus, the marine peril constituted the dominant cause.

This case is comparable to our situation, as the bomb damage to *Barcelona* was caused by a war risk and this was a necessary condition for *Scan Partner* to be present at the site, i.e. there is a chain of causes resulting in the casualty. The tribunal brings forward two arguments: firstly, the closeness or distance in time and space between the first and the second causes, and secondly, that fire extinguishing was in any case *Scan Partner*'s normal working risk, and that it was irrelevant whether the fire was caused by a bomb or was due to other reasons. The distance in space seems less relevant in the *Team Tango* case, but the other arguments may still be applied.

It was not clear in the *Team Tango* case exactly when the ban on import of urea was first instigated, but the first enclosed letter referring to suspension of the End Users Certificate is dated 13 August 2015. Without such an EUC, the import of urea was illegal. The temporary embargo on importation of urea is mentioned in minutes from a meeting dated 3 December 2015. Import of urea to Nigeria was therefore suspended from 13 August 2015 and upheld throughout 2015 and until Team Tango arrived in Lagos. However, Elephant had import permission and apparently a EUC for 2015. It is not clear whether the import and EUC ban applied to existing permissions, but these permissions expired in

January 2016. Elephant did not apply for new permissions until April 2016, at which point in time the ban had been in place for 8 months. Elephant also received the refusal of the application at a point in time when it would still have been possible to reroute the vessel. The required closeness in time thus does not seem to be fulfilled.

In addition, it can be argued that it was part of Elephant's business to import fertilizers and that a general part of such activity was to have the necessary permissions to receive the cargos. In this capacity, Elephant should be able to cope with changes in the regulation and prevent detainment of vessel and cargo. According to the legislation, any breach of the import regime could result in sanctions, regardless of the political security considerations. It was thus not relevant for Elephant's situation whether the ban was caused by a war consideration or a marine consideration.

Based on the criteria from the *Scan Partner* case, it may therefore be argued that the marine peril was the dominant cause in the *Team Tango* case.

The other case concerns a collision between two tankers in the Persian Gulf during the Iran-Iraq war, cf. ND 1993.464 NA *Nova Magnum*:[61]

> The two super tankers *Nova* and *Magnum* collided between Kharg Island and Sirri Island. Both vessels sustained severe damage. *Nova* had marine risk insurance and war risk insurance based on the NMIP 1964. The marine risk insurer compensated the losses *Nova* had sustained and claimed 50 % of this compensation repaid from the war risk insurer according to NMIP 1964 § 21 second sentence, which is identical to NP Clause 2-14 second sentence.
>
> The collision was caused by a combination of both ships sailing with no light, which constituted a war peril, and gross errors of navigation on both parts, which was a marine peril. In particular, *Nova* sailed with one instead of two sets of radar, and due to insufficient training, the second mate was unable to make use of the information provided by the radar immediately before the collision.

[61] Here referred from the translation in Wilhelmsen and Bull (n 4) 125, which is based on the presentation in Brækhus and Rein (n 4) 270.

> The question was thus whether the element of war risk was sufficiently significant to justify application of the equal influence rule. The court referred to several cases from the Second World War, where no light or reduced light had been given decisive weight. However, the importance of the use of lanterns had been significantly reduced in the period since these decisions were made, due to the development of advanced radar systems, which the assured had a duty to install onboard. This radar equipment provided a navigation tool which was far more efficient than conventional lanterns. The tribunal assessed the war risk caused by sailing with reduced light against Nova's negligent use of radar, failure to change the course and failure to call for the captain in time, and in addition navigational errors made by Magnum, and found that the nautical errors – i.e. the marine peril – constituted the dominant cause of the loss.

In the *Nova Magnum* case, the war peril and the marine peril constituted two independent causes interacting before the casualty occurred, which is different from the situation in the *Team Tango* case. Even so, it is interesting to see if the arguments are relevant for our case. The general starting point when two independent causes interact and lead to a casualty is that the direct cause shall be given more weight than a previous indirect cause, unless the former indirect cause has increased the probability of the subsequent loss. The greater the risk, the greater the importance to be attributed to the earlier cause.[62] In line with this, the court points to an assessment of the risk created by the war peril. However, contrary to previous cases where the war risk created by sailing with no lights was given decisive weight, with modern navigation equipment less sight caused by no light could be handled with prudent use of radar. The serious nautical errors that were made were therefore given decisive weight.

Applied to the *Team Tango* case, it can be argued that the direct cause of the intervention was the breach of the import regime, whereas the political security consideration was the previous and indirect cause.

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62 Wilhelmsen and Bull (n 4) 121, similar Commentary (2019) 84. Both are based on Brækhus and Rein (n 4) 262 ff. where a large number of arbitration cases with a combination of war risk and marine risk from the first and second world war is analyzed.

The overriding political security goal that resulted in several measures – hereunder a stricter import regime for urea – was to control the use of raw material for IEDs and to prevent Boko Haram from obtaining this material. This created a risk for anyone who would be producing, trading with or transporting urea. However, this risk could have been avoided if Elephant had accepted the ban on import and EUCs and thus prevented the vessel from arriving in Lagos with the prohibited cargo.

It may be argued that in the *Nova Magnum* case, it was the equipment of the vessel and the use of the equipment that failed, whereas in the *Team Tango* case, the marine peril was caused by a third party. But intervention due to breach of trading regulation will normally be the responsibility of the sender or receiver of the cargo, and the point here is that such breaches constitute a marine peril, not a war peril. It is therefore not – as the assured seemed to claim in the *Team Tango* case – a question of identification between the owner and the receiver, but instead a question of how to treat regulatory breaches as a legal basis for detainment.

5.5 Was the total loss caused by a marine peril?

Team Tango was detained in August 2016. The intervention lasted for more than two years, which, if the detainment was caused by a war peril, would result in total loss according to NP Clause 15-11 sub-clause 1. The implication of the discussions above is that the marine peril constituted the dominant cause for the intervention. This marine peril intervention then interacted with the problems that were met when the authorities tried to discharge the cargo under their control. The starting point when a casualty interacts with a new peril or cause and this results in increased damage is that this increased damage shall be attributed to the initial casualty, cf. ND 1977.38 NSC *Vestfold I*:[63]

[63] Referred from the translated version in Wilhelmsen and Bull (n 4) 121-122, based on the presentation in Brækhus and Rein (n 4) 263-264, 266. See also Commentary (2019) 84.

> *Vestfold I* grounded and sustained damage to the gear, which was repaired. Approximately two months later, the gear broke down. The new gear damage was due either to damage that had not been discovered duringr the previous repair, or instead to an inadequate installation under this repair, or a combination of these causes. The insurance covered damage to machinery caused by, for instance, grounding, but did not cover break-down of machinery per se. The question was therefore whether the grounding had caused both the break-down of the axle and also the later break-down of the gear, or whether instead the break-down of the gear constituted a new casualty.
>
> The Supreme Court held that the question of causation had to be decided by use of the allocation principle in the NMIP 1964 § 20. Furthermore, the court found that there was a legally relevant chain of causation between the grounding and the damage to the gear, and that the inadequate repair could not breach the chain of causation from the grounding. The grounding was a significant element in the total causative picture, because it was due to this grounding that the vessel sustained its initial damage, which then developed into further damage to the machinery. Whether the errors committed by the yard could breach the chain of causation from the grounding would depend on the kind of error that was committed in the individual case. A repair would normally be successful. However, it could be the case that a repair yard overlooked damage or carried out repairs incorrectly, for instance, by making a wrong installation. Such errors were foreseeable. The assessment could be different if the yard had acted with gross negligence. Even so, the errors committed by the yard in this case implied that part of the damage should be allocated to this cause. The court allocated the damage with 2/3 to the insurance and 1/3 to the assured.

The implication here is that when a new cause intervenes through an initial casualty, the initial casualty is a "major part" of the total picture. The case concerned repair of the initial damage, but due to failures during this repair the vessel sustained new damage. Similarly, one might argue that the expected remedy, when a vessel is detained because of breach of import regulation on the part of the receiver of the cargo, would be

to discharge the cargo and let the vessel sail. If problems occur under such a procedure that cannot be seen as being unexpected, any extended damage due to such problems should be attributed to the initial casualty.

In this case, however, the delay could not be considered as ordinary. The assured argued that the problems tied to discharge of the urea were the security considerations and the measures instigated to control storage of urea so that Boko Haram could not obtain it. This could be assessed as a new war peril resulting in a new intervention, which would then be a war risk casualty. However, the court found that the delay of the discharge was caused by Elephant's obstructive behaviour and not the political security considerations. From the *Vestfold I* case it may be deduced that gross negligence by a third party may sever the causal link from a casualty, but the result would be that there was a new state intervention caused by breaches of import regulation, i.e. a new casualty caused by a marine peril, which would not trigger cover for total loss, since the vessel was freed.

6 The UK clauses on arrest or detainment of vessels

A principal consideration during the 2019 revision of the NP was that the cover for state intervention in the NP should be similar to or better than the UK conditions. In the *Team Tango* case, the insurers also argued that it was important for the UK and Nordic solutions to be similar because the insurers competed in the same market, but the UK regulation was not actually addressed in that case.[64] It is therefore interesting to see how the *Team Tango* case would have been solved according to these UK conditions.

Marine risk insurance for ocean-going ships is regulated by several UK sets of clauses.[65] A common feature of these clauses is that they are

[64] The arbitration award (n 1) 7.

[65] Institute Times Clauses (Hulls) (ITCH) of 1983 and 1995; International Hull Clauses (IHC) of 2002 and 2003.

based on the named perils principle, whereby the perils insured against are specifically listed.[66] None of the clauses used provides cover for detainment by state power, which means that this peril is not covered under the UK clauses covering marine perils. The clauses even contain the following paramount war risk exclusion:

> In no case shall this insurance cover loss damage liability or expense caused by
> ….
> 24.2 capture seizure arrest restraint detainment (barratry and piracy excepted), and the consequences thereof or any attempt thereat[67]

However, the Institute War and Strike Clauses (Hulls-Time) 1/10/83 as amended 1/11/95 (IWSCH) (Clause 281) covers:[68]

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

The clauses exclude:

> 4.1.5 capture seizure arrest restraint detainment confiscation or expropriation by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered
> 4.1.6 arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations

The UK regulation is thus simpler than the Nordic regulation, since interventions are either covered by the war risk clauses or else not covered at all. There is no question of there being different levels of cover.

66 Bull (n 46) 210; Wilhelmsen and Bull (n 4) 79ff.

67 ITCH (n 64) 1995 clause 24; IHC (n 64) 2001/2003 clause 29.2.

68 'Institute War and Strikes Clauses Hulls-Time' 1/10/83 amended 1/11/95 <Marine Insurance Clauses 329-548.indd (seamanship.eu))> (accessed 27 October 2021).

The interventions listed in clause 1.2 overlap,[69] but the relevant concept with regard to the *Team Tango* case is "detainment". It is clear that the vessel was detained in a commercial sense, as it was "unable to leave without infringing regulations and would have been stopped by force if it tried to do so."[70] According to the wording of clause 1.2, the cover applies regardless of any war or war-like situation, of who is performing the actions and the legal basis for the actions. The cover thus also applies in times of peace,[71] and there is no explicit requirement for state involvement or legal justification for such intervention. As a starting point therefore, the detainment of *Team Tango* would be covered unless the exclusion applies. The terms originally referred, however, to political or executive acts and did not include ordinary judicial process.[72] The same effect is achieved today by the express exclusions in clause 4.1.5,[73] cf. below.

Clause 4.1.5 excludes detainment "by reason of infringement of any customs or trading regulations". In order to apply the exclusion, there must therefore have been an infringement.[74] This was clearly the situation in the *Team Tango* case. The term "customs regulation" refers to laws in force in the country concerned, whatever their form, which deal with smuggling or other offences in the field of customs.[75] The concept of "trading regulations" refers to regulations forbidding, controlling or otherwise regulating the sale or importation of goods into a country and

69 Michael Miller, *Miller's Marine War Risks* (Michael Davey, James Davey and Oliver Caplin eds, 4th edn, Informa Law from Routledge 2020) 105. See also N. Geoffrey Hudson, Tim Madge and Keith Sturges, *Marine Insurance Clauses* (5th edn, Informa Law 2012) 342 and 360; Wilhelmsen (2019) (n 3) 165; Joseph Arnould, *Arnould: Law of Marine Insurance and Average* (Jonathan Gilman and others eds, 20th edn, Sweet & Maxwell 2021) 1296.

70 Miller (n 68) 107.

71 Keith Michel, *War, terror and carriage by sea* (LLP 2004) 204-205; Hudson, Madge and Sturges (n 68) 359.

72 Miller (n 68) 105. See also Hudson, Madge and Sturges (n 68) 342; Wilhelmsen (2019) (n 3) 166; Arnould (n 68) 1293-1294.

73 Miller (n 68) 105.

74 Hudson, Madge and Sturges (n 68) 365-366; Arnould (n 68) 1317.

75 *Panamanian Oriental SS Corp* v *Wright* (*The Anita*) (1971) 1 Lloyd's Rep 487; Arnould (n 68) 1317-1318.

the carriage of goods for that purpose.[76] Elephant breached the rules of the Nigerian Customs and Excise Management Act, which appear to be included in both concepts.

Further, the detainment must be "by reason of" infringement. This suggests a causal link between the actual infringement and the detainment.[77] It is more unclear to what extent it is relevant that the regulation that was infringed was motivated by overriding political security reasons typical for war or times of crisis. From a Nordic perspective this seem to be a question of combination of detainment due to a political act, which is covered according to clause1.2, and detainment by reason of infringement of customs regulation, which is excluded in clause 4.1.4. In the UK regulation, this issue is regulated through the principle of "proximate cause".[78] The question here is thus whether the expression "by reason of" involves a question of proximate cause. This issue was discussed in the *B Atlantic* case:[79]

> The case concerned a substantial quantity of narcotics that was deliberately planted on board a vessel in harbour in Venezuela. On discovery of the drugs, the vessel was impounded as part of judicial proceedings.[80] It was argued that the secreting of drugs constituted a malicious act that was covered by the war risk insurance clause 1.5, which provided cover for 'any terrorist or any person acting maliciously or from a political motive'. If so, the question was whether this malicious act was the proximate cause of the loss, and not the detention by reason of infringement of customs regulations, which was excluded. The Appeal Court considered whether the phrase 'by reason of' the infringement involved a question of proximate cause, but argued that 'by reason of' then begged the question of 'why' the vessel was detained, and this question was not identical to the question of proximate cause.[81] The Supreme Court

76 Arnould (n 68) 1320.

77 Miller (n 68) 191.

78 Wilhelmsen and Bull (n 4) 128; Miller (n 68) ch. 28; Arnould (n 68) ch. 22.

79 *Atlasnavios Navegacao Lda* v *Navigators Insurance Co Ltd* (*The B Atlantic*) (2019) A.C. 136 (2018) 2 Lloyd's Rep 1; here referred from Miller (n 68) 154, 191.

80 Miller (n 68) 154.

81 Miller (n 68) 191.

> rejected the argument that the proximate cause was the malicious act rather than the infringement, as the malicious act could not be distinguished from the infringement. The court further stated that as 'a matter of construction, the analysis of the present Clauses falls into three stages. The first stage, if clause 1.5 is capable of applying at all, is that there was a loss caused by a "person acting maliciously". Assuming that there was, the second stage is that the means by which loss arose was the vessel's consequent detainment and the fact that this lasted for a continuous period of six months. Only on this basis were the owners able to treat the vessel as a constructive total loss under clause 3. The third stage involves the question whether such detainment was by reason of any infringement of customs regulations within clause 4.1.5.'[82] It is 'possible that a loss may both be caused by a person acting maliciously within clause 1.5 and at the same time arise from detainment by reason of infringement of customs regulations within clause 4.1.5.'[83] '[W]hile the general aim in insurance law is to identify a single real, effective or proximate cause of any loss, the correct analysis is in some cases that there are two concurrent causes. This is particularly so where an exceptions clause takes certain perils out of the prima facie cover'.[84] The court concluded that even 'if it had been possible to view the loss as caused by a person acting maliciously within clause 1.5, it would still have been excluded by clause 4.1.5 as arising, at least concurrently, from detainment by reason of infringement of customs regulations.'[85]

It appears from this that a loss can be proximately caused, both by a peril insured against and by a peril that is excluded, but even so, the exclusion prevails. Applied to the *Team Tango* case, this would mean that even if the detainment was proximately caused by a political act and was therefore covered, it would still be excluded, since the detainment was also proximately caused by infringement of customs regulation.

The exclusion is silent as to who the infringement must be committed by, but there is no implied implication that the infringement must be

[82] *The B Atlantic* 41. See also Miller (n 68) 191.

[83] *The B Atlantic* 42.

[84] ibid 43.

[85] ibid 55.

one committed by the ship-owner itself or by its servants or agents.[86] The clause is not needed in order to exclude smuggling by ship owners themselves, and smuggling by the crew is generally excluded as barratry.[87] In the *B Atlantic* case, the Supreme Court considered whether there could be situations where the exclusion should not be applied, and mentioned three possible scenarios: First, where there was a seizure on a knowingly false basis, where no smuggling took place, or the authority has planted the drugs on board. Second, where a malicious third party planted the drugs on board in order to blackmail the owner. Third, where a malicious third party planted the drugs to inform the authorities about this in order to get the vessel detained.[88] Apart from such situations, it does not matter whether or not the owner is acting in good faith.[89] Based on this, the assured in the *Team Tango* case would not be covered when the vessel was detained due to infringement of customs regulations by the receiver of the goods.

7 Some reflections

The amendment of the cover for interventions by foreign states in NP in 2019 was aimed at clarifying the existing regulation. Even so, the *Team Tango* case illustrates that the distinction between a war risk intervention and a marine risk intervention may be extremely difficult in cases when import regulation is motivated by political considerations of security. This can be the case for many commodities, regardless of the country being in a state of war or in a time of crisis. Import of weapons is normally prohibited, whether or not there is an ongoing war. The main point here appears to be that a breach of a trading regulation is not a war risk, but instead is a criminal offence that normally is covered as a ma-

86 ibid 33; Miller (n 68) 191.

87 Miller (n 68) 191-192.

88 *The B Atlantic* 33-37; Miller (n 68) 192.

89 Hudson, Madge and Sturges (n 68) 366; Arnould (n 68) 1319.

rine risk. This may be deduced from the Commentary when it states that if an overriding political motive is detected this will be decisive, even if the intervention is "formally" based on a regulatory breach; if the legal basis for the intervention clearly is a material regulatory breach, this is not a war risk. However, the question appears clearer if such double motive is analyzed in light of the provisions on combination of causes. It seems fair that if the overriding political motive appears to be the dominant cause, the war risk insurer is liable, whereas if the breach of import regulation is the dominant cause, this is a marine risk situation. In the *Team Tango* case, the principles of causation as applied in previous cases appear to support the decision by the arbitration tribunal.

Another aim of the 2019 amendment was to strengthen the cover for intervention by foreign states. But this was never meant to provide the assured with the extra cover for war risk *losses*; the main point was to provide ordinary hull and loss of hire cover for such intervention, to the extent that it was not caused by a war risk. The Commentary to Clause 2-8 here remarks:

> The standard cover provided by the Plan is not intended to provide the kind of "political risk" cover that would more fully protect owners of vessels trading to countries that have a more or less dysfunctional political system. Solutions for such vessels are available in the market and it is a matter for the assured to decide what level of more specific cover they deem appropriate. It is not natural to spread this risk over all assureds that do not trade in these areas. [90]

Thus, the NP provides a better cover than the UK conditions, in that intervention by a foreign state due to i.a. breach of trading regulation is covered as a marine peril, but it does not extend the cover for losses caused by such interventions.

[90] Commentary (2019) 44.

The Limitation Regimes for Maritime Claims

Erling Selvig[1]

1 Professor emiritus, Scandinavian Institute of Maritime Law, University of Oslo

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1 Global Limitation of Liability for Maritime Claims

1.1 The limitation regimes of international conventions

The Norwegian law on limitation of liability of owners and operators of ships, which is set out in chapters 9, 10 and 12 of the MC 1994 (as amended in 2005), is a rather voluminous piece of legislation. Large parts of it, however, are "imported law", being modelled on the provisions of several internationally elaborated conventions. The purpose of these conventions is to establish and maintain international uniformity in important areas of shipping law when being adhered to by a number of states and, subsequent to ratification, implemented through their national maritime laws. By the ratification of a particular convention as a treaty, each state party assumes vis-à-vis the other state parties *an obligation according to public international treaty law* to maintain and apply the rules therein to cases within the scope of application of the particular convention. This also includes, generally, a duty to interpret the implementing national legislation in a manner consistent with the provisions of the convention. **(1)**

In order to promote international uniformity of the law relating to limitation of maritime claims for damage attributable to ships, Norway and the other Nordic states – as well as a number of other European and foreign states – have ratified and implemented the international liability regimes, as developed and amended over the years. At present, the Maritime Code (*MC*) chapters 9, 10 and 12 mainly reflect the international limitation regimes set out in three separate conventions:

- The 1996 Convention on the limitation of liability for maritime claims, being in fact a copy of the earlier 1976 London Convention with a few amendments contained in the 1996 IMO Protocol.

The 1996 Convention does not contain any rules relating to the basis for liability for maritime claims.

- The 1992 Convention on civil liability for oil pollution damage, which applies to pollution damage caused by the escape of oil (including bunker oil) from tankers laden with crude oil. This convention provides that tanker owners shall have strict liability for such oil pollution damage, and contains in addition its own regime for the limitation of such liability. Supplementing this convention, the 1992 Convention on an international fund for compensation for oil pollution damage allows for additional compensation.
- The 2001 Convention on liability for pollution damage caused by bunker oil, which is applicable only to ships other than laden crude oil tankers. According to this convention, the owner of the ship shall have strict liability for such pollution damage, but this liability may be subject to limitation according to national or international law, such as the 1976 London Convention as amended by the 1996 IMO Protocol.

As a matter of international public law, each of these conventions contains a separate regime for limitation of the particular maritime claims falling within its scope of application. The effect of this is essentially a restructuring of the international law on limitation of maritime claims by which *the traditional global limitation regime be replaced by several separate treaty-based limitation regimes* (*infra* 1.3). National limitation regimes, established by state parties when implementing the 1996 Convention, contribute significantly to the scope of this restructuring (*infra* 1.4).

These three conventions pursue different, but interrelated objectives. Despite some differences in particular as to substance, however, the form, structure and elements of each of the limitation regimes established thereby are generally the same. Clearly, the legal limits of liability provided in each are different, being adapted to the types of maritime claims subject to limitation according to each of the new limitation regimes (*infra*

1.4). However, there is *no direct legal link* between the three regimes. A common denominator for the three treaty-based limitation regimes is that *the particular limit of liability provided applies to the total of the defined types of claims* having arisen out of a particular maritime casualty. All three also apply *a specific limitation fund procedure* to achieve actual limitation of each of the limitable claims (MC § 232, cf. §§ 175 and 178, 185 and 195-196). This means – in brief – that the new limitation regimes are, to this extent, also *variants* of the traditional global limitation system for maritime claims.

Accordingly, the basic idea of each of the new limitation regimes is that the legal limit provided therein shall constitute a limit for *the sum* of all of the claims subject to this limit arising out of a particular casualty occurring in direct connection with the operation of a ship. This presupposes, *first*, that the limit applies to the *aggregated amount* of maritime claims (MC §§ 175, 175a and 195) and, *second*, that the limitation of particular claims is a result of proportionate distribution of the limitation amount among the claimants (MC § 244). In practice, however, such a system for limitation of the particular claims is operational only if – after a casualty – the shipowner actually establishes a *limitation fund* subject to proportionate distribution among the established claims and, in addition, the fund so established has the effect of *barring claimants from separate actions* against the shipowner (MC §§ 178, 178a and 196). Consequently, all the new limitation regimes include a system for enforcing limitation of the particular claims, based on *some of the key principles of global limitation*, viz. the principles of limitation after aggregation of claims and the use of a limitation fund as the vehicle for enforcing limitation of the particular claims.

1.2 Existing variants of global limitation

The origin of the traditional global limitation system is the 1957 Brussels Convention on the limitation of the liability of owners of seagoing ships and the subsequently adjusted redraft thereof in the 1976 London Convention on limitation of liability for maritime claims. At present,

this treaty-based system also remains – at least in form – embodied in an amended and modernized, but restricted, version in the 1996 Convention, often termed – misleadingly – a regime for global limitation of maritime claims. The 1976 Convention also served as model, both for the structure of the limitation regimes of the two other above-mentioned conventions, adopted in 1992 and 2001 and also, in particular, for the *specific limitation fund procedure* for enforcing limitation of particular claims contained therein (*supra* 1.1).

Norway and the other Nordic states have regularly adhered to and thus implemented the various conventions on limitation of shipowner liabilities as elaborated, adopted, amended and replaced in international cooperation over the years. Consequently, international developments have recurrently entailed substantial changes to the national maritime codes and, in particular, to the parts of the MC implementing treaty-based legal regimes. As a matter of treaty law, however, none of the existing conventions provides an in all respects complete or self-contained limitation regime, thus leaving it to *national legislation* of state parties to provide both supplementary rules and other rules on related matters not regulated in the particular convention. When transposing the conventions to national law, Norway and the other Nordic states have done so, in recent years particularly in order to ensure adequate implementation of the 1996 Convention, the 1992 Liability Convention and the 2001 Bunker Convention.

The result of this approach is that, at present, the MC chapters 9, 10 and 12 on limitation of liability constitute a comprehensive and diversified piece of legislation. In addition to the provisions needed to implement fully the treaty-regulated limitation regimes actually in force, these chapters of the MC also contain a number of national legal provisions needed to cover appropriately any exemptions or actual lacunas in the international regimes, particularly by common provisions on limitation funds set out in MC chapter 12. Clearly, all the provisions of the MC are part of the national law. Nevertheless, there remains an important difference in legal character between the treaty-based provisions and the national additions contained in the MC. The reason is that the national

courts generally have a duty to interpret and apply the treaty-based provisions consistent with the international treaty obligations of Norway in relation to other state parties (*supra* 1.1 note 1).

1.3 The scope of the 1996 Convention

The purpose of the 1996 Convention – consistent with the idea of global limitation of maritime claims – was apparently to define as a matter of international law a generally applicable regime for limitation of liability for maritime claims. The new convention constitutes a copy of the 1976 London Convention, as amended by the 1996 IMO Protocol providing higher and internationally uniform limits of liability. Actually, the *global limitation* objective of the 1957 and 1976 conventions also served as the basis for drafting the 1996 Convention. (**2**) Nevertheless, the 1996 treaty-based regime specifically allows any state party a quite wide opt-out option for important groups of maritime claims, cf. in particular the 1996 Protocol Article 9 on the scope of the treaty obligations imposed on state parties to the Protocol (*infra* 2.1).

The limitation regimes of the 1957, 1976 and 1996 conventions generally distinguish between personal injury claims and all other maritime claims occurring in direct connection with the operation of a ship, cf. Articles 2, 6 and 7. They provide separate limits for personal claims, and another limit for the sum of all other types of claims arising out of the same accident or event. The latter group included all kinds of claims based on damage to property (including damage to harbour works and waterways), as well as claims by public authorities in respect of the raising, removal and cleaning-up work, required because the ship is sunk, wrecked or stranded, including anything that is or has been on board such ship. Nevertheless, the 1996 convention Articles 3 and 18 also contained some exceptions and, as a matter of international law, important groups of maritime claims actually fall outside its scope of application, being subject to other separate international or national limitations regimes.

First, claims in respect of oil pollution damage resulting from the escape of crude oil (including bunker oil) from laden tankers, exclud-

ed from the 1996 Convention, are subject to the special and separate limitation regime provided for in the 1992 Liability Convention. The MC chapter 10, part II implements this limitation regime, but with supplementing national rules on limitation fund modelled on provisions applicable to the limitation regime of the 1976/1996 conventions (MC §§ 195 and 196, cf. MC chapter 12). This liability regime also includes claims in respect of raising, removal and clean-up operations to avoid or limit pollution damage arising out of casualties involving laden tankers (MC § 191, paragraph 2). However, other types of maritime claims in respect of damage caused in direct connection with the operation of laden tankers remain within the scope of the limitation regime of the 1996 Convention, as implemented in MC chapters 9 and 12.

Second, 1996 Convention Article 18 allows state parties a wide option to opt-out of the limitation regime of the convention by excluding and exempting any claims in respect of removal and clean-up operations relating to a ship sunk, wrecked or stranded, cf. Article 7 of the 1996 IMO Protocol. A number of state parties, including Norway and the other Nordic states, have done so. Consequently, the *treaty-based* limitation regime of the 1996 Convention, as implemented in the Norwegian MC chapters 9 and 12, is now a separate regime applicable only to the claims remaining within the scope of the 1996 Convention, mainly claims in respect of property damage. Conversely, the exempted claims are subject to *a* new *national limitation regime*, established by national statutory law as a *separate* variant of a "global limitation" system, but based on substantially higher limits of liability than in the 1996 Convention. **(3)** Accordingly, MC chapters 9 and 12 also contain particular provisions defining the key elements of this national limitation regime (MC §§ 172a, 175a, 178a and 179, cf. § 232).

Third, claims in respect of oil pollution damage resulting from bunker oil of ships other than laden tankers, are subject to the strict liability regime provided for in the 2001 Bunker Convention, as implemented in MC chapter 10, part I. This liability regime also includes claims in respect of raising, removal and clean-up operations to avoid or limit pollution damage arising out of casualties involving laden tankers. However,

the Bunker Convention expressly provides in Article 6 that it does not affect any right to limitation of such liability according to national or international law, such as the 1976 London Convention as amended e.g. by the 1996 IMO Protocol (MC § 185, paragraph 3). According to MC chapter 10, part I, such pollution claims consequently in fact fall within the scope of the new separate national limitation regime based on the opt-out exemption of Article 18 of the 1996 Convention and the substantially higher limits of liability for such claims specifically provided in MC §§ 172a, 175a, 178a and 179, cf. § 232. **(4)** However, other types of maritime claims in respect of damage caused in direct connection with the operation of ships other than laden tankers remain within the scope of the treaty-based limitation regime of the 1996 Convention, as implemented in MC chapters 9 and 12, cf. MC §§ 172, 175 and 178, cf. § 232.

The restructuring of the treaty-based and national limitation regimes following from the implementation of the 1996 Convention in the MC chapters 9, 10 and 12, consequently means *an actual replacement of the traditional global limitation regime by several separate treaty-based and national limitation regimes*. Each of these regimes has a defined scope and different limits of liability (MC §§ 172 and 175, 172a and 175a, 185 and 195). However, MC chapter 12 on limitation funds applies to all of these regimes, cf. also MC §§ 176, 177 and 195.

1.4 Erosion of the global limitation system

The traditional global regime for legal limitation of shipowner liabilities, as contained in the 1957 Convention, was originally relevant primarily for claims in respect of damage caused to ships, cargoes and other marine property. These claims usually related to damage already covered against marine risks by direct insurance contracted by the property owners. Accordingly, the original legal limits of liability only reflected a level of third party liability generally expected to be insurable by shipowners at reasonable cost. Obviously, the purpose of any of the international limitations regimes has never been, and even at present is not,

generally, to provide – consistent with the general principles of the law of torts – full compensation to injured parties.

International developments over the years, however, created a new and quite different situation. This explains why international limitation conventions adopted during the last 30-40 years actually initiated a gradual erosion of the original global limitation system for maritime claims. It became obvious that international shipping also presented substantial risks of serious damage to other – and largely uninsured – interests in society, particularly in coastal states. Accordingly, the view emerged – and prevailed – that the costs of such damage resulting from risks of international shipping were expenses generally to be attributable to and covered by the shipping industry itself. The obvious key to achieving this was to combine substantial changes to the existing legal limitation regime(s) with a new important role for the insurance of the legal liabilities by shipowners. Essentially, this meant that the liability insurance contracted by shipowners would also serve as the vehicle for payments of appropriate compensation to third parties for the various claims for damage resulting from risks attributable to the shipping industry. **(5)** In hindsight, the conclusion is that the "global limitation" approach reflected in the 1957, 1976 and 1996 Conventions – even after substantial increase of the limits – actually proved to be too ambitious to address adequately the challenges emanating from internationalized or globalized shipping and trade.

(1) One reason for this was that the substantial increases of the monetary limits of liability provided for in the 1957, 1976 or 1996 conventions proved soon to be outdated in real terms. One reason was the unavoidable effect of inflation. Already in 2012, it was necessary to increase the general 1996 limits by ca. 50 %. In addition, a view widely held in many countries was that the internationally agreed limits proved to be by far too low to provide acceptable compensations to injured parties in cases of serious damage and loss resulting from international shipping. This became particularly apparent as structural changes to the shipping industry gradually entailed both substantial increase of risks and sizable losses for other private and public sectors of modern societies. In general, most

losses suffered by such parties were not covered – or coverable – by direct insurance.

Internationally, the resulting concerns initially provoked recurrent, prolonged and controversial discussions of new substantial increases to the monetary values of the limits of liability, designed primarily to counter the effects of significant inflation over the years. However, although substantial – limited – increases of the limitation amounts followed after the 1976 and the 1996 conventions, this was not sufficient to meet the demands for significantly better protection against *particular types of costly damage caused by ships to uninsured non-shipping interests in coastal areas.* In principle, such losses ought to be recoverable under the legal regimes applicable to the shipping industries, and not – after heavy limitation – to remain in general with the injured parties within society. The major driving forces were strong private and in particular public proponents of the need for adequate protection against damage to the environment and other interests of coastal states.

The remedy eventually agreed was to *exempt these types of claims from the traditional and treaty-based "global limitation" system*. This would allow for such claims instead to be subject to separate international or national limitation regimes with limits of liability ordinarily sufficient to *generally provide full compensation to most of the exempted claims*. **(6)** Furthermore, such restrictions on the applicable limitation regimes would also provide a new and firm basis for substantially extending the liability insurance of shipowners in order to ensure – indirectly – an appropriate insurance coverage for the sizeable losses covered by the claims so exempted (*infra* 1.7).

The result of this approach is that the limitation regime of the 1996 Convention – as a matter of international treaty law – is binding and applicable only for limitation of claims in respect of damage to property such as ships, cargoes and harbours, traditionally exposed to marine risks insurable by direct insurance. In many 1996 states, therefore, claims in respect of pollution and environment damage and the cost of clean-up operations resulting from marine casualties are now subject to limitation according to internationally and nationally established limitation regimes,

ordinarily based on limits of a size largely adequate to cover most of such claims. **(7)**

(2) The first important exception to the "global limitation" system came in the early 1970s, with the adoption of a new international liability regime for oil pollution damage resulting from casualties to laden crude oil tankers, later redrafted in 1992. Internationally, such pollution claims, including removal and clean-up costs, are now subject to the particular limitation regime contained in the dual 1992 civil liability and international fund conventions. Consequently, these pollution claims fall outside the scope of the "global limitation" regimes of the 1976/1996 conventions. The 1992 liability regime is now included in the MC chapter 10, part II and exempted from the general limitation regime contained in MC chapter 9 (MC § 173), cf. 1996 Convention Article 3 and MC §§ 191 and 183 paragraph 10. Nevertheless, when implementing the limitation regime for oil pollution damage contained in the 1992 Conventions, the provisions of the 1976 Convention served as a model for the particular provisions on limitation fund for oil pollution claims against laden tankers as now set out in MC §§ 194-196. This also explains why the particular provisions in MC chapter 12 are generally applicable to such limitation funds (MC § 231).

(3) Another, most important exemption to the global limitation principle subsequently appeared in the 1976 and – later – the 1996 Conventions. By Article 18 No.1 of both conventions, state parties are allowed to "reserve the right to exclude the application of Article 2, paragraphs 1(d) and 1(e)" from these conventions (*infra* 2.1). A great number of state parties, including the Nordic and most European states, have actually adhered to the 1996 Convention subject to this reservation, thereby delimiting their treaty obligations under the Convention so as to relate solely to the remaining types of claims listed in Article 2, paragraphs 1 (a)-(c) and (f), cf. MC § 172. Essentially, this reservation to the 1996 Convention provides a national basis for exempting all claims against the owner of a ship sunk, wrecked or stranded in respect of the raising, removal and other cleaning up work relating to such ship, including anything that is or has been on board the ship. Generally, state parties

to the 1996 Convention thereby retain the right to determine through national law to what extent such types of claims by public authorities and other third parties shall be subject to limitation. This is particularly important in relation to casualties suffered in coastal waters by ships other than laden crude oil carriers (MC §§ 183 and 185). A significant number of state parties, including Norway, have adopted such national legislation (MC §§ 172a, 175a and 179).

Norway ratified the 1996 Convention subject to the reservation permitted by its Article 18 No. 1 and the 1996 IMO Protocol Article 7. For Norway as a shipping state it was important to become a party to the 1996 Convention while, at the same time, safeguarding as a costal state the right to establish nationally acceptable alternative limits for the liabilities imposed particularly by the national Pollution Act (1981) §§ 7, 28 and 74-76. The latter was particularly important for liabilities for bunker-oil pollution in coastal waters resulting from casualties to ships other than laden crude oil carriers (MC § 183), but it also allows generally for the recovery of the cost of removing such ships and other clean-up operations. **(8)** For laden tankers, even claims in respect of bunker-oil pollution were already subject to the liability regime for oil pollution damage of the 1992 Liability Convention (MC chapter 10, part II), cf. MC § 191, paragraph 2. Accordingly, MC chapter 10, part I, implementing the 2001 Bunker convention, is not applicable to bunker-oil pollution caused by laden tankers, cf. MC § 183, paragraph 10.

(4) The implementation of the 1996 Convention, as delimited by the reservation permitted by its Article 18, paragraph 1, obviously required comprehensive redrafting of the 1976 regime for limitation of maritime claims then contained in the Maritime Code. In brief, the amendments to the MC, adopted in 2005, provided that the sum of claims listed in Article 2, no. 1 (a)-(c) and (f) of the 1996 Convention remained subject to the treaty-based limitation regime, and that another new national limitation regime applied to the sum of the claims listed in Article 2, no. 1 (d) and (e). **(9)** However, the new limitation regime – while providing for substantially higher limits than the 1996 Convention – was in most other respects modelled on the principles of the "global limitation" system of the

1976/1996 Conventions (*infra* 2.3.2). As a matter of treaty law, however, the legal character of the two limitation regimes is different. In principle, the provisions of the MC defining the national limitation regime are subject to ordinary national interpretation practices, while Norway – a state party to the 1996 Convention – generally has a paramount duty to treaty conform application and interpretation of the provisions of the MC implementing the 1996 treaty-based limitation regime (*supra* 1.1).

1.5 The effects of the shipowner's limitation fund

1.5.1 An option for the shipowner

The provisions on limitation funds in the 1996 Convention Articles 11 to 14 are implemented in Norwegian law by MC §§ 176-178, 232-234 and 244-245 as supplemented by MC §§ 235-243. Notwithstanding the restructuring of the limitation regimes for maritime claims, the basis for all the new regimes is still *the principle of aggregation of claims*. Each of the new legal limits applies to the sum of all claims subject thereto, arising from damage caused by the ship in any one event. Hence, the vehicle for enforcing each limit by actual limitation of the various limitable claims continues to be a *limitation fund* established by or on behalf on the shipowner (*infra* 1.1), having the effect of *barring separate legal actions from claimants* (1996 Convention Article 13, MC §§ 178, 178a, 189 and 196). As a matter of substantive law, *claimants may, subsequent to the establishment of the limitation fund by the shipowner, only enforce limitable claims by submission to the limitation fund and subject to the rather time-consuming fund procedure* (*infra* 4.2). This follows from MC §§ 177 to 178a

If, after a casualty, a particular action brought against the shipowner relates to a limitable claim, the shipowner has the option to invoke limitation of liability in that action (1996 Convention Article 10, MC § 180) or to request that a limitation fund be established (1996 Convention Article 11, MC § 177, paragraph 1). This option is important in the context of limitation of liability. When deciding the particular action

to be brought, the court shall ordinarily apply the rules on limitation of liability invoked only in relation to the claims actually included in that action. The resulting judgment, however, is of no consequence for the extent of limitation of any other claims arising out of the same casualty, and the shipowner still has a risk that enforcement of such other claims may entail that the total liability for all the claims from the casualty exceeds the applicable legal limit. The shipowner, however, may eliminate this risk if instead he reacts to the action brought, by invoking limitation with a request for establishment of a limitation fund. The fund covers all the claims arising out of the casualty (1996 Convention Articles 11 and 12, MC §§ 176 and 244), preventing all claimants from pursuing their claims by separate legal actions (1996 Convention Article 13, MC § 177, paragraphs 1 and 3).

For the claimants, however, the establishment of a limitation fund is, as a matter of law, not equivalent to actual payment of the limitable claims. The immediate effect is postponement of all payments of compensation to injured parties. The overall purpose of the limitation fund and the fund procedures is to safeguard the legal right of the shipowner to limitation of the total liability for all claims arising out a particular casualty. This limitation model requires that the claims subject to limitation only receive payments in the form of proportionate dividends from the limitation fund, subsequent to the completion of a comprehensive fund procedure to determine the distribution of the fund. Accordingly, there is also a need for statutory requirements ensuring that limitations funds be established and distributed in an orderly manner.

A key element of the statutory requirement is that the limitation fund be established by a decision of the court (MC § 234) which also determines, according to MC § 232, the actual amount in national currency to be paid into the limitation fund. Second, the amounts paid into the limitation fund must be exclusively applied to payment of compensation to the limitable claims (MC § 177, paragraph 2). Third, distribution of the amount of the limitation fund is the subject of a "limitation action" brought before the court by the shipowner against all claimants and determined as and when the court decides this action by the judgment

(MC §§ 177, paragraph 3, and 240). The effect of this judgment is to terminate the fund procedure, to authorize the payment of dividends to established claims, and, ulitimately, to relieve the shipowner of any further liability in respect of the casualty (MC §§ 244 and 245).

1.5.2 The legal effect of «global» limitation

The "global" limitation model means that actual legal effects of each of the limitation regimes are determined within the framework of rules generally applicable to all limitation funds set out in MC chapters 9 and 12 (MC § 231-232, cf. §§ 177, 185, 194-196 and 505). Ordinarily, the fund procedure set out in MC §§ 177 and 232 – 245 entails considerable, often yearlong delays in settlement and payment of compensation to limitable claims (*infra* 4.2). In most cases, the effects thereof are to the advantage of the shipowner and his liability insurer having the option of requesting the limitation fund be established (MC § 177). While the limit of liability is expressed in SDRs, the amount of the limitation fund in national currency is determined by the rate of exchange for SDR when established (MC § 232-234 and 505). Hence, the fund expressed in national currency usually proves to decline in real value during the lengthy delay caused by the fund procedure, particularly due to continuous inflation. Benefits may also follow from the mere postponement of payment of claims until the closing of the fund procedure, also including a possible decline in monetary value.

For the claimants, however, the delay resulting from the fund procedure is also likely to cause additional losses, particularly for parties having suffered damage not covered by their own direct insurance. Such claims are not subject to limitation (MC § 173, paragraph 3) as claims against the limitation funds. One part thereof – loss due to change of exchange rates or decline in monetary value during the period from the casualty to the establishment of the fund – is compensated by a specific addition to the amount of the limitation fund when established, calculated at a normal interest rate (1996 Convention Article 11, paragraph 1 and MC § 232). In addition, the court may, when establishing the limitation

fund, also order the shipowner to provide a separate security to cover interest for delayed payment and other financial loss subsequent to the establishment of the fund and until final payment by the distribution of the limitation fund (MC § 234, paragraph 2).

The background is that claims for interest for late payment of dividends on claims, accrued from the establishment of the fund and to actual payment of dividends by the fund when closed, are not subject to limitation (MC § 173 no. 6) and, consequently, are not enforceable against the limitation fund. Generally, any calculation of interest on the amount of dividend payable from the limitation fund or of other financial loss is not possible prior to the judgment of the Court determining the distribution of the fund among the claimants. In any event, claimants awaiting payments, particularly uninsured parties, have to remedy the damage caused at own costs, which – whether financed by own means or by loans – also represents an additional financial loss. All this means that, in general, claims for interest for late payment of dividends to claimants is enforceable only as a separate claim against the shipowner itself subsequent to the closing of the fund procedures (MC § 234, paragraph 2 second sentence). Even when, according to MC § 234, paragraph 2, the Court has ordered the shipowner to provide specific security, claims for interest tend to be left out of any final settlement or determination of the liabilities of the shipowner made several years after the casualty and establishment of the limitation fund, cf. LB-2017-59152 and LB-2019-122748.

In any event, these decisions, and in particular HR-2018-1260-A (*Full City*), suggest that this pattern of interconnected provisions on the establishment of limitation funds and fund procedures contained in the 1996 Convention and MC Chapters 9 and 12, appears to be too complicated to be readily understood and applied by parties and by courts. **(10)**

1.6 International effects of limitation fund

The establishment of a limitation fund in one of the state parties to the 1996 Convention does not necessarily bar claimants from enforcing lim-

itable claims by separate legal action brought against the shipowner in other state parties. Ordinarily, however, international conventions designed to create internationally uniform limitation regimes also contain provisions on the reciprocal recognition by state parties of limitation funds established in other state parties. The 1992 Liability Convention and 2001 Bunker Convention provide for such mutual recognition, implemented by MC §§ 189, 196, 203 and 205. However, the rules on mutual recognition in Article 13 of the 1976 and 1976/1996 global limitation conventions are different and are kept in rather flexible language, cf. MC § 178. This is of importance because worldwide and even in the EU/EEA area a large group of states remain state parties to the 1976 Convention, while another large group, including the Nordic and most European states, are state parties only to the amended 1976/1996 Convention.

According to the 1996 Convention Article 13 and MC § 178, the rules on mutual recognition only apply to limitation funds established according to the 1996 Convention, and only if actually established in a 1996 state party where the casualty or the arrest of the ship took place, except if recognition is granted merely on a discretionary basis. However, MC § 178 is not applicable to limitation funds established according to the un-amended 1976 Convention (ND 2007 p. 370 NSC).

In the EU/EEA area, however, decisions by courts on establishment or other matters relating to limitation of liability and limitation funds in another member state are subject to the Brussels I Regulation (EC) No. 44/2001 and the Lugano Convention 2007 Articles 27 and 33, containing uniform rules on jurisdiction of courts, lis pendens and recognition of judgments. Consequently, legal actions and decisions relating to limitation of liability in the courts of an EU/EEA state are ordinarily subject to recognition in the other EU/EEA states. In this context, however, it is not relevant whether or not such EU/EEA state is party to the 1996 or the 1976 convention, or whether or not the conditions are met for mutual recognition of limitation funds in 1996 Convention Article 13 and MC § 178 (ND 2007 p. 370 NSC and ND 2005 p. 631 DSC). **(11)**

1.7 Global limitation and P&I insurance

Shipping companies regularly cover the risk of claims in respect of damage resulting from the operation of ships by liability insurance, ordinarily P&I insurance. Traditionally, P&I insurance provides liability insurance for each specified ship, covering the various risks of claims related to the particular properties and operations of the named ship. In general, however, P&I contracts do not specify the insured amount. In most cases, consequently, even the liability of the P&I insurer is subject to the limit of the applicable limitation regime – international or national – as applied to the actual tonnage of the insured ship. This link means that the restructuring of the international and national limitation regimes – establishing new regimes each applicable to different types of claims subject to different limits of liability – also entailed substantial changes to P&I liability insurance practices in international shipping.

The major impact on P&I liability insurance, however, does not follow from this restructuring as such. Its primary objective was to amend the limitation regimes in order that, in practice, the role of the liability insurance of shipowners would be extended to also serve as a vehicle for the provision of adequate compensation for damage caused by ships to uninsured non-shipping interests in coastal areas (*supra* 1.4). This presupposed, however, that the new limitation regimes be supplemented by schemes for *obligatory liability insurance* of each of the groups of maritime claims subject to limitation, containing also *minimum requirements to the insurance cover* to be provided. These schemes proved to have substantial consequences quite foreign to traditional P&I business. Nevertheless, P&I insurers readily provided the new liability covers needed by shipowners, in fact also assuming the administrative tasks required by insurance contracts protecting not only the insured shipowner, but also various groups of third parties.

The principle of obligatory liability insurance was first recognized by the 1974/1992 Liability Convention and, subsequently, by the 2001 Bunker Convention. Both conventions apply to oil pollution damage attributable to ships, and require the registered owner of the ship to provide full

liability insurance cover up to the applicable legal limits for oil pollution damage claims (MC §§ 197 and 186). The ship must carry an insurance certificate confirming such insurance cover. In addition, both conventions expressly provide that injured parties may enforce their claims by *direct action against the P&I liability insurer* (MC §§ 200 and 188).

In addition, the EU directive 2009/20/EU now provides a general regime for obligatory liability insurance, requiring that ships be fully insured against all liabilities for claims limitable under the 1976 Convention as amended by the IMO 1996-Protocol (MC §§ 182a-182c). According to MC § 182a, however, it is a duty of the actual operator, as either the owner or the bareboat charterer of the ship (the "reder"), to obtain such liability insurance, evidenced by an insurance certificate. Another difference is that the EU directive itself does not contain provisions on the right of injured parties to enforce their claims by direct action against the liability insurer, thereby leaving this to be determined by national law, such as NFAL §§ 7-6 to 7-8 and the DFAL § 95. This, however, is likely to cause important uncertainties as to the interaction between P&I insurance and the limitation regimes.

1.8 The links between the limitation regimes and P&I insurance

The restructuring of the international and national limitation regimes, combined with specific requirements relating to obligatory insurance of the liabilities subject to limitation, strengthened and broadened the traditional links between the limitation regimes and P&I insurance. In any event, however, this link already was – and still is – a direct consequence of the actual limitation procedures applied by the several limitation regimes. The key element is the establishment of a limitation fund by or on behalf of the shipowner with the court receiving an action against the shipowner (MC § 177). In most cases, nevertheless, the limitation fund actually consists of payment or guarantee provided by the P&I insurer of the ship involved. Moreover, MC § 171, paragraph 3 also gives the P&I

insurer his own right to limit his liability for insured claims, according to the applicable limitation regime, cf. also MC § 177, paragraph 3.

This means that the P&I insurer actually holds the real interest – at least indirectly – as party to the disputes on claims and distribution of the limitation fund subsequently arising during the limitation process. In fact, the P&I insurer generally has a key role in the limitation procedure, even in cases where the required liability insurance does not give claimants an express right to direct action against the P&I insurer. Moreover, in view of recurrent crises and extensive forum shopping in international shipping, P&I insurers increasingly appear to be the favoured targets for direct actions as a vehicle when seeking to enforce maritime claims against the insured shipowner.

The countermeasure of international P&I insurers is P&I-contract terms, including a preferred jurisdiction and choice of law clause, purporting to prevent such "third party" actions from injured parties. Internationally, however, there is no uniform response to these hurdles from legislators or courts. In an EU/EEA context, the issues raised in such actions against P&I insurers primarily relate to the initial, but important, questions of applicable jurisdiction and choice of law, rather than the actual liability for the particular claims, cf. ND 2017 p. 445, at p. 460-61 DSC (*Assens Havn*), and HR-2018-869-A and HR-2020-1328-A NSC (*Gard I and II*). **(12)** These decisions held that, according to the applicable national rules of choice of law, the particular dispute between the injured party and the P&I insurer was governed by the national tort law. In the cases at hand, the national law on insurance contracts also permitted the claim of the injured party to be brought by direct action against the P&I insurer (Dfal § 95 and NFAL §§ 7-6 to 7-8).

Nevertheless, the Danish and Norwegian approach to the issues of substantive insurance law on direct claims against the P&I insurer is somewhat different. According to Dfal. § 95, paragraph 2, the rule is that a direct claim against the P&I insurer will succeed only in cases where the insured shipowner is actually subject to insolvency proceedings. In ND 2017 pp. 445 DSC (Assens Havn) the court held that the direct action, based on a claim according to applicable Danish tort law, was subject to

Danish jurisdiction and properly brought for subsequent final decision by Danish courts, even if the P&I contract provided for English law and jurisdiction, see my Comments in ND 2017 pp. lxx-lxxiii. Norwegian law, however, applies a clear-cut distinction between the initial issues and rules on jurisdiction and procedural law applicable to direct actions, and the issues and rules of substantive law relevant applicable when, in the main proceedings of the direct action, to determine whether the P&I insurer is actually liable for the claim brought.

In *HR-2020-1328-A*, the Supreme Court (Gard II) held that, as a matter of procedural law, a direct claim based on liability insurance governed by NFAL §§ 7-6 to 7-8 may *generally* be the subject of a direct action against the P&I insurer having Lugano-jurisdiction in Norway. Thus, the main issue is whether there is a Norwegian forum available for the legal action brought against the P&I insurer, and this issue is generally independent of any assessment of the likely result in the main proceedings, as eventually decided by the court. In Norwegian law, consequently, questions such as the legal effect of the P&I-contract terms for the liability for the particular direct claims, are a matter of substantive insurance contract law *to be decided in the main proceedings of the direct action* according to the relevant facts, cf. ND 2008 p. 267 NSC (*supra* note 12). In any event, the overriding principle in NFAL § 7-6, paragraph 4 is that the P&I insurer may generally invoke the same objections against the direct claim as the insured party, provided, however, that P&I contract terms allowing any additional objections to the liability of the insurer are invalidated if the insured party is insolvent (NFAL § 7-8). Although the Danish and Norwegian procedural approach to direct actions seems to be different, in most cases, the *substantive insurance law* in sum will be the same.

2 A two-tracks model for treaty-based and national limitation

2.1 The impact of international developments

The origin of the existing regimes for limitation of maritime claims is the 1957 Brussels Convention. The convention objective was to promote international uniformity by defining the maritime claims subject to limitation (Article 1) and by specifying limits for the total of all limitable claims arising against the ship at any distinct event (Article3), enforceable by means of limitation funds legally established by the shipowner (Article 2). This regime, implemented in the Maritime Code in 1964 **(13)**, later became – in a modernized and redrafted version – incorporated in the 1976 London Convention, providing a substantial increase of the 1957 limits and new, specific requirements as to the establishment, effect and distribution of limitation funds (Article 11-14). After denunciation of the 1957 Convention, the Nordic states in 1983 implemented the 1976 London regime in the Maritime Code (*MC*). An important part of the implementing legislation was a new chapter of the MC, structured in accordance with the provisions on limitation funds in Articles 11-14. Included in this chapter were also supplementing national rules on the limitation fund procedures and on limitations actions against all claimants, to determine the amount of the fund as well as the distribution of the fund among the established claims against the shipowner. **(14)**

The 1996 IMO Protocol brought a few, but important, amendments to the 1976 Convention. **(15)** A *first objective* was to provide another major increase to the limits of liability. Without awaiting the entry into force of the IMO Protocol, Norway in 2002 implemented the new limits in the Maritime Code without, at the same time, denouncing the 1976 Convention. As a matter of public international law, consequently, it was also necessary to add an exception whereby shipowners from state parties to the 1976 Convention would remain entitled to limitation according to the original limits of the 1976 regime. **(16)**

The *second, but overriding objective* of the 1996 Protocol, however, was to *re-establish* internationally uniform limits of liability fully based on the 1976 Convention, as amended by the 1996 IMO Protocol. In fact, the result of the Protocol was a *new* 1996 Convention designed to replace the 1976 Convention. To achieve this, it was necessary to terminate the international role of the 1976 Convention and its limits, and to restrict the mutual recognition of the limitation regimes in other states to the limitation regimes based on the limits in the new 1996 Convention (*supra* 1.5, cf. ND 2007 p. 370 NSC). At the same time, however, it was also important not to impair the international uniformity of the limitation system as such, as already established by the 1976 Convention. The mechanism to implement these principles is set out in Article 9 of the Protocol.

The basic idea inherent in Article 9 is that the state parties to the 1976 Convention, by denunciation of the 1976 Convention and simultaneous ratification of the 1996 IMO Protocol, would be *state parties only to the 1996 Convention*. Except for new limits and rules on periodic updating of limits, the 1996 Convention was almost identical with the original 1976 Convention, thus preserving generally the uniformity of the existing systems for limitation of maritime claims. As between state parties to the 1996 Protocol, consequently, the 1976 Convention, as amended by the Protocol, formally constituted in its entirety a *new treaty* – the 1996 Convention – which was to be read and interpreted as one single instrument, cf. the Protocol Article 9, nos. 1 and 2.

This procedure substantially reduced the number of state parties to the original 1976 Convention. At present, more than 60 states, including the Nordic and most European states, are parties to the 1996 Protocol and 1996 Convention. Nevertheless, there are still a number of other states remaining parties to the 1976 London Convention un-amended without ratifying the 1996 Protocol. The effect of the mechanism in the 1996 IMO Protocol Article 9 is, however, that 1996-states, having denounced the 1976 Convention, no longer have any treaty obligations vis-a-vis such states (Article 9, no. 4). In 1996-states, consequently, the limitation regime based on the 1996 Convention, and even an alternative national

limitation regime for claims excluded by a reservation according to Article 18 thereof, is also applicable to ships from such 1976-states (ND 2007 p. 370 NSC) and to ships from states not party to any of the conventions.

The third objective of the 1996 IMO Protocol was to solve a problem arising because the mechanism set out in the Protocol Article 9 generally meant that the list of maritime claims subject to limitation contained in the 1996 Convention Article 2 actually remained the same as in the 1976 Convention Article 2. However, the recurrent controversies as to whether the international limitation regime should even extend to cover claims in respect of removal of the ship, cargo and other clean-up operations relating to a ship sunk, wrecked or stranded, actually constituted a serious threat to the extent of international acceptance of the 1996 Protocol and 1996 Convention. In particular, there still was strong opposition from most coastal states. The solution agreed, in order to avoid delay in the entry into force of the 1996 Convention, was to allow each state party to reserve the right "to exclude the application of article 2, paragraphs 1 (d) and (e)". According to the 1996 IMO Protocol Article 7, amending the 1976 Convention Article 18, paragraph 1, any state party could do so not only when adhering to the 1996 Convention, but also at any time thereafter (*supra* 1.4).

This compromise meant that the 1996 Convention could not serve as a vehicle for re-establishing an internationally uniform limitation regime for maritime claims. At any point in time, there now exists two groups of state parties to the Convention. One group has a treaty obligation to implement and apply the uniform limitation regime of the 1996 Convention to all maritime claims listed in Article 2. The other group consists of state parties having limited their treaty obligation to the application of the uniform limitation regime of the Convention only to the maritime claims not excluded by an Article-18 reservation. At present this group includes one third of the more than 60 state parties to the Convention, including the Nordic and most European states, all retaining an option to establish at any time an alternative national limitation system for the excluded maritime claims. Many of these state parties have also done so.

Consequently, in the two groups of state parties, the defined scope of *the treaty-based* limitation regime will be different and, accordingly, the effects of limitation will differ. Moreover, the particular provisions of the 1996 Convention, designed for its limitation regime as a whole, cannot be readily applicable on face value and without adjustment to the limitation regime as delimited in scope by the Article-18 exclusion. The Convention itself, however, does not address the resulting problems, and the solutions provided by the different states vary a great deal.

2.2 Treaty-law effects of the reservation in Article 18 of the Convention

2.2.1 The role of national legislation

According to international law, the effect of a reservation made by one state party to a convention is generally that the provisions of the convention covered by the reservation are not applicable in the relationship between such state and the other state parties to the convention. This applies regardless of whether or not the other state party concerned has given its consent or made an equivalent reservation, cf. the Vienna Convention (1969) Article 21. These principles also apply to multilateral conventions, such as the 1996 Convention.

The 1996 Convention Article 18, paragraph 1 (as amended by the IMO 1996 Protocol Article 7) generally allows that a state party to the Convention reserves at any time "the right … to exclude the application of article 2, paragraphs 1 (d) and (e)". Accordingly, in the relationship between the state party making such reservation and all the other state parties to the Convention, the obvious treaty-law effect of this reservation is that the Convention is not binding and applicable to questions of limitation relating to the claims thereby excluded from the Convention.

This means that a state party making the Article-18 reservation continues to have an obligation under treaty-law to apply the limitation regime of the Convention, if a ship and its owner or actual operator from other state parties invokes limitation of liability in respect of the

remaining claims in Article 2, paragraphs 1 (a)-(c) and (f). Such state party, however, has no obligation to apply the treaty-based limitation regime to limitation in respect of the excluded claims listed in Article 2, paragraphs 1 (d) or (e), invoked before a national court by a ship from another state party. Nor does the national court have any obligation according to the Convention Article 13 to recognize any limitation funds in respect of excluded claims established according to the Convention in other state parties. The consequence of the exclusion by the Article-18 reservation is that, according to international law, the state party itself may generally determine by national legislation *if, and to which extent the excluded claims shall be subject to limitation* (*supra* 1.5).

As a matter of public international law, it is the text of Article 18, paragraph 1 of the Convention itself, interpreted according to the Vienna Convention (1969) Article 31, which defines and delimits the actual room for adoption of such national legislation by a state party. The Article-18 reservation, however, does not affect the obligation of the state party relating to the application of the limitation regime of the Convention with respect to the claims listed in Article 2, paragraphs (a)-(c) and (f) as interpreted according to the Vienna Convention Article 31 and, consequently, independent of national law in the state party concerned. To this extent, the state party remains bound as state party to the Convention. Thus, if adopting or applying national rules so as to infringe this treaty-based right to limitation of ships from other state parties , the state party would in fact be in breach of its treaty obligation vis-à-vis the other state parties (cf. *supra* note 1).

According to the treaty law, consequently, a state party having reserved the right "to exclude the application of Article 2, paragraphs 1 (d) and (e)" may adopt national law providing either that the excluded claims shall not be subject to limitation, or that a quite different and/or separate national limitation regime for such claims shall apply. Article 18, paragraph 1 leaves the choice to the state party concerned. This is the basis for the two-track model implemented by the Norwegian MC Chapter 9, being applicable as lex fori by Norwegian courts, cf. MC § 182, paragraph 1 (*infra* 2.3.1). **(17)** A consequence of the Article-18 model is, however, that

the national solutions actually preferred or adopted by the different state parties vary a great deal. There are also many state parties, e.g. Denmark, having refrained from adopting particular national legislation, thus preferring – *notwithstanding their Article-18 reservation* – that the entire limitation regime of the Convention as implemented in their national law shall apply in all cases where limitation be invoked.

2.2.2 The effect of the reservation on the application of the 1996 Convention

The over-all effect of reservations according to Article 18 of the 1996 Convention actually is to restrict the scope of application of the Convention as a whole. Accordingly, the provisions of the Convention must be read and interpreted as *an entire convention setting out only a treaty-based limitation regime for the remaining claims* defined by the Convention Article 2, paragraphs 1 (a)-(c) and (f). Subject to this restriction on its scope, the Convention as a whole *remains binding as treaty law between all state parties*, not to be departed from by national law or interpretation with respect to limitation of such claims (*infra* 2.3 at notes 19-21). This means that the treaty-law effects of the reservation and the exclusion of the claims in Article 2, paragraphs (d) and (e) is not merely a deletion of the two provisions specifically mentioned in Article 18, paragraph 1 of the Convention. This deletion or exclusion is also – directly or indirectly – of consequence for the actual content or interpretation of several other provisions of the Convention.

First, there are provisions in the Convention specifically referring to Article 2 as a whole or to Article 2, paragraphs 1 (d) and (e), such as the definitions of persons entitled to limitation in Article 1, paragraphs 1) and 3). If, according to its reservation, a state party has excluded the application of Article 2, paragraphs 1 (d) and (e), the limitation regime of the Convention does not apply at all to limitation of liability in respect of such claims in cases where invoked by ships, shipowners or operators. Moreover, the definition of salvage operation in the Convention Article 1 paragraph 3 does not include removal and clean-up operations, such

as are mentioned in Article 2, paragraphs 1 (d) and (e) or in Article 2, paragraph 2 (*infra* 2.4.3).

Second, many of the provisions of the Convention apply only to claims "subject to limitation according to the Convention". Consequently, these provisions do not govern limitation of the excluded claims. This is the case as regards e.g. Article 2, paragraphs 1 (f) on loss-prevention measures (*infra* 3.2), Article 2, paragraph 2 and Article 12 , paragraph 2 on claims brought by way of subrogation, and Article 5 on limitation of counterclaims (*infra* 3.4.6). More important is that the limits of liability provided for in Article 6, paragraph 1 (b) and the rules on aggregation of claims in Article 9, paragraph 1 only apply to the four types of claims listed in Article 2, paragraph 1 not actually excluded from the Convention as limitable claims. This also means that the Convention's Articles 11 to 14 on limitation funds only apply as matter of treaty law to claims subject to limitation according to the Convention.

Although the provisions of the Convention referred to above do not apply as treaty law, it follows from the implementation of the Norwegian two-track model in the Maritime Code that these provisions may nonetheless be applicable as national law (*infra* 2.3). This means that the provisions is a part of the new separate national limitation regime for the claims excluded by the Article-18 reservation, cf. e.g. MC §§ 231-232. Moreover, with the exception of the key provisions for the national regime relating to limitable claim, limits of liability and aggregation of claims (MC §§ 172a, 175a, 178a and 179), most of the provisions in MC Chapters 9 and 12 are actually provisions common for the treaty-based and the national limitation regimes (*infra* 2.3.2 at notes 23-24). Even the general scope of application of the two regimes is on the whole determined by provisions common to the treaty-based and the national limitation regimes (*infra* 2.4).

2.3 The Implementation of the two-tracks model in the Maritime Code

2.3.1 Two new separate limitation regimes

Norway and the other Nordic states ratified the 1996 IMO Protocol and the 1996 Convention with the reservation permitted by Article 18 "to exclude the application of article 2, paragraphs 1 (d) and (e)", i.e. claims in respect of the removal of ship, cargo and other clean-up operations relating to a ship sunk, wrecked, stranded or abandoned. The Norwegian ratification in 2002, prior to the entry into force of the 1996 Protocol and Convention on May 13, 2004, contained this reservation. For Norway it was important to become a state party to the new 1996 Convention while, at the same time, also safeguarding the right under treaty law to adopt national legislation with a higher limit of liability for the excluded types of claims, in particular claims by public authorities according to existing environment and pollution legislation. **(18)** A treaty-law effect of this reservation, however, was also that the 1996 Convention would not govern the right of Norwegian ships to limitation of any liability for the excluded claims incurred in other 1996-states (*supra* 2.2.1). This, however, was a rather limited problem, arising only in a 1996-state actually ratifying the Convention with an Article-18 reservation and – in addition to its reservation – subsequently adopting national legislation providing an express exemption or a specific limitation regime for such claims. If not, the entire limitation regime of the 1996 Convention, as implemented in the national law of that state party, would be applicable even to ships from other 1996-states (*supra* 2.2.1).

The denunciation of the 1976 Convention by the Nordic states and the ratification of the 1996 Convention with a reservation according to its Article 18, entailed a substantial change in the position of these states, as a matter of public international law, leaving a new and wide room for national legislation on limitation of the excluded maritime claims (*supra* 2.2.1). Subsequent to the entry into force of the 1996 Convention in 2004, this opened for a thorough redrafting of MC Chapter 9, originally

modelled on the global limitation system of the 1976 Convention. The redraft, adopted in Norway by an amendment to the MC by an Act of June 17, 2005 No. 88, actually replaced the limitation regime of the 1976 Convention by a two-track model, consisting of *two separate limitation regimes* for different groups of claims other than personal injury claims. **(19)**

One limitation regime had, of course, to be *convention-based*, implementing the 1996 Convention and the limits therein as applicable *exclusively* to the aggregated sum of the claims listed in the Convention Article 2, paragraphs 1 (a) to (c) and (f), cf. MC §§ 172, 175, paragraphs 3 and 4, and 178. The other limitation regime was *a new nationally established limitation regime*, with substantially higher limits of liability, applicable *exclusively* to the aggregated sum of the claims listed in the Convention Article 2, paragraphs (d) and (e), excluded from the treaty-based regime by the Article-18 reservation, cf. MC §§ 172a, 175a, 178a and 179.

The provisions of the redraft of MC Chapter 9 specify the key elements inherent in each of the new convention-based and nationally established limitation regimes. Except for the differences relating to the limitable claims and the limits of liability, the structure of the two regimes and the actual wording of the particular provisions are nearly the same. An important exception, however, is that MC §§ 172a, paragraph 1 (3) and 179, deviates from Article 2, paragraph 1 (f) of the Convention, by providing that even loss prevention cost incurred by the shipowner in respect of the claims listed in § 172a is recoverable in the national limitation fund. (**20)**

2.3.2 The redrafting of the Maritime Code Chapter 9.

The effect of the 2005 MC amendments is that, in principle, the convention-based limitation regime and the nationally established limitation regime each constitute *a separate and legally independent limitation regime*. In MC Chapter 9, this is denoted by the new headings respectively to MC §§ 172, 175 and 178, and to MC §§ 172a, 175a, 178a and 179. According to the Government Bill, the purpose of the new headings is to

have specifically clarified, both that the redrafted § 172 only includes the claims subject to limitation according to the rules of the 1996 Convention, and also that the new § 172a only governs limitation of the claims excluded and exempted from the treaty effects of the Convention. **(21)** Accordingly, the claims listed in the existing MC (1983) § 172, paragraphs 1 (d) and (e) – the claims in respect of removal and clean-op operations – were actually deleted from § 172 and instead inserted in the new MC § 172a. The purpose of this change was to denote both the exclusion of these claims from the 1996 Convention and, in addition, that specific rules on limitation of liability rules applied to the § 172a-claims. **(22)** This difference between the treaty-based and national limitation regimes is also denoted expressly by equivalent changes made to the headings of MC (1983) §§ 175 and 178 and in the new headings to §§ 175a, 178a and 179.

The redraft of MC Chapter 9 itself, however, specifically regulates only the matters characteristic of each of two new limitation regimes, such as the limitable claims (MC §§ 172 and 172a), the limits of liability and aggregation of claims (MC §§ 175 and 175a), and the bar-to-other-action effect of a limitation fund (MC §§ 178 and 178a). The approach of the redraft is that, in addition, the numerous other provisions already contained in MC Chapters 9 and 12 – actually based on provisions in the 1976/1996 conventions – would serve as *rules common for each of the two new regimes.* **(23)** Consequently, the preparatory works relating to the legislation implementing the 1976 Convention – and its predecessor the 1957 Convention (*supra* at note 14), still provides guidance to the interpretation of the actual wording of particular provisions of the legislation presently in force.

This approach was a pragmatic and convenient solution, taken in order generally to meet the need for adequate regulation, even of the matters relating to the new national limitation regime not already addressed by specific provisions. This applies to MC §§ 171 and 182 defining the general scope of application of both limitation regimes, MC §§ 173 and 174 on exceptions to limitation, MC §§ 176, 177 and 180 on implementation of the limitation of claims, MC § 181 on warships, and MC §§ 182a to 182c

on obligatory insurance of claims subject to limitation. However, the provisions of the Maritime Code Chapters 9 and 12 designed to serve as "common" for the treaty-based and the national limitation regime, are "common provisions" only in the sense that they actually constitute *a part of each of the two limitation regimes as a whole,* supplementing the particular provisions specific to each of the regimes mentioned above.

2.3.3 Two different limitation funds

A particularly important consequence of this drafting approach is that *the existing limitation fund system* for enforcing the actual limitation of particular claims, defined primarily by the provisions in MC §§ 176, 177 and §§ 231 to 245, will continue to apply as *a system common for both limitation regimes.* **(24)** This explains why the definition of "global fund" includes both type of limitation funds. The apparent implication is that the rules on the establishment, administration and distribution of the limitation fund are equally applicable, both to limitation funds established according to MC § 175 to ensure limitation of claims listed in MC § 172, and to limitation funds established according to MC § 175a to ensure limitation of claims listed in MC § 172a. As a matter of law, however, it is nevertheless necessary – when applying the "common" provisions – to distinguish between the two types of limitation funds:

- Each of the limitation funds is legally a separate fund to be established at a Norwegian court according to MC § 177, paragraph 1, in order to cover solely either the claims listed in § 172, or the claim listed in § 172a, as determined specifically by a decision of the court according to MC § 234,
- a limitation fund established according to § 175 may be used only to make payments of claims subject to the limit contained in § 175, and a § 175a fund may only be used to make payments of claims subject to the limit contained in § 175a, cf. MC § 177, paragraph 2.

- the amount of each of the limitation funds – although both calculated according to MC § 232 – will be quite different, because §§ 175 and 175a both referred to in § 232, provide different limits of liability,
- the claims against each of the funds are exclusively determined either by § 172 or by §§ 172a and 179,
- any limitation fund is established for the benefit of all persons entitled to invoke the same limitation of liability, cf. MC § 177, paragraph 2,
- the scope and effect of a subsequent limitation action against all claimants according to the rules in §§ 177, paragraph 3 and 240, as applied to each of the two funds, will be different,
- the effect of each of the funds as a bar to other actions by claimants relating to claims subject to limitation is different, cf. §§ 178 and 178a,
- the effect of procedural rules such as §§ 235, 237, 238 and 241 as applied to each of the funds, will vary with the particular claimants in each fund,
- the effect of § 244 for the distribution of each of the funds among the established claims will depend on the effect of the particular rules in §§ 176 and 177 as applied to each of the funds.

The key rules on limitation funds contained in MC §§ 176, 177 and 231 to 245 are based on the internationally uniform principles for limitation funds set out in the 1976/1996 Convention Articles 11 to 13. The provisions of MC §§ 177 and 232-234 implement the main rules on the constitution of the fund (Article 11), while the main rule on distribution of the established fund (Article 12), and on the effect as bar to other actions (Article 13) are implemented by MC § 176, cf. § 244, and § 178. It follows from Article 14 of the Convention that – *subject to Articles 11-13* – a state party may only provide by national law *supplementary* rules on such matters. Article 14 is the basis for the provisions in MC Chapter 12 other than those implementing Articles 11 and 12 of the Convention, but not – as held in HR-2018–1260-A (*Full City*) para. 56-57 – a basis

for providing or interpreting national rules amounting to a derogation of any provision in Articles 11 to 13 of the Convention.

As a matter of international treaty law, Articles 11-14 of the Convention are subject to treaty conform interpretation. Consequently, the provisions of Articles 11 and 12, as implemented in the MC §§ 176, 177, 232, 234, 240 and 244, should be interpreted and applied consistent therewith, in matters related to the treaty-based limitation regime (*supra* 2.2.1). While the Convention does not apply to the national limitation regime, the provisions of the Maritime Code on limitation fund – and other provisions "common" for the two limitation regimes (*supra* 2.3.2) – are nonetheless also applicable as national law to limitations funds established as part of the national limitation regime. This is relevant for MC §§ 176 and 177 and the entire MC Chapter 12. Consequently, in the absence of specific rules, the interpretation of these provisions as applied to the treaty-based and the national limitation regime should generally be the same (*infra* at notes 38-39). This is also the approach applied in HR-2018–1260-A (*Full City*), however, with the surprising and regrettable result of an interpretation freely detached from the ordinary reading of the wording of the equivalent provisions contained in both the Convention and the Maritime Code (see my Comments in ND 2017 pp. xxxv-xlviii). Quite another matter – as pointed out above – is that the effect of a particular provision as applied to either of the two limitation regimes may be different.

2.4 Common provisions on the scope of the two limitation regimes

General provisions on the scope of the two new limitation regimes, modelled on the 1996 Convention Article 1, are set out in MC § 171. As mentioned *supra* 2.3.2, these provisions are part of the redrafted MC Chapter 9 designed to serve as rules common for the two regimes.

2.4.1 Persons entitled to limitation

In general, shipowners and salvors, as defined in MC § 171 (Article 1, paragraph (1) to (3) of the Convention), may invoke each or both of the new limitation regimes in order to "*limit their liability*" for the maritime claims brought by legal actions or arrest of a ship before a Norwegian court (MC § 182). Consistent with Article 1, paragraph 2 of the Convention, MC § 171 provides that the term *shipowner* – as the person entitled to limitation of liability – means "the owner, charterer, manager and operator" of the ship. The liability of the owner also includes the liability in an action brought against the ship itself.

The problem with this definition is that the owner of a ship is not generally liable for any damage occurring in connection with the operation of the ship. The general rule set out in MC § 151 is that the person liable for such damage, is the "reder" – *the actual operator of the ship.* Generally, MC § 151 does not apply to a shipowner not being also the actual operator of the ship, but § 151 is without prejudice to special rules imposing personal liability for particular types of claims on the owner of the ship. This difference between the personal liability of the shipowner and the actual operator of the ship may be important because, at present, the shipowner is quite often not the actual operator of the ship. In the context of the limitation regimes, however, this is rather insignificant.

While in MC § 171 "rederen" – the actual operator – appears as the person primarily entitled to limitation of liability, this provision also lists the shipowner as such as being entitled to limitation of any personal liability for maritime claims. This means that MC § 171, by including the "charterer" of the ship, also caters for problems arising for ships on bare boat charter parties. Ordinarily, the bare boat charterer assumes a general responsibility for providing a crew, as well as the technical and commercial operation of the ship, and, consequently, assumes the role as the actual operator – the "reder" or "chartered owner" – of the ship. **(25)**

Other types of charterers of the ship, e.g. time charterers, rarely assume such wide responsibilities as a bare boat charterer. Even if MC § 171 also includes the "charterer", the extent to which a charterer, not

being the actual operator, is nonetheless entitled to limitation, is a much debated question. **(26)**. In any event, a "manager" of the ship is not entitled to limitation unless he, by the management agreement, assumes tasks equivalent to those of an actual operator of the ship. **(27)** Accordingly, the terms "charterer" and "manager" in MC § 171 are likely to be subject to rather restrictive interpretation in the context of the limitation regimes.

2.4.2 Salvage operations

According to Article 1, paragraph (1) "salvors, as hereinafter defined, may *limit their liability in accordance with the rules of this Convention for claims set out in Article 2*", viz. any liability for limitable claims. The term "salvor", as defined in Article 1, paragraph (3), means "any person rendering services in direct connection with salvage operations", including removal and clean-up "operations referred to in Article 2, paragraph 1 (d), (e) and (f)". Although providers of salvage services to a ship in distress may also be entitled to limitation of liability for limitable claims in respect of damage caused during salvage operations, different limits of liability apply to "salvors" operating from their own ship, compared to other providers of salvage services, cf. the Convention Article 9, paragraph 1. These provisions are likely to cause difficulties.

A "salvor" operating from his own ship is, according to the Convention Article 2, paragraph 1, entitled to limit his liability for claims in respect of damage arising in direct connection with the salvage services rendered. **(28)** Thus, any liability in tort incurred by the provider of salvage services for claims in respect of damage actually caused to a third party in direct connection with the salvage operation carried out, is covered by the express provision in Article 2, paragraphs 1 (a) and (c) and MC § 172, paragraphs 1 (a) and (c). Quite another matter is whether the operator of the ship receiving the salvage services rendered may also be liable and entitled to limit such liability for the damage caused during salvage operations, cf. the Convention Article 9, paragraphs 1 (a) and (b). This presupposes that there is a basis for also holding the owner

or operator of this ship liable for such claims. If not, only the rules on limitation and limits applicable to "salvors" will apply.

Ordinarily, a salvor or provider of salvage service acquires a right to salvage reward or other remuneration for the salvage services rendered according to a request by the owner or operator of the ship. The prevailing view is that such claims against the owner or operator of a ship in distress have a contractual or quasi-contractual basis. Accordingly the exemptions from limitation in the Convention Article 3, paragraph 1 and Article 2, paragraph 2, second sentence include all claims in respect of salvage operations or services. Thus, MC § 173, paragraph 1 expressly provides that this includes both salvage awards and remunerations according to the contract for services rendered in direct connection with salvage operations. **(29)**

Consistent with this provision, according to the Convention Article 2, paragraph 1 (f) the owner or operator of the ship may not limit the liability for claims in respect of the cost of loss-prevention measures purporting to limit the extent of liability for other claims against the owner or operator, unless the claim is actually brought by a third party. However, a salvor and other service provider is not such a third party when he carries out work for or on behalf of the shipowner or operator having requested or been contracted for the services rendered. **(30)** At present, however, MC § 172 paragraph 1 (4) is relevant only for treaty-based limitation, cf. MC §§ 172a, paragraph 3 and 179 (*infra* note 33).

2.4.3 1996 Convention and salvage operations

The provisions on salvors and salvage operations in the 1976 Convention Article 1, paragraphs (1) and (3) were implemented by MC (1983) § 171. The 1996 Convention Article 1 contains the same provisions. Nevertheless, MC § 171 needed redrafting when the Convention was ratified with the reservation allowed for by its Article 18, because the Convention Article 1, paragraph (3) contains a specific reference to Article 2, paragraphs 1 (d), (e) and (f). The Article 18 reservation, excluding the claims in Article 2, paragraphs 1 (d) and (e) from the treaty-based limitation

regime, meant that these claims became subject to the new national limitation regime. This change clearly had an impact on the definitions of "salvors" and "salvage operation" in Article 1 and MC § 171. In addition, this exclusion also meant that Article 2, paragraph 1 (f) would no longer apply to the cost of the typical loss-prevention operation referred to in Article 2, paragraphs 1 (d) and (e). **(31)** Accordingly, when implementing the 1996 Convention in 2005, the drafting of both MC (1983) §§ 171 and 172, paragraph 1 (f) had to be reconsidered.

The result thereof was that the provision in Article 2, paragraph (f) should apply only in connection with claims subject to treaty-based limitation according to MC § 172. This is now expressly stated in MC § 172, paragraph 1 (4). In the context of the national limitation regime, however, an equivalent rule covering the cost of loss-prevention measures, such as that set out in Article 2, paragraph 1 (d) and (e), only where carried out by third parties, **(32)** was likely to discourage shipowners from carrying out their own loss-prevention measures. For a shipowner, the own cost of such measures constitutes merely a part of the claims in respect of the removal and cleanup operations for which the shipowner is liable subject to a limit substantially higher than in the treaty-based regime, cf. MC § 175a. **(33)** Consequently, MC § 172a, paragraph (3) now covers all loss-prevention cost in respect of claims covered by MC § 172a, whether incurred by third parties or by the shipowner, cf. MC § 179.

The new provisions in MC §§ 172, paragraph 1 (4) and 172a, paragraph (3), however, required a redraft of MC (1983) § 171, defining the right to limitation of "salvors" and persons rendering "services in direct connection with salvage operations". In order to avoid any restriction of MC § 171, the reference in MC (1983) § 171 to § 172 paragraphs 1 (d), (e) and (f) was consequently replaced in MC (2005) § 171, paragraph 1, second sentence, by express reference both to MC § 172, paragraph 1 (4) and to MC § 172a paragraph 3. **(34)** This entailed a similar amendment to MC § 173, paragraph 1.

3 Two separate limitation regimes

3.1 The two groups of limitable claims

Article 1 of the 1996-Convention provides that "shipowners", as defined therein, may limit "their personal liability" for all types of claims listed in Article 2, paragraph 1. According to the Maritime Code §- 172 however, the treaty-based limitation regime of the Convention only applies to the group of claims listed in Article 2, paragraph 1 (a)-(c) and (f), while MC § 172a and the national limitation regime governs limitation in respect of the claims listed in Article 2, paragraphs 1 (d) and (e) excluded from the Convention. This is explained *supra* 2.2 and 2.3, also pointing out that the difference between the two limitation regimes is clearly and specifically denoted by different rules determining the limit of liability, the aggregation of claims, and the effect of the limitation fund as a bar to other action (*supra* 2.3.2).

The criteria applied by Article 2, paragraph 1 to distinguish between the various types of claims subject to limitation addresses two different aspects. Generally, MC §§ 172 and 172a applies the same criteria when distinguishing between the two limitation regimes. One of the criteria relates to *the types of damage* being the basis for the claim(s). The other defines the actual *causal connections* required between the particular damage or claim(s) and the particular ship, determining the limit of liability applicable according to either MC § 175 or MC § 175a. Thus, these links between the damage/claim(s) and the ship are significant when it comes to the actual limitation of the personal liability of its owner or actual operator.

MC § 172, paragraph 1 on treaty-based limitation only covers claims in respect of damage to property and certain other types of damage *if occurring on board or in direct connection [with the operation] of the ship* **(35)** *or with salvage operations* as defined in § 171 paragraph 1 to include loss-prevention measures relating to such claims (*supra* 2.4.3). Claims in respect of such damage are subject to the limits of liability contained in

MC § 175, paragraph 3, calculated on the tonnage of the ship having the required causal connection to the relevant damage/claim.

On the other hand, MC § 172a only covers claims in respect of the raising, removal, destruction or rendering harmless of a particular ship, including anything that is or has been on board this ship, *provided in addition that the ship is sunk, wrecked, stranded or abandoned*. **(36)** Thus, MC § 172a generally covers all claims in respect of removal and clean-up operations after a casualty to a ship with the result that the ship is sunk, wrecked, stranded or abandoned. These claims are subject to the limit of liability set out in MC § 175a, calculated on the tonnage of the ship so sunk, wrecked, stranded or abandoned, to determine the personal liability of its owner or actual operator. **(37)**

According to the Maritime Code, the actual *extent of limitation of the personal liability* of the owner or the actual operator of the relevant ship is consequently clearly different for the two groups of limitable claims. Each of the two new limitation regimes is applicable and may be invoked only for limitation of any personal liability for the particular claim(s) *actually falling within the particular group of exhaustively listed limitable claims* as set out either in MC § 172 or in MC § 172a, thereby also defining the scope of each limitation regime (*supra* 2.3.3)

This is particularly important for claims listed in MC § 172, which implements the Convention Article 2, paragraphs 1 (a)-(c) and (f). These provisions are subject to treaty-conform interpretation in compliance with the Norwegian treaty obligations towards other state parties to the 1996 Convention (*supra* 2.2.2) Consequently, MC § 172 implementing these provisions is subject to interpretation consistent therewith (*supra* note 1). The scope of the new national limitation regime, on the other hand, is entirely a matter determined by national law within and subject to the limits set by the Article-18 reservation (*supra* 2.2.1). Accordingly, MC § 172a, even if modelled on the Convention Article 2, paragraphs 1 (d) and (e), is generally subject to ordinary national interpretation, **(38)** provided, however, that the scope of § 172a is not thereby extended so as to include any claim subject to treaty-based limitation according to MC § 172 (ND 2007 p. 110 NSC and ND 2007 p. 370 NSC). **(39)**

This means that *the two new limitations regimes are mutually exclusive*. This is important if the claims arising out of the same maritime incident are different in kind and, accordingly, are subject to different liability regimes and limits of liability. **(40)** Furthermore, there is no legal link between the limits of liability of the two limitation regimes, cf. MC § 175 paragraphs (3) and (4) and § 175a, providing different limits and rules for aggregation of claims. In addition, this is also specifically stated in MC § 177, paragraph 2, implementing Article 11, paragraph 1, 3rd sentence, and paragraph 3 (*supra* 2.3.3). Accordingly, no cumulative or "spill over" rule applies between the two different limits if the total loss of a claimant in a particular case consists of claims subject to limitation according to both limitation regimes. Moreover, in a specific case involving more than one ship, questions relating to the required causal connection between the claim(s) and each of the ships, as discussed above, consequently determine the extent to which the owner or operator of each ship may be personal liable and also entitled to invoke limitation of liability for particular claims asserted (*infra* 3.4.6).

3.2 Limitation and the basis of liability

MC §§ 172 and 172a only defines and delimits the groups of claims which are subject to limitation according to each of the two limitation regimes. These provisions are subject to the general rule that "shipowners", as defined in MC § 171 (Article 1, paragraph (1) to (3) of the Convention), are entitled to "*limit their liability*" for maritime claims (*supra* 2.4.1). However, neither MC §§ 172 or 172a, nor the legal framework of the two limitation regimes, determines whether one or more of the persons entitled to invoke limitation, actually has personal liability for the particular limitable claims asserted. In general, the answers to such questions depend on the applicable rules of the law of damages. Both MC §§ 172 and 172a provide – consistent with the Convention Article 2 paragraph 1 – that the types of claims listed are subject to limitation, *whatever the basis of liability may be*. Even if invoking limitation does not mean admission of liability (Article 1, paragraph 7 of the Conven-

tion), there is a remaining problem that the actual basis of liability may differ both with the particular claim(s) asserted and with the person actually invoking limitation.

The "basis" for personal liability of the owner and/or the operator of a ship, however, may be different and vary with the particular claim(s) subject to limitation. The actual operator of the ship is generally liable according to MC § 151 for damage linked to the operation of the ship, while the removal and cleanup operations after a casualty to the ship is generally a strict liability imposed on the owner of the ship (*infra* 3.4.3). Hence, by determining whether or not the owner or the actual operator may be held personally liable for the particular claim asserted, the actual "basis of liability" may also be of consequence for the scope of application of either of the treaty-based or the national limitation regimes, as defined in MC §§ 172 and 172a. Thus, a shipowner, being not also the operator of the ship, may not be held liable according to MC § 151 for a claim covered by MC § 172, while an operator not being the shipowner, may not be liable for claims listed in MC § 172a (*infra* 3.4.3)**.** If, in a particular case, the same person may be held personally liable both for § 172-claim(s) and for § 172a-claim(s), in the context of limitation it is nevertheless necessary to keep the two groups of claim(s) separate, because one group is subject to the limit in MC § 175, paragraph (3) and the other subject to the limit in MC § 175a. Additional questions relating to the basis of liability for particular claims are likely to arise if a casualty involves more than one ship (*infra* 3.4.6).

Accordingly, a maritime claim listed in MC § 172 or MC § 172a is not subject to limitation unless – according to applicable rules relating to the basis of liability – the shipowner or the operator of the ship actually invoking limitation is or may ultimately be held personally liable for the claim(s) asserted. In general, however, limitation of liability for claims covered either by MC § 172 or by MC § 172a may be invoked by the shipowner or the actual operator, if alleged by legal action to be liable for any limitable claim(s), cf. the rules on aggregation of claims in MC § 175, paragraph (4) and § 175a, second paragraph. The direct link between personal liability and the right to limitation is particularly apparent in

Article 1, paragraph 1 of the Convention and in MC § 171 first paragraph. This also explains why § 171 first paragraph expressly refers to both of the two different rules relating to liability for claims in respect of the cost of loss-prevention measures now set out in § 172 first paragraph (4) and in § 172a, first paragraph (3) supplemented by § 179 (*supra* 2.4.3 at note 34).

3.3 Claims subject to treaty based limitation

The purpose of MC § 172 is to implement the Convention Article 2, paragraph 1 (a)-(c) and (f) and to enumerate exhaustively the types of claims subject to limitation, according to the limitation regime of the 1996 Convention (*supra* 3.1). No doubt, the most important of these types of claims is claims in respect of *damage to property* as defined in Article 2, paragraph 1 (a):

> "Claims in respect of … loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection [with the operation] of the ship or with salvage operations, and consequential loss resulting therefrom" (*supra* note 35).

In addition, Article 2, paragraphs 1 (c) and (f) cover claims for loss resulting from infringement of non-contractual rights occurring in direct connection with the operation of the ship or salvage operation, and claims for measures taken by third parties in order to avert or minimize claims subject to treaty-based limitation (*supra* 2.4.3 at note 34).

By using the generic term "property damage", however, MC § 172, paragraph 1 (1) is an abbreviated and more concise version of the enumerating provisions in Article 2, paragraph 1 (a) of the Convention. This simplified version already appeared in MC (1983) § 172, drafted to implement the equivalent and detailed provision in the original 1976 Convention, and this text remains unchanged in MC (2005) § 172, implementing the treaty-based regime of the 1996 Convention. **(41)** The only change then made in MC (1983) § 172, paragraph 1 was the deletion of paragraphs 1 (4) and (5), relating to the claims of the Convention Article 2, paragraphs 1

(d) and (e), subsequently to be inserted in the new MC § 172a (*supra* 2.3.1). Consequently, the claims listed in the Convention Article 2, paragraphs 1 (a)-(c) and (f), are binding as a matter of public international law and are subject to treaty-conform interpretation according to the Vienna Convention (1969) Article 31. This means that, generally, MC § 172, as an implementation of these provisions, is subject to an interpretation consistent with the Norwegian treaty obligations towards other state parties to the 1996 Convention (*supra* 3.1).

First, when drafting MC (1983) § 172, paragraph 1, the Ministry deleted as superfluous the particular references to damage to harbour works, basins, waterways and aids to navigation. The prevailing view was that such damage is simply examples of "damage to property" and, consequently, thereby already covered by this term in § 172.

Second, the Ministry felt that there was no need to provide specifically in MC § 172 that, in the context of limitation of liability, claims in respect of damage to property also included liability for "consequential loss resulting therefrom". It is common ground – and still consistent with the law of damages – that "claims in respect of" all the types of property damage listed in MC § 172 also includes liability for consequential losses of damage to property. **(42)** Consequently, the collision liability of a ship according to MC § 161 includes not merely the actual collision damage to the other ship, but in addition also the other economic losses and additional costs suffered by its owner or operator as a result of the collision damage inflicted on his ship. One item of consequential loss is the cost of removal and clean-up operation subsequently carried out by the owner or operator of the damaged ship, in order to avoid, limit or remedy the pollution damage attributable to the ship, including remuneration to providers of salvage services requested by the ship (*supra* 2.4.2 at note 29). Consequently, the total of the damages claimed by the owner/operator of the ship damaged by the collision is subject to treaty-based limitation according to MC §§ 172 and 175. **(43)**

According to the comments in the Government Bill, the provision in MC § 172 on "consequential loss resulting therefrom" is subject to treaty-conform interpretation. Consequently, MC § 172 may not be

interpreted so as to extend further to independent claims for *the cost of removal and cleanup operations as such*, not asserted by the claimant as a part of the entire claim and liability for property damage. The cause of action and the subject of such independent claim is different from a claim for such cost asserted as a consequential loss of "property damage", such as damage to a ship caused by collision (*infra* 3.4.6). Consequently, a claim merely for cost of removal and cleanup operations is only subject to limitation according to the national limitation regime, cf. MC § 172a, 175a and 179. **(44)** In the context of limitation, the scope of MC § 172 and of § 172a are reciprocally exclusive (*supra* 3.1).

3.4 Claims subject to the national limitation regime

3.4.1 The general and the statutory basis for liability

The national limitation regime determines the right of owners and operators of a ship to limit their liability for claims in respect of wreck removal and related cleanup operations subsequent to a maritime casualty to the ship, cf. MC §§ 172a, 175a and 179. Ordinarily, such claims cover the own cost or other loss incurred by public authorities or other third parties after the casualty, from operations intended to prevent or limit pollution or other damage to coastal areas, including ports and navigable waterways. In general, this is third parties having no direct interest attached to the ship or other property actually damaged by the casualty, and the cost or loss so incurred is merely indirect consequences of the property damage caused by the marine casualty. Consequently, in such cases, the basis for any third party claim for damages is not any property damage inflicted, but rather that the casualty to the ship or other property *indirectly* also has detrimental economic effects for such third party. Hence, the legal character of particular claims for cost and other loss of third parties is in principle different from that of claims in respect of the property damage as such, generally enforceable by the actual owner of the property damaged. The liability of the owner and operator of the

ship for such claims in respect of property damage is subject to the treaty-based limitation regime (*supra* 3.3).

According to general principles of the law on damages, a third party without any direct property interest in the property damaged, has in general no right to claim damages for property damage or indirect consequences thereof directly from the person actually liable for property damage caused. This also applies to damage linked to the operation of ships. Exceptionally, the law on damages may nevertheless provide legal protection of such indirect third-party interests, but only if considered as warranted because the actual interest invoked has a particularly close or attached link to the property damaged. Available case law on property damage, however, reflects an obvious and definite reluctance to accept any claims by third parties not having suffered any direct property damage. **(45)**

In general, consequently, the law of torts as such provides no legal basis for claims by a public authority or other third party for the recovery of the cost incurred by own removal and cleanup operations in a direct action against the owner or operator of the ship subject to the marine casualty. However, the comprehensive regulatory regimes contained in the Pollution Act of March 13, 1981 No. 6 (*PA*) and the Ports and Navigable Waters Act of June 21, 2019 No. 70 (*PNWA*) now provide a *statutory and strict liability basis* for such third-party claims against the owner or operator of the particular ship subjected to the removal and related cleanup operations. In addition, the combined effect of the Article-18 reservation to the 1996 Convention and the new national limitation regime is actually that these statutory liabilities now are subject only to nationally determined limits of liability, cf. MC §§ 172a and § 175a (*supra* 1.4 and 2.3.1). The actual limit of liability contained in § 175a, calculated on the tonnage of the ship hit by the casualty (MC § 232), increases quite substantially with the size of the ship involved (*supra* 2.3.3).

According to these Acts, the owner/operator of the ship hit by a casualty consequently has a strict statutory but limited liability for the cost of the subsequent removal and related operations carried out by public authorities. The owner or operator of the ship, however, may recover the

resulting cost provided the ship is sunk, wrecked, stranded or otherwise damaged and the cause thereof is due to conduct attributable to another ship. Any liability for the property damage thus caused by this ship may also include the cost payable to the public authority (*infra* 3.4.6).

3.4.2 The statutory remedies

The *Pollution Act* contains a legal framework generally setting out both wide regulatory powers designed to avoid and contain pollution damage detrimental to the coastal environment, and also provisions on strict liability for the recovery by public authorities and other third parties of the cost incurred by operations purporting to combat such pollution damage. This Act applies also to pollution damage resulting from casualties to ships and, in addition, provides important supplements to the liability systems for oil pollution damage from ships set out in MC Chapter 10, Part I and II (*supra* 1.3). Moreover, the *Ports and Navigable Waters Act* provides an almost equivalent regulatory and liability system for the removal and related operations in respect of ships likely to represent risks or effects detrimental to the sea traffic or safe use of ports or navigable waters.

In cases of casualties to ships, the point of departure for the provisions in PA §§ 7, 28 and 37 is that the shipowner or actual operator has a statutory duty generally to avoid, prevent and limit pollution damage attributable to his ship, by adopting the measures required to achieve this (*infra* 3.4.3). These duties include the removal of the ship or other waste, as well as the cleanup measures at the place of the casualty. Likewise, according to PNWA § 17, the rule is that the owner, operator or other user of a ship shall not leave his ship in a position likely to cause risks or detriments to ports or navigable waters, and has, in any event, a duty to ensure that such risks or detriments be removed. The provisions of these Acts also presuppose that, in any event, it is for the owner or operator of the ship concerned to cover all own cost incurred by the preventive measures carried out. However, MC § 179 allows proportionate recovery of such cost as a claim within the limit of liability for the ship concerned, cf. MC §§ 172a and 175a.

In cases of non-compliance with these statutory duties, public authorities may order the owner or operator responsible for the ship to carry out the preventive and remedial activities required to combat and limit pollution damage (PA §§ 7, paragraph 4, 28, 37 and 74). Likewise, the owner or operator of the ship may be ordered to remove risks and any detriment to ports or navigable waters (PNWA § 17, paragraphs 2 and 4). It is for the owner or actual operator of the ship so ordered to cover the cost incurred when carrying out the removal and cleanup operations proved to be necessary; subject, however, to proportionate recovery within the limit of liability for the ship concerned, cf. MC §§ 175a and 179. **(46)**

Alternatively, however, the public authority may decide that it shall be the task of the authority itself to carry out of the operations ordered (PA § 74 and PNWA § 18), employing as needed professional suppliers of salvage services to participate in its operations. In urgent cases, the authority may so decide even before issuing any order to the ship or its owner or operator. **(47)** In any event, the owner or operator of the ship has strict liability for the cost and loss so incurred by the public authority, including any remuneration payable to the suppliers of salvage services employed to carry out the operations (PA § 76 and PNWA §§ 17, paragraph 4 and 18, paragraph 4). However, the liability for such claims by the public authority is subject to limitation according to MC §§ 172a and 175a, cf. § 179 (*supra* 2.4.3).

3.4.3 The subjects of the statutory remedies

The provisions of PA §§ 7, 37, 74 and 76 as well as PNWA §§ 17 and 18 generally designate "the responsible person" as the subject or addressee of the duties, orders and claims based on these provisions. In a maritime context, nevertheless, the proper addressee for orders and claims ordinarily is, for all practical purposes, the shipowner or alternatively the actual operator of the ship involved. PA §§ 37 and 74, cf. § 55, denote that removal of the ship and waist after a casualty is a responsibility of the owner or the operator of the ship. On the whole, PNWA § 17, paragraph 4, and § 18, contain equivalent provisions.

The liability regimes for oil pollution damage contained in MC Chapter 10, Part I and II, however, contain own specific rules, matching with the rules on the duty to contract obligatory insurance for such liabilities (*supra* 1.8). Consequently, the subjects liable for pollution damage caused by bunker oil from ships other than laden crude oil tankers are the owner of the ship, as well as the bare boat charterer or other actual operator "responsible for the key functions related to the operations of the ship" (MC § 183, paragraphs 5 and 10). **(48)** According to MC § 185, paragraph 2, such liability for pollution damage is subject to limitation according to the provisions contained in MC Chapter 9 and is – irrespective of the subject responsible (*supra* 2.4.1) – limited as claims governed by the national limitation regime, cf. MC §§ 172a, 175a and 179. **(49)** On the other hand, claims in respect of oil pollution damage caused by a laden crude oil tanker are enforceable only against the owner of the ship (MC §§ 191 and 193), and these claims are also subject to the special limitation regime defined by MC §§ 194 and 195, cf. MC §§ 173 and 183, paragraph 10.

3.4.4 The scope of regulatory powers

The regulatory powers contained in the Pollution Act and the Act on Ports and Navigable Waters are very wide. According to PA §§ 7, paragraph 4, 28, 37 or 74, the public authorities may order "the person responsible" (*supra* 3.4.3) to implement the measures necessary to prevent pollution likely to cause damage or be detrimental to the coastal environment. PA §§ 28 and 37 generally apply to the removal of ship and other waste likely to impair, damage or otherwise be detrimental to the environment. These provisions are also applicable to ships causing oil pollution damage covered by MC Chapter 10, Part I and II.

Generally, these regulatory powers leave the public authority with a rather large amount of room for administrative discretion when determining if and how to apply these powers in particular cases. Consequently, before issuing an order to "the person responsible", the regulatory authority has to assess whether the consequences of the casualty to the

ship are likely to meet the statutory criteria and, in addition, what would be the appropriate measures for avoiding or containing any such pollution. In cases of a serious casualty to a ship, this is often a difficult task. At the casualty, relevant facts may not be readily available and further developments hardly predictable. Risks and uncertainties are inherent in most decisions on actions needed at the time of the casualty or fairly soon thereafter. The experience recurrently is that the regulatory decision-making often turns into an evolving and time-consuming process, also subject to subsequent adjustments. In spite of continuous dialogues between the regulatory authority and the owner and/or operator of the ship concerned (and their insurers), disputes on facts and law often arise between the parties, particularly when relevant for cost and liabilities, substantially delaying any final settlement.

The remedy available to challenge decisions by the regulatory authority is primarily an administrative complaint, requesting a general review and reconsideration of the decision by a superior administrative authority, usually the relevant government agency or ministry. Subsequently, according to settled principles of administrative law, the legality and validity of any regulatory order may also be subject to judicial review. In general, however, the courts limit their review to legal issues relating to the scope of regulatory power granted by the relevant Act or to the proper application of the rules for administrative procedures. It is common ground that the courts will only quite exceptionally reconsider or intervene in the actual assessments made by the regulatory authority when applying their statutory power. The role of judicial review, as a safeguard, is nevertheless important and not to be underestimated.

In *ND 2017 p. 63 NSC* (“*Server*”), relating to removal of a submersed ship according to PA § 37, cf. § 28, the Supreme Court pointed out that PA §§ 28 and 37 leave it to the regulatory authority itself to assess whether an order for the removal of the ship “may” be issued. The court held that, ordinarily, the discretion actually exercised according to such a “may-rule” as § 37 is not a subject for judicial review. In general, it is not a task for the courts to assume the role of a regulatory authority by exercising

the assessment contemplated by the statutory provision. Nevertheless, the court concluded that the order for the removal of the ship was invalid.

The basis for the regulatory order to remove the wreck of "Server" was only the one of two particular criteria set out in § 37, viz. that the ship after the casualty appeared to be "impairing" the environment. The court, however, held that a submersed ship which was not at all visible at the scene of casualty, did not meet the condition set out in the statutory provision relied upon. Further, it was held as irrelevant whether the removal order might alternatively be warranted if based on the other criteria in PA § 37, covering ships "causing damage or other detriments" to the environment. This part of § 37 cf. § 28, however, required another and somewhat different assessment, not actually made by the authority. Nor could any order be issued according to PA § 7, since this provision only covered "damage or detriment" to the environment resulting from pollution caused. In any event, the judicial review of a regulatory order did not ordinarily extend beyond the proper interpretation and application of the statutory basis actually invoked for the removal order issued. Consequently, the removal order issued, since not warranted by the statutory authority invoked, was set aside as invalid.

In *ND 2017 p. 63 NSC ("Server")* the Supreme Court also has to clarify the relationship between *the regulatory powers granted by PA § 37, cf. § 28 and the national limitation regime,* limiting the liability of the owner and operator for cost or loss resulting from removal of a ship sunk, wrecked, stranded or abandoned, cf. MC §§ 172a, 175a and 179. The shipowner challenged the removal order issued, essentially alleging that the regulatory powers were subject to limitation, and that the removal order was invalid because the shipowner, by complying therewith, would entail cost and liabilities exceeding the statutory limit of liability.

It was common ground that according to PA § 53, paragraph 1, any liability according to the Pollution Act was subject to special provisions on liability contained in other legislation, and that this exception covered the limitation regimes contained in the Maritime Code. Consequently, the liability of the owner or operator of the ship would be subject to limitation if the regulatory authority, according to PA § 74, decided to

carry out the removal operations itself and, subsequently, wanted to recover the resulting own cost or loss incurred by a claim according to PA § 76, against the owner or operator of the ship. In the "Server" case, however, the regulatory authority did not follow this course of action, relying instead on its alternative power according to PA § 37, paragraph 2, by issuing a direct order to the owner/operator of the ship for the removal of the wreck and related cleanup operations. Accordingly, the shipowner asserted that he had no legal duty to comply with this removal order, because his cost in doing so would exceed the statutory limits of liability and amount of the limitation fund established by the shipowner according to the rules in MC Chapter 9 and12 (§ 232).

In *ND 2017 p. 63 NSC* (*"Server"*) paragraphs 120-132, the Supreme Court rejected this objection by the shipowner. The court held that the removal duties of the Pollution Act, having the character of public law, was not subject to the limitation regimes of the Maritime Code. Accordingly, the cost incurred by the shipowner himself when complying with such duties was not subject to limitation. Such claims were not included in the list of claims of § 172a, and had to be covered by the shipowner in addition to claims by third parties resulting from the casualty. **(50)** Moreover, in 2005 these principles also served as the basis for a compromise, with the adoption of both a new and higher limit of liability in § 175a and a new § 179 entitling the shipowner to proportionate recovery of own removal cost from the limitation fund when distributed among the claimants. This means, essentially, that any excess liability of the shipowner resulting from carrying out the removal order issued, is confined to the amount of own cost not recovered from the limitation fund according to § 179. **(51)**

3.4.5 Limitation of statutory liabilities

The most important groups of claims subject to the national limitation regime and MC §§ 172, 175a and 179 are the various statutory claims by public authorities and other third parties for own cost resulting from removal and/or clean-up operations, according to the Pollution Act or the Act on Ports and Navigable Waters (PA §§ 55 and 76, and PNWA

§ 18). **(52)** These provisions define the liability of the owner or operator of the ship hit by the casualty to which the pollution damage to the environment or detriments to navigable waters are attributable (*supra* 3.4.1 and 3.4.2). The provisions of the Pollution Act also apply as supplement to MC Chapter 10, Part I and II, on the liability for oil pollution damage caused.by ships, including the cost removal and cleanup operations needed after the casualty to the ship (MC §§ 172a, 179 and 191, paragraph 2). This is particularly important for the claims for bunker oil pollution in coastal areas.

Subject to specific rules on limitation for laden crude oil tankers (MC §§ 193 to 196), these statutory liabilities of the owner or any actual operator of the ship are subject to the national limitation regime and the limit in MC § 175a (*supra* 3.4.3 at notes 48-49). This limit covers claims in respect of removal and cleanup operations carried out after the casualty by public authorities and other third parties (MC § 172a, paragraph 1) as well as by the responsible shipowner or actual operator of the ship (MC § 179). The limit in MC § 175a, calculated on the tonnage of the ship hit by the casualty, applies to all such claims arising out of the same occurrence against the owner or other actual operator of the ship (MC 175a, paragraph 2, cf. § 175, paragraph 4). Moreover, the limitation fund established by any of these persons has effect for and may be invoked by all the other persons liable for the claims listed in MC § 172a (MC § 177, paragraph 2). As a bar to independent actions by claimants, however, the effect of a limitation fund based on the § 175a-limit established at a Norwegian court according to MC § 232, generally relates only to actions brought in Norway to enforce claims listed in § 172a (MC § 178a), cf. *supra* 2.3.2 and 2.3.3.

The provisions in MC § 172a appear as a Norwegian version of the provisions of the 1996 Convention Article 2, paragraphs 1 (d) and (e). In general, this provides the point of departure for the interpretation of the provisions in § 172a. **(53)** The national limitation regime generally applies to claims in respect of removal and cleanup cost in cases where *the ship concerned is sunk, wrecked, stranded or abandoned*, cf. MC § 172a, but there are also other – less serious – incidents of damage to the ship not

meeting these criteria. **(54)** If, after the casualty, the ship is removed by salvage operations within a reasonable time, the remuneration for salvage services is generally not subject to limitation (MC § 173, paragraph 1). However, there may nevertheless remain a need for cleanup operations after the casualty, and MC § 172a, paragraph 1 (3) also includes claim for cost incurred thereby (*supra* 2.4.3). Claims unrelated to a casualty to the ship referred to in § 172a, e.g. resulting from an event referred to in NPWA§§ 17 and 18, may be subject to limitation as a liability for claims in respect of infringement of a non-contractual right, cf. MC § 172, paragraph 1 (3).

3.4.6 The treaty-based and the national limitation regimes distinguished

When interpreting MC 172a, however, it is also relevant that the paramount purpose of § 172a is to define the scope of the national limitation regime for statutory liabilities for claims by public authorities and third parties based on the Pollution Act and Act on Ports and Navigable Waters. The objective was to provide appropriate limits for such claims, replacing the far too low limit of the 1996 Convention that would otherwise apply. **(55)** However, the new limitation regime and § 172a were not to affect or contain the scope of MC § 172 as defining the claims which have to remain subject to the treaty-based limitation regime consistent with the treaty-law obligations of Norway as a party to the 1996 Convention, subject to the reservation according to its Article 18 (*supra* 1.4 and 2.2). This means that the provisions of MC § 172a may not be subject to any extensive interpretation in order to include also claims which are within the scope of MC § 172, paragraph 1, because this would actually entail an equivalent exception from § 172 inconsistent with a treaty-based interpretation of the Convention Article 2, paragraph 1(1) as implemented by § 172. **(56)**

According to MC § 172, paragraph 1, the shipowner/operator of a ship may generally limit his liability towards third parties for claims in respect of property damage and its consequences occurring in connection

with operations of his ship. If the property damage is caused to another ship, any claim for damages of its owner also includes, in addition to the damage inflicted on his ship, the consequences thereof such as the resulting own cost for subsequent removal and cleanup operations relating to this ship (*supra* 3.3 at notes 42 to 44). The own cost of the owner/operator of the damaged ship also includes any liability for the cost of public authorities and other third parties according to the Pollution Act § 76 or MC § 183 for bunker oil pollution (*supra* 3.4.3). Quite another matter is that, in any event, such liability, *incurred by the public authorities* having carried out such removal operations (PA §§ 74 or 76), is subject to limitation according to MC § 172a and the national limitation regime. However, this does not provide any basis for any restrictive interpretation of MC § 172, paragraph 1 or an extensive interpretation of § 172a, with the result that even the liability of the ship responsible for the casualty and its consequences is subject to MC § 172a and the higher limit in MC 175a. Such an interpretation would deprive the ship responsible for the casualty of the right to treaty-based limitation according to §§ 172 and 175 of any liability for property damage and the consequences thereof (*supra* 3.1 at notes 38-40). In addition, the question of limitation relates to two different claims and different liabilities. One claim is a claim by the public authority *against the owner/operator of the damaged ship* for the recovery of the cost of removal and cleanup operations. Such liability is subject to the national limitation regime. The other is a claim by the owner/operator of the damaged ship *against the owner/operator of the ship responsible for the casualty,* for recovery of damages for the property damage inflicted and consequential loss thereof. Such liability is subject to the treaty-based limitation regime. If the ship sunk, wrecked, stranded or abandoned is solely responsible for the casualty, the question of limitation of liability consequently only relates to the claim by the public authorities subject to the national limitation regime.

Conversely, difficult problems may arise if the casualty is due to a "both-to blame" collision, initiating removal and cleanup operations at the site of the casualty. *First*, each ship has a statutory strict liability towards the public authority according to PA § 76 for 100% of the cost

of the part of removal operations attributable to each of the ships. The resulting liability for each of the ships is subject to limitation according to MC §§ 172a, 175a and 179, as applied to the tonnage of each ship. *Second,* each of the ships is liable for collision damage caused to the other ship, viz. the property damage inflicted and the consequential loss thereof, determined according to the extent that faults on its part has contributed to the collision. The claim for collision damages by each ship also includes, as consequential loss, its statutory liability for the cost due to the public authority. *Third,* the claim for collision damages of each ship against the other ship is a claim for property damage covered by MC § 172, paragraph 1 (1). However, when applying the treaty-based rules of limitation of liability to such liabilities, these claims are set off against each other (the single liability principle), and only the remaining balance is subject to treaty-based limitation, cf. the Convention Article 5 and MC § 172, paragraph 2. **(57)**

The 1996 Convention Article 2, paragraph 2 states that a "claim set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise." This provision is not implemented in MC § 172 because the right to limitation of liability of the listed claims applies "whatever the basis of liability may be". **(58)** The question may nevertheless arise as to whether the shipowner/operator of the ship hit by the casualty, by covering the claim incurred by the public authority according to the Pollution Act § 76, may by way of subrogation acquire this claim against the ship responsible for the casualty and damage caused thereby. In such a case, however, there is no claim to acquire by way of subrogation.

The claim by the public authority according to PA § 76 is a statutory strict liability imposed only on the owner/operator of the ship subject to the removal and cleanup operations (*supra* 3.4.3). There is no basis for extending this liability to any other ship, since each of several ships involved in the same casualty is liable towards the public authority according to PA § 76 only for the removal and cleanup operation related to that ship. Moreover, the public authority itself, having no direct property interest in the ship actually damaged, does not ordinarily – according to

general principles of the law of damages – have any claim for damages for property damage against another ship, even if this ship is solely responsible for the casualty and the damage caused thereby (*supra* 3.4.1 at note 45). Hence, the cost for removal and cleanup operations due to the public authority according to PA § 76 may only be included as an item of the damages due to the owner of the ship for the damage inflicted on his ship hit by the casualty, subject to limitation according to MC § 172 (*Supra* 3.3 at note 40 and 44).

4 Global Limitation enforced by limitation funds

4.1 The limitation fund model of the limitation regimes

The limitation regimes of the international conventions implemented by the Maritime Code all provide that the shipowner/operator of the ship may enforce limitation of maritime claims by establishing a limitation fund at the court receiving a legal action in respect of limitable claims (*supra* 1.2). The limits of liability provided therein are limits for *the total of all limitable claims* arising out of a particular maritime casualty, viz. the aggregate sum of the particular claims. This limitation model presupposes that the actual limitation of the particular claims be carried out by proportionate distribution of the limitation amount among the aggregated claims. The mechanism to achieve this is the establishment of a limitation fund, as requested by or on behalf of the shipowner/operator, having the legal effect that limitable claims may be enforced only as claims against the limitation fund (*supra* 1.5).

The provisions on limitation funds contained in the Maritime Code chapters 9, 10 and 12 generally appear as rules common for limitation funds established according to each of the different limitation regimes (cf. MC § 177 and 231). In general, these provision are modelled on and in conformity with the requirement and principles for treaty-based lim-

itation funds set out in Articles 11-14 of both the 1976 and the 1976/1996 Conventions, including certain national supplements allowed by Article 14 (MC §§ 176 to 179 and 231 to 245). This legal framework originally addressed only limitation funds related to the treaty-based limitation regime (MC §§ 172, 175 and 178). However, its scope of application is by national law generally extended to include any limitation fund established according to either the particular limitation regime for crude oil pollution (MC §§ 194-195) or the new national limitation regime (MC §§ 172a, 175a 1n 178a) and, cf. MC § 231. It is important, nevertheless, that, as a matter of law, each of the three limitation regimes is legally a separate regime and, consequently, that the application thereto of any one of the common provisions may entail somewhat different legal effects (*supra* 2.3.3).

4.2 The limitation fund procedures

4.2.1 Establishment of limitation funds

Accordingly, the legal framework for limitation funds contained in the Maritime Code is set out in provisions generally applicable as an important part of each of the limitations regimes, even if the specific provisions on limitable claims and limits of liability thereof are different, cf. in particular MC §§ 176-179 and §§ 231-245. These provisions first define:

- when and how the shipowner may request that a limitation fund according to MC §§ 175, 175a or 195 be established,
- the requirements as to the amount of each of the limitation funds (MC §§ 177 and 232-234).

According to the Convention Article 11 and MC § 177, any person alleged to be liable for a claim subject to limitation may request that a limitation fund be established with a court where an action is brought or an arrest of the ship requested. Ordinarily, the shipowner submits his request for establishment of the fund immediately or fairly soon after the casualty, in order to clarify the likely extent of total liability for the casualty and to prevent any of the claimants from initiating independent

actions for claims subject to limitation (MC §§ 178 and 178a). Nevertheless, the establishment of the limitation fund at such an early stage is hardly possible unless the questions related to the establishment of the limitation fund as requested generally are detached from possible disputes related to questions of liability, amounts and other matters when determining the particular claims.

The approach of the Convention Article 11 and MC §§ 232-234 is that, at the establishment of a limitation fund, the court will primarily have to determine the amount of the specific limitation fund to be established. This presupposes a calculation of the amount mainly based on the relevant statutory limit and the tonnage of the ship and on certain other facts readily available at the time of the request by the shipowner. Accordingly, when converting the limit expressed in Special Drawing Rights to national currency, the court applies the rate of exchange at the date of the establishment of the fund (Convention Article 8, paragraph 1, MC § 501). Likewise, the Convention Article 11 and MC § 232 provides a standardized basis and period for the calculation of the particular amount added to the fund as required by the Convention Article 11, paragraph 1, and MC § 232 paragraph 1, expressed in terms of interest for the period from the casualty to the date of the establishment of the fund. The court may at its discretion determine that the shipowner shall provide additional security for costs related to the limitation fund procedure and any subsequent liability for delay-interest not subject to limitation (MC § 234, paragraph 2.

4.2.2 Limitation actions and procedures

After the establishment of the limitation fund, only the shipowner or his insurer or a claimant in the fund may bring a "*limitation action*" against all known and unknown claimants of limitable claims (MC §§ 177, paragraph 3 and 240). The purpose of the limitation action is to have all questions relating to liability for the particular claims, the right to limitation of liability for the claims, and the distribution of the limitation fund, decided ultimately by judgment. Consequently, the limitation action is the initial stage of an – ordinarily – comprehensive and most time-con-

suming limitation fund procedure. The objective is to ensure that all the – known and unknown – claims subject to the same limit of liability arising out of any one casualty, be limited to the extent required, in order that the total liability of the shipowner/actual operator shall not exceed the amount of the limitation fund. This requires statutory provisions on:

- submission of claims against the fund,
- the settlements of or decisions on disputes relating to liabilities and the extent of particular claims required to ascertain the key to proportionate distribution of the amount of the limitation fund among the claimants (MC § 235-243, cf. §§ 176-177),
- the judgment of the court deciding the proportionate distribution of the limitation fund with binding effects for all established claims and relieving the shipowner of any further liability towards known or unknown claimants (MC §§ 244-245), and finally
- payment by the limitation fund of the amount of dividends allocated to each of the established claims.

The model for this comprehensive legal framework of the Maritime Code is the key principles set out in Articles 11 to 13 of the 1996 Convention, but is, without prejudice to the provisions of these Articles, also supplemented as contemplated by Article 14 by certain national procedural rules appropriate to general rules on civil litigation in the particular state party. According to both the 1996 Convention and the Maritime Code, consequently, *the limitation fund ordinarily holds the key role as the vehicle to ensure efficient "global limitation" of the shipowners' liability according to each of the several limitation regimes* (*supra* 1.5).

The "global" limitation model of the limitation regimes would hardly function unless the shipowner/operator in particular cases is able to invoke limitation, by requesting the establishment of a limitation fund as the basis for a coherent and coordinated final settlement of all limitable claims arising out of a particular casualty. The result thereof is a proportionate distribution of the limitation fund (Convention Article 12 and MC § 244), in order that the total liabilities shall not exceed the amount of the

limitation fund. However, the quite time-consuming limitation procedure also means that the shipowner/operator, by requesting a limitation fund, also derives benefits of resulting postponement and delay of payment of compensation to injured parties. Accordingly, additional disputes frequently arise on questions relating to interest on claims and other loss during the period from the casualty to the establishment of the limitation fund and subsequently to the final payment of dividends to claimants (*supra* 1.5.2). **(59)**

4.3 Treaty conform or national interpretation

The legal framework for global limitation based on limitation funds is, in general, apparently not easily accessible, even if the limitation regime of the 1976 and 1976/1996 Convention is clearly structured. **(60)** One reason is that the system of global limitation directly based on a limitation fund is an imported specialty of international maritime law, rather foreign to domestic law. Another reason is that the international conventions applying to this model of limitation of liability only set out the main principles thereof, leaving it to national law or courts to fill the lacunas. In state parties having ratified and implemented these conventions, however, the duty to treaty conform application of the imported provisions is often of consequence for the national supplements to, or the interpretation of, particular provisions of the implementing domestic legislation (*supra* note 1and 2.3.3), cf. the Convention Article 14.

A further reason is that the redrafting of the Maritime Code on the implementation of the 1976 and 1976/1996 Conventions is not entirely clear in all respects (*supra* 2.3.2 and 2.3.3). Thus, the lack of a clear distinction between the application of limitation of liability in separate actions related to particular limitable claims and the regimes for global limitation by means of limitation funds has actually proved to create unfortunate uncertainties and misunderstandings, particularly as to key issues relating to global limitation, cf. HR-2018-1260-A (*Full City*). This decision does not recognize that the paramount task of the 1976 and 1976/1996 Convention is to provide an internationally uniform global

limitation regime based on limitation funds. In My Comments in ND 2017 pp. xxxv-lxv, I have already discussed the various problems arising from the *Full City* decision.

Notes

1. ND 2007 p. 110 SCN an 2007 p. 370 SCN, cf. my Comments in ND 2008 pp. xiv-xvi and ND 2017 pp. xvi-xix, but see HR-2018-1260-A Full City and the discussion thereof in my Comments in ND 2017 pp. xlii-xlv and lxiii-lxv.
2. The texts of the 1996 Convention and the IMO 1996 Protocol are set out in the Government Bill Ot.prp. nr. 90 (1998-99) pp. 50-63 and pp. 42-49.
3. Cf. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 14-15, 23 and 41-43.
4. Cf. Government Bill Ot.prp. nr. 77 (2006-2007) pp. 9 and 11.
5. Cf. Government Bill Ot.prp. nr. 79(2004-2005) pp.15 and 18.
6. Cf. Government Bill Ot.prp. nr. 79(2004-2005) pp. 23-26.
7. Cf. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 14-15, 23 and 41-43. The level of removal and clean-up costs incurred by the State in ND 2017 p. 63 SCN "*Server*" (HR-2017-331-A) in effect led to a nearly 100 % general increase in the original Norwegian limits in MC 175a for claims in respect of pollution and environment damage applicable to ships of more than 2000 tons, cf. Government Bill Ot.prp. nr. 16 (2008-2009) pp. 7-8.
8. Government Bill Ot.prp. nr. 77 (2006-2007) pp. 9 and 11, and Government Bill Ot.prp. nr. 16 (2008-2009) pp. 7-8, entailing – as a consequence of ND 2017 p. 63 NSC "*Server*" (HR-2017-331-A) – a nearly 100 % general increase of the original limits in MC 175a for ships of more than 2000 tons, cf. *supra* note 7.
9. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 15, 17, 19, 23 and 41-43.
10. See my Comments in ND 2017 pp. xxxv-lxv, addressing particularly the problems resulting from the interpretation of the provisions on the establishment and distribution of limitation funds in HR-2018-1260-A (Full City).
11. *Selvig*, Limitation of shipowners' liability and forum shopping in EU/EEA states Simply 2010 pp. 359, at pp. 371-73, cf. my Comments in ND 2008 pp. xxi- xxv.
12. See my Comments in ND 2017 pp. lxviii-lxxxvi to the numerous decisions involved in these proceedings. Subsequently, *LA- 2020-99757* (*Gard III*) decided certain jurisdiction issues left open by HR-2020-1328-A, but the Supreme Court bluntly denied the application for yet another hearing relating to the Gard-case. The message was clear and. eventually, all the Gard cases ended with a multilateral settlement between the owners of the colliding ship and the groups of insurers involved.
13. Government Bill Ot.prp. nr.13 (1963–1964), jf. *Selvig*, Rederansvaret, part I and II, in MarIus no. 25 (1977) and MarIus no. 35 (1978), and Government Bill Ot.prp. nr. 32 (1982-83).
14. Government Bill Ot.prp. nr. 32 (1982–1983) and NOU 1980:55, cf. Ot.prp. nr. 13 (1963–1964), subsequently included in chapters 9 and 12 in a new Maritime Code of 24. June 1994 no. 39.

15. The 1996 IMO Protocol and the 1976 Convention as amended by the 1996 Protocol are set out in Annex 2 and 3 in Ot.prp. nr. 90 (1998–1999) s. 42 et seq.
16. Government Bill Ot.prp. nr. 90 (1998–1999) s. 13-19, cf. Government Bill Ot.prp. nr. 79 (2004–2005) pp. 6-8, cf. Rt. 2007 p. 246 (ND 2007 s. 110 NSC) and my Comments in ND 2008 s. xiii-xvi.
17. Government Bill Ot.prp. nr. 79 (2004–2005) p. 18-19 and 23, cf. *infra* 2.3 at notes 19 and 20
18. Government Bill Ot.prp. nr. 79 (2004–2005) p. 11-12, 15, 18-20 and 23.
19. This two-track approach first appeared in the Report of the Maritime Law Committee in NOU 2002:15 s. 36-40, and constituted subsequently – in somewhat simplified form – the basis for the Government Bill Ot.prp. nr. 79 (2004–2005), cf. pp. 23-29 and 41-42.
20. Government Bill Ot.prp. nr. 79 (2004–2005) p. 26-29.
21. Government Bill Ot.prp. nr 79 (2004-2005) p. 41.
22. Government Bill Ot.prp. nr. 79 (2004–2005) p. 41, cf. p. 23.
23. Government Bill Ot.prp. nr. 79 (2004–2005) p. 35-36.
24. Government Bill Ot.prp. nr. 79 (2004–2005) p. 35-36.
25. ND 2012 p. 394 DSC "*Assens Havn*", cf, my Comments I ND 2017 p. lxx-lxxi.
26. *Falkanger & Bull*, Sjørett (edition 8, 2016) p. 170 points out liability for cargo damages is subject to limitation, and that it is debatable whether even other types of charterer liabilities may be limited.
27. ND 2017 p. 63 NSC "*Server*" where it was held that a manager did not have the role of an owner, even if the management agreement provided for outsourcing of important operational tasks.
28. Government Bill Ot.prp. nr. 32 (1982-83) p. 23, stating that this applies only to the claims actually subject to limitation according to Article 2, paragraph 1). As pointed out there, this may also include any liability in tort for damage caused during salvage operations by loss-prevention measures as mentioned in Article 2 paragraphs 1 (d), (e) and (f), cf. *Falkanger & Bull* l.c. p. 170.
29. Government Bill Ot.prp. nr. 32 (1982-83) p. 26. The provision in Article 3, paragraph (a) exempting "claims for salvage" covers not only salvage awards, but also claims for other compensation payable according to contracts for services rendered in direct connection with salvage operations, cf. Article 2, paragraph 2 second sentence.
30. Government Bill Ot.prp. nr. 79 (2004-2005) p. 26-27.
31. Government Bill Ot.prp. nr. 32 (1982-83) p. 25-26 according to which the provision in Article 2, paragraph (f) also applies to claims referred to in Article 2, paragraph 1 (d) and (e).
32. Government Bill Ot.prp. nr. 32 (1982–1983) p. 26-27.
33. Government Bill Ot.prp. nr. 79 (2004-2005) p. 26-29 and 41.
34. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 41 and 44.
35. Article 2, paragraph 1 (a) does not include the words "with the operation" of the ship, but it is obvious – when compared to Article 2, paragraph 1 (c) – that this is due to an editorial error, disregarded in MC § 172, paragraph 1 (1).
36. Government Bill Ot.prp. nr. 79 (2004-2005) p. 41-42.
37. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 18-19 and 23-26.

38. Government Bill Ot.prp. nr. 79 (2004-2005) p. 41, pointing out that the interpretation of Article 2 paragraphs 1 (d) and (e) also serves as a "point of departure" when interpreting MC § 172a.

39. Government Bill Ot.prp. nr. 79 (2004-2005) p. 23 and 41-42, cf. p. 36-29. *Solvang*, Some reflections concerning the scope of the Maritime Code section 172a, SIMPLY 2016 (MarIus nr. 482) p. 29, at p. 36 and 39-43, apparently, does not take into account this difference in legal character of the treaty-based and the national limitation regimes.

40. Supra 2.3.3. Government Bill Ot.prp. nr. 79 (2004-2005) p. 42 illustrates this through the discussion of a case of owners' claim for loss of income due to oil spill on a quay installation preventing use of the quay. The view expressed there is that § 172 applies if loss of income resulted from an oil spill as a "physical" damage to the quay as such, but that § 172a would apply to a claim for loss due to a cleaning up operation of the oil spill preventing use of the quay.

41. Government Bill Ot.prp. nr. 32 (1982–1983) p. 24-25 and NOU 1980: 55 pp. 15-16, cf. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 41 and 44.

42. Rt. 1996 p. 1472 NSC, at p. 1476, cf. *Hagstrøm & Stenvik,* Erstatningsrett (2015) pp. 381- 82, 428-30 and 491-99.

43. The view expressed in Government Bill Ot.prp. nr. 79 (2004-2005) p. 42 is that MC § 172, paragraph 1 (1) applies to claims in respect of property damage and the economic consequences of the property damage.

44. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 23 and 41-42 and the observations on the "quay" example referred to *supra* note 40. A decision of 16.11.2021 by the Hordaland district court in the case 21-058354TVI-THOD/TBER (*KNM Helge Ingstad*) applies this view when distinguishing between the scope of MC §§ 172 and 172a.

45. *Hagstrøm & Stenvik,* Erstatningsrett (2015) pp. 50-56, 375-82 and 428-30, cf. in particular Supreme Court decisions in Rt. 1955 p. 872, Rt. 1973 p. 1268, Rt. 1996 s. 1473, Rt. 2006 p. 690 and Rt. 2010 p. 24.

46. Government Bill Ot.prp. nr. 79 (2004-2005) p. 27-28, cf. *supra* note 40. See also *Hagstrøm & Stenvik,* Erstatningsrett (2015) pp. 380-82, cf. 377-78.

47. ND 2012 p. 245 NLG, cf. my Comments in ND 2014 pp. lxx-lxxi and *Falkanger & Bull*, Sjørett (8th edition 2016) pp. 211-15.

48. Government Bill Ot.prp. nr. 77 (2006-2007) pp. 12-14, cf. *Falkanger & Bull*, l. c. pp. 199-201. In ND 2017 p. 63 NSC "*Server*" it was held that a manager did not have the role of an owner, even if the management agreement provided for outsourcing of important operational tasks. This is consistent with the observation in Government Bill Ot.prp. nr. 77 (2006-2007) pp. 12-14 that a manager according to the various management agreements regularly used in modern shipping, is ordinarily not a subject of the statutory remedies in PA or PNWA.

49. Government Bill Ot.prp. nr. 77 (2006-2007) section 3.3 and 4.3, cf. *Falkanger & Bull*, l. c. pp. 200-201.

50. The Court's conclusion relied on the opinion expressed in Government Bill Ot.prp. nr. 79 (2004-2005) p. 26-27. This opinion also defines the relationship between the limitation regimes of the Maritime Code and regulatory orders issued according to the Act on Ports and Navigable Waters §§ 17-18, cf. Government Bill Prop. 86 L (2018-2019) section 8.9.4.

51. Government Bill Ot.prp. nr. 79 (2004-2005) p. 27-29, cf. *Falkanger & Bull* l.c. p. 214 and my Comments in ND 2017 pp. xx-xxii, at p. xxiii.

52. The owner/operator also has strict liability for pollution damage caused to other third parties (PA § 55). An order, according to PNWA § 18, paragraph 4, may also provide for the cover of cost caused to users of ports and navigable waters.
53. Government Bill Ot.prp. nr. 79 (2004-2005) p. 41.
54. Government Bill Ot.prp. nr. 79 (2004-2005) p. 41-42, where it is pointed out that a ship may be "sunk, stranded or abandoned" without being a wreck, and also that a ship which can normally be salvaged, cannot be regarded as a wreck.
55. NOU 2002: 15 pp. 15-16, 38-39 and 40, Government Bill Ot.prp. nr. 79 (2004-2005) pp. 26-29 and 43, *Falkanger & Bull*, l.c. p. 214, cf. *supra* 2.3.1 at notes 35 to 40. Moreover, if the claims arise as a consequence of damage to the ship, the public authority or any third party – having no direct interest in the property damaged – may not recover their removal or cleanup costs on the basis of such property damage and its consequences (*supra* 3.4.1 at note 45).
56. This question is discussed in *Solvang*, Some reflections concerning the scope of the Maritime Code section 172a, SIMPLY 2016 (MarIus nr. 482) p. 29, at p. 36 and 39-43.
57. Government Bill Ot.prp. nr. 32 (1982-83) p. 26. Cf. *Falkanger & Bull*, l.c. p. 176.
58. Government Bill Ot.prp. nr. 32 (1982-83) p. 24, cf. *supra* 3.2.
59. See My Comments in ND 2017 pp. xxix-xxxiv and lii-lv.
60. See My Comments in ND 2017 pp. xxiii-xxxv.

Selected topics of causation between nautical fault and initial unseaworthiness under the Hague-Visby Rules – a comparative analysis

Trond Solvang[1]

1 Professor, Scandinavian Institute of Maritime Law, University of Oslo

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1 Introduction

In my article in SIMPLY 2020,[2] we looked at various aspects of the Norwegian Supreme Court case the *Sunna,* asking how the Norwegian court instances decided the case, including their ways of reasoning, while also considering the same topic within an international context, by looking at the origin of the Hague and Hague-Rules (HVR) and a selection of foreign case law.

We now move away from having the *Sunna* case as the main subject of our analyses, and instead use that case as a stepping stone into adjacent areas of law at the core of the Hague-Visby Rules (HVR) system of risk allocation. The common denominator in the sections that follow is the phenomenon of causation relating to our overriding topic: the relationship between nautical fault and initial unseaworthiness. Such questions of causation are potentially complex, and the approach to their resolution may differ between various legal systems. Still, they are at the heart of endeavours to harmonize the law under the HVR, hence it is worth attempting an analysis from a comparative law perspective.

2 Solvang, The relationship between nautical fault and initial unseaworthiness under the Hague-Visby Rules – with critical remarks on the Norwegian Supreme Court's methodology in adjudication, SIMPLY/MarIus No.551, 2021, pp 32 et seq.. That article discussed i.a. the English Court of Appeal decision the *Libra* (ch. 4.5.). Subsequently the U.K. Supreme Court rendered its decision in that case, upholding the result but differing on central aspects of reasoning, [2021] UKSC 51.

2 The question of "transforming" initial seaworthiness obligations into nautical fault

2.1 Policy considerations

The problem to be discussed can be formulated thus: If matters relating to initial seaworthiness can be remedied after the ship's departure from the load port (e.g. while the vessel still sails in sheltered waters) but such subsequent remedial acts fail and lead to cargo damage, should such failure then be categorized as nautical fault (failure in management of the ship) exempting the shipowner from liability – or should it be deemed part of the initial seaworthiness obligation attaching (as it were) retroactively, thus leading to liability for the shipowner?

The following main considerations are here at play:

On the one hand, being too lenient in allowing such subsequent failure to be deemed nautical fault, would have the undesired effect of removing important incentives for the shipowner to ensure that the ship is made seaworthy before departure. To put it to the extreme, a shipowner's thinking could go: "Acts of seaworthiness can wait, since if the crew fails in rectifying them after departure, I as shipowner am exempt from liability".

On the other hand, it would in many instances be impractical to have all matters relating to seaworthiness attended to before or at the very moment of departure. Some leeway is obviously needed, and in many instances it would be considered entirely safe to perform certain tasks subsequently. But the legal question then becomes: if such subsequent tasks nevertheless fail, who should bear the risk? It would not be commercially unjust or in any way illogical to say that the shipowner should bear the risk of such subsequent failure, since such tasks belong to the sphere of making the ship seaworthy before departure, rather than to the sphere of nautical faults occurring during the voyage.

In the following we look at some examples of this type of questioning under Nordic law. Before doing so, it is however worth recalling some points from the wording and scheme of the HVR, which in the writer's view have been ignored and/or misconceived in the Nordic discussion, due to the way the Maritime Code (MC) has been drafted.[3]

In the HVR, art. III 1 is considered as "the merchant's" provision: matters of initial seaworthiness are not to be eclipsed by the liability exceptions in art. IV.[4] Moreover, matters of initial seaworthiness are deemed to be within the shipowner's "direct control",[5] hence it should clearly not be open to the shipowner to render the performance of it "outside of his control", by delegating the task to be performed by the crew at a later stage. The system of the HVR therefore points in the direction that if such seaworthiness tasks are performed subsequently, and fail, such failure remains part of the shipowner's initial seaworthiness obligation pursuant to HVR art. III 1.

Based on mere policy considerations, one could probably go one step further and say that if such subsequent failure were to be considered nautical fault, the shipowner should at least be required to demonstrate that there was a prudent system already in place at the time of departure to ensure that performance of the subsequent tasks did not entail any risk of something going wrong. Such a requirement would follow from the very concept of seaworthiness itself: that there are no foreseeable circumstances leading to an increased risk of something going wrong during the voyage – as e.g. adopted by the Supreme Court in the *Sunna*.[6]

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3 See Solvang (2021) ch. 3.4.

4 That does not mean that a matter falling outside of art. III cannot exist as a latent deficiency before departure, see .Solvang (2021) p. 75.

5 See the *Tasman Pioneer*, discussed in Solvang (2021) ch. 3.2.

6 Solvang (2021) ch. 2.

2.2 A preliminary look at Nordic case law

From these introductory considerations, we take a look at three different Nordic Supreme Court cases which all involve this topic of subsequent rectification of aspects of seaworthiness.

The first is the Swedish Supreme Court decision, the *Pagensand*[7] from 1956.

In this case a gauging pipe had not been sufficiently locked (a cover not being put on at the end of the pipe) at the time of departure. During the voyage, sea spray entered the pipe and caused damage to the cargo, consisting of paper. The shipowner was held liable for the cargo damage by reason of initial unseaworthiness. The Court discussed questions of causation concerning whether a prudent plan for remedial acts was in existence at the time of departure. In that respect the Court stated that initial unseaworthiness would be found to exist (with ensuing liability for the shipowner) "unless it appears likely that the defect would be remedied before the peril was encountered. Since the evidence in the present case […] justifies the conclusion that there was no established practice of performing gauging by the use of the gauging pipe [at load port], there is no basis for concluding that the defect would be remedied before the peril was encountered."[8]

In other words, since there was no such remedial plan in place, there was an inherent risk that the prima facie state of unseaworthiness would materialize into cargo damage, and the subsequent failure to remedy the prima facie defect was not considered a nautical fault. In principle the approach is similar to that of the Norwegian Supreme Court's assessment of the situation in the *Sunna*: there was no indication that the failing state of affairs (lack of a prudent bridge management plan) would be remedied subsequent to departure.[9]

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7 ND 1956.175.

8 My translation.

9 Solvang (2021) ch. 2.

A second case to be mentioned is the Norwegian Supreme Court case the *URD II*[10] from 1919.

That case is mentioned in legal literature on a par with e.g. the *Pagensand* in terms of the said topic of considering allowance for subsequent rectification of seaworthiness defects,[11] but cannot in my view be considered as authority in that respect. The case concerned a claim by a shipowner for recovery under its H&M policy after the ship had sunk. Admittedly, the policy contained a condition for cover that the ship was seaworthy upon departure from port, but such a condition in an H&M policy still does not resemble the risk allocation system of the HVR, nor are the wordings the same. There is e.g. no parallel provision in an H&M policy to that of the relationship between initial unseaworthiness and subsequent nautical fault liability exceptions as in the HVR. Moreover, policy considerations by the courts are clearly different depending on whether there is a question of depriving the shipowner of insurance cover for a lost ship, or instead of imposing liability for (in principle, minor) cargo damage.

The facts of the case were that coal used for fuel was loaded on deck, which prevented the cargo hatch covers from being closed at the time of departure from load port. There would have been plenty of time to have this remedied (coal removed and hatch covers closed) before the ship, after some hours of sailing time, reached open waters. Those acts were however neglected and when the ship encountered open waters, being deeply loaded with minimum freeboard, swell washed over the decks, entered the cargo holds, and the ship eventually sank.

As mentioned, the case concerned recovery under an H&M policy. The Supreme Court found that the ship was (sufficiently) seaworthy upon departure from load port, since as a matter of course the hatches could have been closed in time. There is however no inquiry as to whether the shipowner had in place a prudent plan for this to be performed, as one would expect in the context of the HVR. Moreover, a concurring view by the Court, dissented on the reasoning, held that it would be

10 ND 1919.364.

11 Falkanger/Bull, Sjørett, 2016, p. 295.

sufficient in the context of seaworthiness for the shipowner to establish that the ship *in itself* was seaworthy, including being competently manned – thus without adopting any consideration of the risk assessment of the upcoming voyage, which clearly forms part of the seaworthiness test under the HVR.

The third case to be mentioned is the Norwegian Supreme Court case the *Sunny Lady*[12] from 1975.

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

As part of its reasoning relating to the seaworthiness test, the Court put the question: "whether at the beginning of the voyage it could be seen as highly likely that the defect which here existed would be remedied or neutralised during the voyage by the means available on board the vessel."[13] On the facts of the case, the Court answered this in the affirmative: there was reason to believe that during the course of the voyage the new crewmember would acquaint himself with the piping system, or at least ask someone before filling water.

The case is therefore not direct authority on the question of whether prima facie seaworthiness deficiencies may be remedied after departure, since the ship was not found to be unseaworthy, even without the (minor) deficiency in terms of overpainted flanges not being rectified. The case is however of interest since the Court of Appeal in the *Sunna* used the reasoning in the *Sunny Lady* in support of the view that whatever

12 ND 1975.85.

13 Page 92-93 of the decision (my translation).

unseaworthiness existed in the *Sunna* (the master not having in place a bridge management plan),it could have been rectified subsequently. That kind of use of the findings from the *Sunny Lady* in the *Sunna*, seems to be flawed.[14]

2.3 A look to English law – the possible influence of the doctrine of seaworthiness by stages

English law is of relevance since the present topic lies within the ambit of the HVR with its overriding aim of achieving uniformity of the law.

Looking at English law, two main observations can be made. The first is that the English law solution is aimed at being rooted in the wording of the HVR, that is, in HVR art. III – an approach which is entirely absent from Norwegian/Nordic law, and which may, at least partly, be due to the HVR art. III having been "hidden" as part of the redrafting of the HVR into the MC.[15] The second observation is that the English law allowance for subsequent rectification of seaworthiness aspects, seems to be more restrictive (in favour of the cargo side) than is the main position under Nordic law.

In order to understand the English law position, it seems convenient to start with the English common law doctrine of seaworthiness by stages. Although that doctrine is set aside by the system of the HVR, it still plays a role in the English approach to construing the HVR.

The common law doctrine of seaworthiness by stages entailed a strict obligation of seaworthiness, not merely a due diligence obligation as in the HVR. Moreover, the "voyage", in the common law sense, meant the planned (first) stage of the cargo voyage, not the cargo voyage as whole, as is the English law understanding of the system of the HVR. Such evaluation of seaworthiness by stages at common law could for example be assessed against the (first) stage when the ship reached an intended intermediate port for bunkering as part of the cargo voyage.

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14 Solvang (2021) pp. 95-97.

15 Solvang (2021) ch. 3.4.

The English common law approach is illustrated by the leading case, the *Newbrough*[16] from 1939. The planned first stage was to sail from load port at Vancouver to an intermediate port at the Virgin Islands to bunker, and from there proceed on the cargo voyage to the UK. Upon sailing from Vancouver, the ship had insufficient bunkers on board to make it to the Virgin Islands. After passing the Panama Canal, she therefore had to deviate to Jamaica for bunkers. While sailing towards Jamaica the vessel grounded due to negligent navigation, and was lost.

The House of Lords held that the shipowner was not entitled to rely on any exception for negligent navigation, since the vessel was initially unseaworthy: the deficiency of bunkers constituted an increased risk of danger to the vessel and cargo, as assessed against how the voyage was planned at the time of departure from load port, i.e. to sail to the intended intermediate port at the Virgin Islands to bunker.

The "cause" of the damage in the *Newbrough* is considered attributable to the initial unseaworthiness, since without such unseaworthiness, no deviation for bunkering would have occurred, hence also no grounding during the course of such deviation. In that sense, the risk of any misfortune occurring during the course of deviation is imposed on the shipowner, in the sense that he forfeits what would otherwise be covered by liability exception for nautical fault.

That perspective is not foreign to Norwegian and Nordic law. If one asks the question: would a prudent shipowner have allowed the ship to sail with knowledge that she had insufficient bunkers to the intended port, and the answer is "no" (assessed at such earlier times when deviation would entail a significant additional risk), the same outcome probably would ensue. In that sense initial unseaworthiness would override a situation where the incident itself would fall squarely within the wording of a nautical fault exception. However, the situation of the *Newbrough* does not really belong to our category of cases reviewed above from Nordic law. In the *Newbrough* there was no question of rectifying a prima facie situation of unseaworthiness en route. The unseaworthiness was

16 *Northumbrian Shipping v. E. Timm & Sun* [1939] A.C. 297.

"irreparable", in that the ship was incapable of reaching the intended port of loading.

It is worth noticing that the English doctrine of seaworthiness by stages has an aspect to the English contract law doctrine of deviation, which in turn forms part of the English law discussion of the phenomenon of "fundamental breach of contract", which has no direct counterpart under Norwegian contract law.[17] The doctrine of deviation is rooted in the notion that if the ship, through deliberate decision by the master or shipowner, deviates from the route contractually agreed with the merchant, then such deviation leads to an increased risk *per se,* which in turn means that whatever mishaps that may occur during the course of such deviation, are deemed to fall outside the ambit of contractual liability exclusions. In that sense the deviation (or other types of "fundamental breach") are deemed to be the "cause" of the relevant mishap, by "transposing" the situation outside of the scheme of contractual protective remedies.[18]

We then turn to how the HVR are considered under English law in relation to our question of "transforming" initial unseaworthiness into situations of nautical fault. As mentioned, the HVR are viewed as having the effect of setting aside the doctrine of seaworthiness by stages, in favour of a system whereby the upcoming voyage (the cargo voyage) is considered as a whole. However, the common law doctrine seems nevertheless to exert significant influence through the rigidity of perspective from which the HVR system is viewed.

Illustration can be found in various examples given by the authors of Cooke et al, Voyage Charters. It should be noted that the authors start

[17] See some comparative law aspects in Solvang, Sensur av ansvarsfraskrivelser: Har prinsippet i Wingull (ND 1979 side 231) satt spor etter seg? ('censoring of liability exclusion clauses – has the principle laid down in the Wingull-case set its marks?'), Lov og Rett, 2009, pp. 27-42. Aspects of causation on a comparative law level are also discussed in Solvang, The English law doctrine of indemnity for compliance with a time charterer's orders – does it exist under Norwegian law? SIMPLY/MarIus no. 419, 2013, pp. 11-28. Moreover, complex questions of causation on a comparative law level in the context of laytime and demurrage, are discussed in the monography, Solvang, Forsinkelse i havn – risikofordeling ved reisebefraktning ('delay in port – risk allocation in voyage chartering'), Gyldendal, 2009.

[18] The matter involves a number of complicating aspects which are not addressed here, see e.g. Cooke et al, Voyage Charters, 3rd Ed., 2007, pp. 251-267. The 3rd edition is here used, the relevant parts are identical in the 4th edition from 2014.

out by giving weight to HVR art. III (which is an absent factor in the Norwegian discourse – as pointed out earlier). The authors take as an example intended bunkering during the course of a cargo voyage, while at the same time looking at the voyage as a whole. The authors state:

> "Where matters of seaworthiness need to be attended to after the voyage has begun, such as taking on bunkers at a port of call in the ordinary way in order to complete the voyage, it is submitted that the shipowners are not in breach of their Article III rule 1 duty merely because the vessel does not have sufficient bunkers on board to complete the whole voyage at the beginning of that voyage, at least where a prudent owner would have done the same and, probably, where suitable arrangements for taking bunkers have been made."[19]

From a Norwegian perspective, this does appear a very cautious and in many ways unrealistic approach. It seems obvious that, in modern times where bunkering is planned as a matter of course and at the convenience of the shipowner, planned bunkering to be effected en route, would be entirely in order, not even being seen in the context of initial unseaworthiness. The example seems under English law to be a remnant of the common law doctrine of seaworthiness by stages, where older cases typically involved bunkering, but where bunkering practices have later changed.[20]

From there, the authors go on to state:

> "In such a case, if, through subsequent fault of servants or agents, the vessel does not in fact take on sufficient bunkers at the port of call and loss or damage results, the shipowners are not in breach of their Article III rule 1 obligations so long at least as it is not attributable to a prior failure to make proper arrangements."[21]

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19 Cooke et al (2007) p. 973.

20 The remarks in Cooke et al are at odds also with the views expressed by the authors elsewhere to the effect that in modern times deviation for bunkering at intermediate ports is seen as more or less a matter of course, see Cooke et al (2007) pp. 252-253.

21 Cooke et al (2007) p. 973.

From a Norwegian perspective, one would be tempted to ask: what other solution could there be? If the fact of planning to bunker en route is not a matter of unseaworthiness, and if faults made in connection with such bunkering occur due to taking on insufficient bunkers, and if later deviation ensues for the purpose of replenishing bunker, and if an accident then happens during the course of such later deviation, it is hard to see how this accident could in any way be traced back to initial unseaworthiness.

Again, the English thinking seems to be rooted in the earlier doctrine of seaworthiness by stages. This also applies to the reservation by the authors that the taking on of insufficient bunkers en route is a result of lack of planning. With the ordinary seaworthiness test being applied: if at the commencement of the voyage there is some lack of planning of how much bunkers the ship shall take on board at an intermediate port of bunkering – would a prudent shipowner then have disallowed the ship to sail with knowledge of such facts? The answer seems to be no. From a Norwegian perspective, this example would probably therefore not fall within the category of rectifying initial seaworthiness deficiencies subsequent to departure.

The authors then state, in direct continuation of the above:

> "They [shipowners] may also be protected by the exception In Article IV rule 2(a), should it be necessary for them to rely on an exception, as, for example, when there is loss or damage to the goods, as opposed to liability in salvage for example. There may, however, be other subsequent faults by those servants which will cause the carriers to be liable under Article III rule 2 [which imposes a duty of care for the *cargo*] or because they evidence a failure 'properly to man the ship'."[22]

These remarks make good sense, since they go to the very point of such subsequent fault (i.e. fault in management of the ship for bunkering, which in turn may end up in "deviation" leading to navigational fault being committed) – all of this being considered within the ambit of HVR

[22] Ibid.

art. IV 2(a). These remarks also make good sense in terms of the general notion that, in given cases, the subsequent fault may relate to caring for the cargo and for that reason would not qualify as nautical fault[23] – or it may be a reflection of incompetence by the crew, in which case we are back to the topic of initial unseaworthiness, as e.g. argued by the cargo side in the Norwegian *Sunny Lady*, namely that the crew was incompetent in not having learned the correct way of replenishing domestic water into the right pipe.

Then, finally, we reach examples that are familiar to the Norwegian discussion. The authors state in direct continuation of the above quote:

> "On the other hand, the abandonment of the doctrine of stages may well mean that in other respects, e.g., in the case of loading at a river port, a vessel needs to be seaworthy for an ocean passage, and due diligence exercised accordingly, at an earlier time than under the common law. This does not cause any particular injustice because of the abandonment of the absolute undertaking of seaworthiness and also, *so long as the shipowners remedy the unseaworthiness at a stage which would have been proper in the context of the doctrine of stages, it should not be causative of any loss or damage*."[24]

The latter part of the quote, concerning lack of causation, is from a Nordic perspective trite: if it is prudent to remedy a seaworthiness defect subsequently and it is so remedied, then there can be no question of liability for a subsequent event leading to cargo damage, since ex hypothesis there is no breach of any obligation which caused the cargo damage.

There seems however to be one difference between the Nordic and English approaches. Under Nordic law, if there is a prudently planned remedial act to an initial deficiency, the thinking is that the obligation to exercise due diligence at the time of departure is fulfilled through such prudently planned remedial act. Hence, a subsequent failure to do the remedial act would be considered a nautical fault occurring during the

[23] See Solvang (2021) ch. 3.1.

[24] Ibid (my emphasis).

voyage, thus exempting the shipowner from liability – see the account given above.

This type of thinking seems however to be foreign to English law. There the test of seaworthiness seems to be assessed against the voyage as a whole (which in itself is also the case under Norwegian law), and if matters are attended to after departure but the remedial acts fail, then this seems to be viewed as matters of initial unseaworthiness having been committed retroactively (as it were) – and with no legal basis for categorizing them as nautical fault.

That point is important since it has to do with the construction and application of the HVR. Matters of initial seaworthiness are governed by HVR art. III 1, and there is no basis in the HVR for having art. IV and nautical fault "taking over" in such situations of breach of art. III 1.[25] This is the problematic part in the thinking of the Nordic cases allowing for subsequent unseaworthiness failure to be "transformed" into nautical fault – and it may be another example of how the HVR art. III 1 seems to have been neglected under Nordic law, probably because of the way the MC has been drafted.[26]

Therefore, as a matter of construction of the HVR, and as a matter of international uniform application, it seems that the Nordic law position should at least go no further than those principles allowing for subsequent rectification as suggested in the previous section. In other words, those principles as reflected in the Swedish Supreme Court decision *Pagensand* seem to be sound, while those derived from the Norwegian Supreme Court case *URD II* seem not to be, in the context of the HVR.

25 This is a different topic than that dealt with in Solvang (2021) ch. 4.3. There the point was that certain nautical faults already occurring before departure might *not* entail breach of HVR art. III 1.

26 Solvang (2021) ch. 3.1.

3 Causation and evidentiary aspects – nautical fault pointing retroactively towards initial unseaworthiness

In the *Sunna,* the conduct of the master was evidentially substantiated by the fact that he had on a prior occasion been sanctioned by the Dutch Port State control for having defied the safety rules.[27] This, combined with the later grounding when there was no double watch on the bridge, bore out the fact that the master at the time of departure from load port, had the mindset of defying the rules and that there was no prudent bridge management system in place – hence the vessel was initially unseaworthy.

If one were to disregard the fact of the prior Port State control, the result in the *Sunna* should be no different, apart from the evidentiary aspect: It might have been more difficult to establish that the rule-defying mindset of the master was already in existence at the time of departure. It might for example have been easier for him (if wishing to do so) to fabricate a version that this was a one-off instance of deciding that there was no need for double watch keeping. It should in this respect be recalled that the master's explanation for only deploying a single watch on the night of the incidence, was that the weather was calm, and that the crew needed rest to do maintenance work on the ship during daytime. It might in this respect not have been straightforward to establish initial unseaworthiness if, ex hypothesis, the only available evidence had been the version given by the master and crew.

By altering the facts in this way, it may perhaps be asked whether, so to speak, any incident of nautical fault of some gravity, may not shed retrospective light on what may be considered intrinsic causes already in existence at the time of departure, hence constituting initial unseaworthiness. If a master makes a grave navigational mistake, would that not mean that this was part of his character, which materialised during

27 See the detailed account given in Solvang (2021) ch. 2.

the voyage but existed latently back in time?[28] Clearly, such questioning involves complicated issues at the intersection between evidentiary aspects and evaluation of legal principles of causation. Some reflections may be made in that respect.

There is clearly a difference between the *Sunna* where the rule defying mindset of the master was the cause of a later incident, and a case where an incident happens which leads the master or crew to make a bad nautical decision. To again use the *Sunna* as an example: in theory it might perhaps be the case that since the second mate fell asleep on watch, he might already have had this character of being prone to falling asleep at the earlier time of departure. It seems however to be an unrealistic approach to say that the vessel must therefore have been initially unseaworthy; there would be a multitude of potential causes which might occur after departure which could, in the legal sense, be viewed as the proximate cause of the nautical fault of falling asleep.[29] This, at the same time, illustrates the important distinction between incompetence of crewmembers (constituting initial unseaworthiness) and singular instances of negligence (constituting nautical fault), which forms part of several English law decisions.[30]

On the other hand, there might well be grave incidents of nautical fault which could constitute at least prima facie evidence of initial seaworthiness, and perhaps also prima facie evidence of the shipowner being at fault in not detecting incompetence by the master or the crew.

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28 See also the discussion about 'latent human defects' in Solvang (2021) ch. 4.6.

29 Similar considerations may arise in respect of one-man shipowning companies where the master is at the same time the owner/manager of the ship and where intricate situations of nautical fault (by the 'master-ego') and commercial faults (by the 'manager-ego') of one and the same person – see Solvang, Rederiorganisering og ansvar – rettslige utviklingsrett ('organisation of shipowing companies – legal developments'), MarIus no. 484, 2017, pp. 31 et seq, with comments on the case *Vågland*, ND 1954.56. See also Solvang (2021) ch. 4.7.

30 See e.g.the *Eurasian Dream,* Lloyd's Rep. 2002, 1, 719, discussing aspects of incompetence vs. negligence in relation to the fire exception of the HVR. The master was found to be incompetent and the shipowner was held liable in negligence for not having detected it and for not having provided him with proper fire fighting training.

An instance of grave misconduct by the master follows from the New Zealand case, the *Tasman Pioneer*[31] from 2010. During the voyage of a liner service ship, the master decided to alter the normal route by deviating east of an island (the Japanese island Okino Shima) to shorten the sailing distance and thus bring the ship back on time schedule. While deviating, the vessel touched bottom, which led to seawater ingress.[32] The master decided to conceal this navigational error by proceeding for about two hours until reaching a geographical point compatible with the original sailing route. From here he called the Coast Guard and the offices of the shipowner, and gave a forged story of having struck an unidentified submerged object. He also instructed the crew to lie to the Coast Guard when later interviewed about the incident.

The water ingress stemming from the extra time taken before the master called for assistance, caused (additional) damage to the cargo, and when learning the true facts, the cargo owners rejected the shipowner's purported invocation of the HVR exception for nautical fault relating to the (additional) cargo damage – that the initial grounding constituted nautical fault was not in dispute.

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

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

32 It transpired that the deviation was in itself unproblematic; the master had sailed that route before, however on the present occasion he discovered that the radar did not work properly, hence he decided to abort the deviation, and as part of this abortion (turning in a narrow straight) the ship touched bottom. See also the account given in Solvang (2021) ch. 3.2.

Moreover, the master of the *Tasman Pioneer* was found to be competent as a seaman, hence there was no issue raised concerning negligence on the shipowner's part in not providing a competent crew – as obliged by HVR art. III 1). There was also no assertion made by the cargo side to the effect that the master had (perhaps) a mindset already in existence at the time of departure, which posed a general risk of something like this happening during the voyage, thus making the ship initially unseaworthy. Hence, the thinking must have been that as a matter of causation it was the prior grounding (being of a "plain" nautical fault nature) which brought about the master's wholly unacceptable conduct.

We leave the topic here – with the *Sunna* as an example of the evidentiary importance of being able to establish the true facts in this interface between initial unseaworthiness and nautical fault, in that case with the prior Port State control as important evidentiary means of shedding light on the true circumstances of what later happened.

It is, moreover, worth pointing to a slight paradox that may ensue in some of these cases, namely that it is in the general interest of the shipowner to argue, and adduce evidence to the effect, that it was the master's decision making that failed, not what lay within the shipowner's "direct control"[33] and thus within the sphere of responsibility of the shipowner.

This possible inclination of highlighting the fault of the master is particularly clear from the City Court's decision in the *Sunna*. The shipowner introduced evidence to the effect that the shipowner's superintendent acted prudently in instructing the master to comply with the safety rules; it was the master who failed by not being amenable to taking them seriously. One could then speculate: if the master had been called as witness, hence been given the opportunity of speaking his case, his inclination would probably have been to counter the version given by the superintendent, thus potentially weakening the shipowner's case.

These reflections concerning evidentiary aspects of important questions of causation, which in turn are decisive to the question of liability of the defendants to a legal dispute, may be said to be general in nature.

33 As that term was used in the *Tasman Pioneer*, see Solvang (2021) ch. 3.2..

However, the importance of such reflections is enhanced in this type of cases which involve liability exceptions for something as central as the conduct of a contracting party's main servant: the shipowner's master.

4 Causation "the other way around" – initial unseaworthiness not causative of nautical fault

The previous chapter concerned situations of nautical fault which could throw retrospective light on what might constitute initial unseaworthiness – or to put it the other way around; possible instances of initial unseaworthiness which materialize into, and thus cause, what would otherwise be seen as nautical fault. There are also, however, other possible constellations in play: that instances of initial unseaworthiness are considered not to be the proximate cause of subsequent nautical fault. One example is the English case, the *Isla Fernandina*.[34]

The ship sailed on a cargo voyage from Puerto Bolivar to Libya. Upon passing the Panama Canal, the bosun was seriously injured from an accident onboard, and the ship had to deviate to the nearest port for medical assistance (the bosun died in the meantime). During such deviation to port, the master and the third officer misread the navigational lights, leading to the ship grounding (near the Salmedina Bank). The cargo, consisting of fresh bananas, was damaged by the ensuing delay. In the subsequent proceedings it transpired that the ship did not have on board charts of the area with a suitable scale for navigating in close waters; it only carried a small scale chart as the plan was merely to transit the area.

The Court found that the lack of proper charts constituted initial unseaworthiness, since a possible need to deviate to shore should form part of prudent voyage planning. However, the Court found on the evidence that the master and third officer would have relied on the navigational

[34] Lloyd's Rep. 2000, 2, 15.

marks as the only means of navigating to the port, even if proper charts had been on board, and that therefore there was no causation between the initial unseaworthiness and the later grounding. Hence, the shipowner was held entitled to invoke the liability exception of nautical fault. Moreover, the master and the third officer were considered to be competent as seamen, hence there was no basis for holding the shipowner liable for unseaworthiness in terms of incompetence by officers and crew.

This case, therefore, on a par with the *Sunna*, has the strange effect of giving incentive for the shipowner to argue that the master or crew onboard acted negligently, thereby escaping the consequences of liability for initial unseaworthiness. In other words, a cargo claimant may succeed in showing initial unseaworthiness stemming from negligence (that of not procuring a complete set of charts), while the shipowner successfully counters by submitting that even if the ship had been seaworthy, this would not have led to a different outcome, as the master would have run the ship aground anyway. But with the constellation as in the *Isla Fernandina*, there may be a further twist, in that the master as part of his evidence would perhaps not have had an incentive to argue otherwise. He would risk being at fault on either alternative: not procuring the necessary charts at commencement of the voyage and/or failing in navigation by relying on insufficient navigational marks.

5 Causation within the scope and purpose of safety rules being violated

A matter of causation which is intrinsic to the concept of negligence as a basis of liability, concerns a delineation to be made as to whether the damage in question falls within the category of interest intended to be protected by the relevant safety rules.

The point can be briefly illustrated as follows: a) there is damage caused by the defendant, b) there is an instance of rule violation by the defendant, c) there is causation in the sense that had the rules not been

violated, the damage would not have occurred. However, there may still be a limiting factor (of causation): did the damage happen in the direction of the interest intended to be protected by the violated rules?

A classic example is the English case *Goris v. Scott*[35] from 1874. In that case, the safety rules for the carriage of live sheep as deck cargo required separation fences to be mounted on deck. The shipowner neglected to mount such fences. During the voyage much of the deck cargo was washed overboard as the ship encountered rough seas. This washing overboard would not had happened if separation fences had been mounted. The shipowner was nevertheless held not liable for the lost cargo since the interest intended to be protected by the rules was that of preventing spread of disease among the animals, not to protect them from being washed overboard.

By parity of reason it could perhaps be submitted that the safety rules in the *Sunna* requiring double watch keeping during night time sailing, had the purpose of ensuring satisfactory lookout ('two pairs of eyes see better than one'), not the (primary) purpose of preventing officers on watch from falling asleep. Should the shipowner, perhaps, have been acquitted along this line of reasoning?

The answer seems clearly to be in the negative. Such an argument was not even raised by the shipowner before the Courts. The interest intended to be protected by the safety rules in the *Sunna* was accident prevention to ship and cargo, i.e. to prevent damage due to improper navigation of the ship – and in that sense to avoid the very type of damage which actually ensued. It would therefore be too artificial an argument to say – within such intended scheme of damage prevention by the rules – that the primary situation envisaged by the rules (to enhance the effect of lookout) was not causative of the way the damage occurred.

It is, moreover, an open question whether the type of principle of causation which was in play in the *Goris v. Scott,* would be applied as rigidly under Norwegian law as it was at the time under English law.[36]

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[35] (1874) 9 LR Exch 125.

[36] See e.g. Hagstrøm/Stenvik, Erstatningsrett, 2019, pp. 91-94. They point to the Supreme Court case in Rt. 1970.1452 (damage caused by high voltage electricity in private

6 Causation and its relation to a wide or narrow concept of seaworthiness

The question of causation between initial unseaworthiness and subsequnt faults (possibly) being of nautical nature, may furthermore be seen as a question of adopting a "narrow" or a "wide" concept of seaworthiness. The very notion of unseaworthiness entails aspects of foreseeable risks during the upcoming voyage, hence within such a context, intrinsic questions of causation.

We may again take the *Sunna* as an example. The Supreme Court found as a matter of fact and evidence that the absence of a prudent bridge management plan at the time of departure, meant that there was an increased risk of something going wrong during the voyage, and that this increased risk as a matter of causation materialized during the voyage. This type of risk-assessment approach could be called a "wide" concept of seaworthiness.

The Court of Appeal, on the other hand, essentially confined its assessment of seaworthiness to a finding that a) the ship was furnished with a competent crew, and b) there was a safety manual onboard which was easily accessible to the master (and the Court found that the shipowner's representatives had reason to believe the master would make use of it).[37] Hence, what subsequently happened during the voyage would, according to the Court of Appeal, be assessed within the scope of nautical fault. This tendency of applying a seaworthiness test without emphasis on the risk aspect of something going wrong, could be called a "narrow" concept of seaworthiness.

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housing, attributable to insufficient isolation as part of wrongful installation work) which bears some resemblance to the said English case, but comment (p. 94): "Even if one has the more ordinary sequence of damage in mind through the formulation of the relevant rule of conduct, that is not the same as saying that it has been the intention to limit the scope of liability accordingly. On the contrary, the presumption must be that it is irrelevant how the damage occurs, when being caused by rule violating conduct." (my translation)

[37] See Solvang (2021) ch. 2.

These differing approaches have their parallels in foreign law. An example can be taken from U.S. law and the case of *Mahnic v. Southern S. S. Co.*[38] from 1944. That case concerned seaworthiness in the context of personal injury suffered by a crewmember.[39] During the voyage a crewmember was doing maintenance work (by being hauled fifteen feet over the deck) by the use of ropes. The rope broke, turning out to be decayed, and the seaman fell onto the deck. The rope was selected by the claimant (the injured seaman) from a box placed onboard the ship, which contained unused ropes, being a few years old. All the ropes looked fine from appearance but some turned out to be decayed.

On the question of whether the ship was unseaworthy due to being equipped with decayed ropes, the District Court held that it was seaworthy since there were other ropes on board of sound quality which could have been selected. The Court of Appeal held likewise. The Supreme Court reversed, on the basis that there was an increased risk of something going wrong with the mixture of sound and decayed ropes, hence the ship was found to be unseaworthy.

The case provides a simple illustration of the point at hand, also appearing in the *Sunna*. Should one look at the mere existence of good working condition of the ship and crew at any given time (in our context: at the commencement of the voyage), or should one look at the combination of potential risk factors and the likelihood of something going wrong during the voyage – in other words, considerations of foreseeable risks and causation?

Somewhat simplified, one could say that the Supreme Court in the *Sunna* and the Supreme Court of the U.S. both took the latter approach, that is, they adopted a "wide" concept of unseaworthiness. The same point is reflected in the *URD II* (above) where the concurring vote of the Supreme Court expressed a "narrow" perception of seaworthiness: that it sufficed to look to the formal-technical status of the ship and crew at the time of departure, without considering the likely further events, namely

[38] 1944 A.M.C. 1.

[39] See also Solvang (2021) ch. 5 with similar discussion of the U.S. case the *Racer*.

whether the combination of risk factors already in place might lead to an increased likelihood of a later casualty.

The same type of question came up in the *Sunny Lady* (above). Here the Supreme Court did consider the question of the likelihood of something going wrong in view of the prima facie deficiency at the time of departure: the flanges of the gauging pipes being overpainted, combined with a crew which at that time was inexperienced in the peculiarities of the ship. In that case, the subsequent mistake (filling of domestic water into the wrong pipe) was found to be an incident of nautical fault, and – notably – the ship was not considered to be initially unseaworthy. This latter position was reached through a combination of factors: the overpainted flanges constituted a kind of de-minimis defect, combined with the fact that the crewmembers were competent as such, and that there were reasons to expect that the crewmembers would be trained during the course of voyage and thereby learn the correct identity of the pipes. In other words, through a combination of such factors there was no sufficient foreseeable risk that something might go wrong (through the wrong use of the pipes) for saying that the ship was initially unseaworthy. In that sense, the Supreme Court, again, adopted a "wide" concept of seaworthiness.

It may be asked whether, at least in theory, a contrary view might have been taken in the *Sunny Lady*, in line with the causative approach taken by the Supreme Court in the *Sunna*. One could say that the facts as they materialized during the voyage in the *Sunny Lady* (the combination of overpainted pipe flanges with an inexperienced crew), would shed retroactive light on an increased risk already in existence at the commencement of the voyage, hence meaning that the ship was initially unseaworthy.[40] In other words, one could "count backwards" from the ensuing damage through the factors leading up to it, with these factors being traceable back to the initial condition of the ship (and crew), and

[40] And thus to require that the shipowner adduce evidence to the effect that there were proper procedures in place to cater for a proper training etc. of the new crewmembers so as to avoid the mishap that later ensued – along the line of prudent rectification of initial seaworthiness defects as discussed in chapter 2 above.

possibly end up with a conclusion of initial unseaworthiness. However, such "counting backwards" based on a mere causative approach, loses sight of the discretionary assessment of foreseeable risk at the time of commencement: would a prudent shipowner with knowledge of the relevant facts (overpainted flanges and inexperienced crew) have allowed the ship to sail? This concept, entailing notions of (reasonably) foreseeable risks, was applied in the *Sunny Lady* and answered by the Supreme Court in favour of the shipowner – and that conclusion hardly invites criticism.

New technologies and the robustness of the maritime convention system

Kristina Siig[1]

1 Professor WSR, Department of Law, University of Southern Denmark

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1 Introduction

1.1 Background

From the early nineteenth century onwards, the maritime convention system has increased the unification of the private law regime governing international maritime activities. The conventions are – both in scope and content – a reflection of the time in which they are made. Recent attempts at modernizing the convention system have only been partly successful and rapid changes to the convention system are not a likely scenario. Conversely, technological developments are rapid. Autonomous vessels are being developed; the possibility of land based navigational support – or indeed of remote control – is increasing, both technologies potentially removing the onboard human factor. The question one may ask is therefore, whether there is a breaking point in the convention system, where the technological development pushes either the vessel/unit used or the activity which it is performing outside the scope of application of the existing maritime convention regime. If that is so – either generally or in part – the maritime regulations will be out of scope and the general rules governing the activity in question will apply. In that case, the possibility and incentive for shopping for venue and/or law would probably increase, and the legal uncertainties connected therewith would increase with it. Shipowners – or parties wishing to claim against shipowners – might in such a case find that the legal analysis on which their risk management is based no longer holds.

Consequently, the following will scrutinize *whether the switch to new technologies may hinder the application of the convention-based maritime regulatory framework.*

1.2 Delimitation

To both focus and limit the discussion, the question asked in the following will be whether the overall application of the regulation in question

is challenged. The discussion concerns the applicability of the regulations *per se*, taking as its starting point the rules determining the application of the convention in question. Discussions of specific substantive provisions and requirements of those rules must be found elsewhere,[2] unless they have direct bearing on the overall applicability of the regulation of which they form part. Some regulations do not distinguish between the rules on their application of the regime as such and the substantive criteria for their use; normally because their application is governed by other rules, such as statutory regulation or incorporation by reference into standard contracts, see e.g., YAR Rules 2016.[3] Therefore, some excursions will be made beyond what the intended distinction should indicate.

> To provide an example: The exemption of liability for navigational errors committed by the crew in the Hague Visby Rules 1968 Art. IV(2)(a) may potentially be inapplicable in the context of an unmanned autonomous vessel; however, this will not be dealt with below. Instead, this article will consider whether the Hague Visby Rules 1968 as a system of regulation may still be applied to e.g. autonomously operating vessels in the first place, and the focus will instead be on Art. X of that convention.

The analysis will focus on two factual scenarios: That the vessel is remotely navigated from ashore (scenario 1) or that the vessel is totally autonomous/AI-operated, or at least that it is in "autonomous mode" at the time of the incident in question (scenario 2). In both situations the onboard human factor is removed at the time of the incident. Where relevant, the application of the convention or regulation in question will be tested against these scenarios.

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2 See e.g., for a multifaceted approach, Ringbom, Røsæg, Solvang (eds.), "Autonomous Ships and the Law", Routledge, 2020.

3 The York Antwerp Rules 2016 on general average are soft law and not a convention but will nonetheless be included in the analysis in the following. Their application may follow from statutory rules, such as the Danish and Norwegian Maritime Codes sec. 461, or Conlinebill 2000 cl. 12.

The article will fall in three parts: First, in section 2, the applicability of the main conventions will be scrutinized, mapping the criteria for their applicability. Analyzing the findings in section 2, the main issues potentially hindering the applicability of the conventions will be extracted and further discussed in section 3, allowing for a conclusion on the robustness of the convention system to take place in section 4.

2 Mapping the convention system and its main criteria for application

2.1 Introduction

The question of whether an international convention may govern a particular question of law, depends on whether the factual situation underlying the question of law is covered by the convention, upon a proper interpretation of that convention's regulation of its scope of application. The following will therefore analyze which factual criteria must be satisfied for the maritime conventions to apply. The intention is to cover the maritime conventions presently in force, including the York Antwerp Rules 2016, which, albeit not technically a convention, but instead soft law, for all intents and purposes serves the same function as a convention in maritime regulation.

The conventions will be divided into three categories based on their content, i.e., whether they are of general application (section 2.2), related to contracts of carriage (section 2.3), or concerned with tort law or negotiorum gestio aspects of maritime activities (section 2.4). Finally, the extract of the analysis will be presented (section 2.5), providing the basis for the further discussion on the potential pitfalls for the convention regime, which takes place in section 3.

2.2 Conventions of general applicability; mortgages, arrest, and global limitation

For the Maritime Liens Convention 1993[4] to apply, the lien must concern a lien over "…seagoing vessels *registered*[5] in a State Party…". It will be the rules of the flag state in question regarding what is considered a registered vessel, which will determine the application.

For the Arrest Convention 1952[6] to apply, the claimant must have a claim against a vessel flying the flag of a contracting state for a "maritime claim" included in the list mentioned in the convention Art. 1. Several of the items of Art. 1 include the word "ship", and the convention in itself presupposes that it is only applicable to "sea-going ships"; however, no definition of the term may be found in the convention. Therefore, as with the Maritime Liens Convention 1993, it will be the requirement for registrable vessels in the underlying flag state, that will be the main issue in determining the scope of application.

Turning to the Convention on the Limitation of Liability for Maritime Claims 1976 (LLMC 1976),[7] its applicability presupposes that a "seagoing vessel" be relevant in the factual setting, but its applicability is not linked to this as such, but rather to specific legal entities, namely owners, charterers, managers, and operators of seagoing vessels, and to salvors, wishing to limit their liability, see Art. 1(1) and 1(2). The provision has also been used to allow the owners of pleasure boats to limit their liability;[8] however, as will be further elaborated below in section 3.1.b, it is presumed that there is a lower limit regarding how insignificant a structure may be for it to make an "owner of a seagoing vessel". Still, the inclusion of charterers, managers, and operators in the list of who may be allowed to limit their liability indicates that the *process or structure*

4 International Convention on Maritime Liens and Mortgages, 1993.

5 Writer's emphasis.

6 International Convention for the unification of certain rules relating to Arrest of Sea-going Ships, 1952.

7 Convention on Limitation of Liability for Maritime Claims, 1976 with protocol of 1996.

8 NDS 1980.134.

in which the decision-making processes are carried out is *not* important to the application of the convention. This is further underlined by Art. 1(4), according to which persons for whom the shipowner or salvor is responsible would also be able to limit their liability under the rules of the Convention.

Fig. 1. Conventions of general applicability

Convention	Rules on scope of application
Maritime Liens 1993	Art 13(1): Applies to "all seagoing vessels registered in a State Party".
Arrest 1952	Art. 1: Applies to maritime claims against a "ship", which is undefined.
LLMC 1976	Art. 1(1): Applies to "shipowners" of "seagoing ships" and "salvors" wishing to limit liability. Art 1(2): Includes the charterer, manager, and operators in the term "ship-owners".

2.3 Conventions governing contracts of carriage

Looking first at the prevailing convention system regarding carriage of goods by sea, the Hague Rules 1924, and the Hague Visby Rules 1968 (HVR), these are *stricto sensu* not applicable to ships or vessels, but instead to bills of lading evidencing an international contract of carriage of goods, see HVR Art. X. The HVR do contain a definition of a "ship", but the definition is as broad as possible and encompasses "any vessels used for the carriage of goods", see HVR Art. I(d). Therefore, provided the goods are carried on an international journey on a device which is floating, technological developments in automatization, remote control, or autonomy should not affect the application of the rules. The rules will therefore continue to apply if the bill of lading is issued in a contracting state, if the goods are carried from a port in a contracting state, or if the bill of lading contains a clause paramount, see HVR Art. X. On a contractual level, it follows that if a bill of lading is e.g. a through bill of lading, also covering pre- or on-carriage or other contractual obligations

of the carrier, the clause paramount should still be effective, if at least a part of the carriage may be seen as carried out by a "vessel used for the carriage of goods", and the contract contains a sea-leg. Always presupposing, of course, that the parties choose to transport their goods under a bill of lading.

The Hamburg Rules 1978 apply to "contracts of carriage by sea", see Hamburg Rules 1978 Art. 1(6) and 2(1). In this respect the rules seem technology neutral, provided the device used for transport may reasonably be described as a means by which a contract of carriage *by sea* may be carried out. Thus, the mandatory rules in the Hamburg Rules would still be relevant and supersede the background law as *lex specialis*, even if the goods are carried by means of a remotely controlled or automated/ autonomous vessel.

Looking at the transport of passengers, the Athens Convention 2002 defines a "ship" as "… only a seagoing vessel, excluding an air-cushion vehicle," see the Athens Convention Art 1(3). However, provided the basic technology requires the vessel to sail *through* water, and the vessel can be seen as "seagoing", the scope of application of the rule ought not to be challenged. The Athens Convention *per se* should thus be applicable, and a claimant will have to respect its rules, as long as the ship's flag state, the place of making the contract, or the point of departure or destination of the voyage, is in a contracting state according to the Convention Art. 2.

Whereas fully remote controlled or autonomous long-distance, ocean-going carriage of goods or passengers must be assumed to be some way off, remotely controlled, or autonomous carriage by sea over shorter distances, e.g., by ro-ro vessel, or by smaller vessels operating short sea trade or inland waterways, is already being developed.[9] It is therefore relevant in our context to look at certain multimodal modes of carriage of goods. It is noteworthy that both the CMR Convention 1956 (CMR)[10]

9 See e.g., https://www.ntnu.edu/autoferry (accessed 07.07.2022), or https://yle.fi/uutiset/osasto/news/autonomous_ferry_makes_first_demonstration_voyage_in_finland/10537448 (accessed 07.07.2022).

10 Convention on the Contract for the International Carriage of Goods by Road, 1956 with protocol of 1978.

Art. 2 and the COTIF CIM Convention 1999 (COTIF CIM),[11] Art. 1, §§ 3 and 4, presuppose that in such cases, the CMR respectively the COTIF CIM takes precedence and will include any sea-leg or passage over inland waterways. As with those regulations which are mainly aimed at maritime transport, neither convention is concerned with how the vessel operating a sea-leg or a stretch over inland waterways is propelled or steered. The possibility of invoking both the road/rail regime and the Hague Rules or HVR at the same time has given rise to frequent case law over the years, due to the differing bases for liability, level of compensation due, and not least the different time bars provided for by the systems. These uncertainties persist.[12]

Summing up on the conventions governing contracts of carriage of goods or passengers in general, one may conclude that as long as the device carrying the goods or passengers may reasonably be understood as a "vessel" or "ship" travelling through water, the application of the conventions should not be affected by a shift to higher levels of remote control or autonomy.

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11 Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM – Appendix B to the OTIF Convention) 1999.

12 Case law is extensive. As examples of Scandinavian cases the following may provide a starting point: U 1982.398 Danish Supreme Court, ND 1984.292 Eidsivating Court of Appeals U 1984.577 Maritime and Commercial Court of Copenhagen, ND 1992.148 Maritime and Commercial Court of Copenhagen, LB-2017-44065 Borgating Court of Appeals and HR-2019-912-A Norwegian Supreme Court.

Fig. 2. Conventions regarding contractual liability for carriages of goods and/or passengers

Convention	Rules on scope of application
Hague 1924 / HVR 1968	Art. X(a): Applies to bills of lading. Art. I(d): Presupposes the use of a “ship”, which is defined to include “any vessel used for the carriage of goods by sea2.
Hamburg 1978	Art. 2(1): Applies to “Contracts of carriage by sea between two different States”.
Athens 2002	Art. 1(3): “ship” means only a seagoing vessel, excluding an air-cushion vehicle; Art. 2: Applies if the ship’s flag state, the place of making the contract or the point of departure or destination is in a contracting state.

2.4 Conventions governing claims in tort or negotiorum gestio

The conventions dealing with accidents and emergencies may be divided into two groups, according to whether they are of general application or whether they aim at a specific incident. At one end of the spectrum, the Salvage Convention 1989 and the York Antwerp Rules on General Average 2006 (YAR Rules) both aim to ensure that property at risk of being lost at sea is salvaged and that the cost of doing so is split between parties sharing the same peril. As for the Salvage Convention, it applies not only to ships but also to other property at sea, so even seagoing drones may be salvaged. There is also nothing to indicate that remote controlled vessels may not be salvors. (Autonomous salvor vessels are still for the future). The YAR Rules do not distinguish between what one could call their formal scope of application and the criteria which must be satisfied for a general average situation to exist, but the rules still continue along the lines given by the Salvage Convention and apply to any “vessel” finding itself in a “common safety” or “common peril” situation. The term “vessel” is even wider than the term “ship”, and the owner of the vessel, having found itself in a general average situation, should still be expected to be

able to declare general average, even if the vessel is remotely controlled. One problem, however, may present itself, is that it is a condition for the application of the YAR Rules that the sacrifice or expenditure involved is made "intentionally".[13] There must be a decision-making process involved, and it is uncertain if a fully autonomous vessel which e.g., beaches itself to avoid sinking may be seen to have done so "intentionally".

Conversely, the CLC Convention 1992 on oil pollution damage at sea[14] is aimed at a specific sector of the maritime market, namely the tanker trade. For that reason, it has a limited scope and is only applicable to oil tankers that are in fact transporting oil in bulk, but also here – as with most other conventions – we see that the definition of a ship is not concerned with how the decision-making processes onboard are carried out, but rather with the construction and purpose of the ship. This picture repeats itself with the Collision Convention 1910[15] and the Wreck Removal Convention 2007, which apply respectively to "seagoing vessels"[16] or to wrecks from what used to be "ships"[17]. Indeed, the Wreck Removal Convention specifically states that a "ship" includes "…a seagoing vessel of any type whatsoever [including] hydrofoil boats, air-cushion vehicles, submersibles, floating craft, and floating platforms."[18] Considering the purpose of the Wreck Removal Convention (namely to ensure that wrecks are removed by their owners), such a wide scope is appropriate, and an owner of a fully autonomous vessel can expect to be encompassed by the Convention, should that vessel become a wreck.

Again, apart from the YAR Rules' requirement for an intentional sacrifice of expenditure to have occurred, if the Rules are to apply, we see a system that should remain coherent despite technological advances, as long as an autonomous or remotely controlled craft is still recognizable as a 'vessel' or 'ship'.

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13 YAR Rule A(1).

14 International Convention on Civil Liability for Pollution Damage 1992 (CLC).

15 The International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, 1910 (Collision Convention 1910)

16 Collision Convention 1910, Art. 1.

17 Wreck Removal 2007, Art 1(2) cf. Art. 1(4).

18 Wreck Removal 2007, Art. 1(2).

Fig. 3. Conventions regarding accidents and liability in tort

Convention	Rules on scope of application
Collision 1910	Art. 1: Applies to "seagoing vessels" that are flagged in a contracting state, see Art. 12.
Salvage 1989	Art. 1(a): "…assist a vessel or any other property in danger in …[any]… waters." Art. 1(b): "Vessel means any ship or craft, or any structure capable of navigation." Art. 2: Is applied as lex fori in contracting states.
YAR 2016	Rule A (1): Applies to "vessels" that are faced with a "common peril" or has its "common safety" threatened. Presupposes *intent*.
CLC 1992	At 1(1): "Ship" means any seagoing vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo.
Wreck removal 2007	Art. 1(2): "Ship" means a seagoing vessel of any type whatsoever…". Art. 3(1): The rules apply when "ships" become "wrecks" within the EEZ of a state party, see Art. 1(3).

2.5 Extracting the central criteria

Looking at the selected conventions, it is immediately noticeable that none of the conventions link their application to the specifics of the navigation system onboard, nor are they particularly concerned with the presence of officers and/or crew onboard the vessel. They may contain provisions as to the obligations of the officers/crew,[19] or regarding the legal effect of human error committed by the crew,[20] but the presence of a crew is not a precondition for the application of the regulations as such. Further, even if some of the conventions apply to specific vessel-types, none of the conventions concern themselves with e.g. the extent of remote controlling or the autonomy of the navigation. In other words, at first glance, they seem technology neutral.

19 See Salvage Convention 1989, Art. 10 on the master's duty to render assistance.

20 See HVR Art. IV(2)(a), as mentioned under section 1.

Still, certain themes present themselves regarding the scope of application. First and foremost, most conventions require for their application that the claim is connected to the operation of specific constructs, namely "ships" or "vessels". The conventions dealing with contractual liability are not so focused on the specifications of the transport unit, but rather, on the definition of which contract, or indeed which type of document, they apply to. Additionally, a few conventions provide a different focus, and apply to specific persons/legal entities, whereas a specific decision-making process is finally requested by the YAR Rules 2016.

Therefore, depending on the regulation, we must ask the following questions:

1. Is the craft a 'vessel' or a 'ship', or even a particular type of vessel or ship,
2. Is the dispute governed by a contract for carriage of goods or persons at sea, or even a 'bill of lading',
3. Is the person or legal entity claiming the application of the rule named as an entity covered by the regulation, and/or
4. Is the action which has led to the dispute a result of a decision-making process as indicated in the regulation?

If the respective requirements are not satisfied, the maritime regulation may be out of scope and the dispute will have to be dealt with by the background law rules, providing a pitfall for the unified systems. In the following, these pitfalls will be dealt with in turn.

3 Pitfalls in the continued application of the unified maritime system

3.1 Remotely controlled or autonomously operating vessels – what are the challenges?

3.1.a Setting the scene

Before addressing the four pitfalls outlined above, we shall first briefly discuss the features of remotely controlled vessels (scenario 1) and autonomously operating vessels (scenario 2) in order to qualify the analysis below. These features will be taken into account below where relevant for the discussion.

3.1.b Vessels being remotely controlled at the time of the incident: Still within the carrier's scope of liability?

Looking first at scenario 1, if the crew, or a part of it, e.g. the bridge officers, are replaced by officers or other personnel remotely controlling the vessel from ashore, the risk of human error in the operation of the vessel is moved geographically away from the vessel. Also, new possibilities of technical malfunctions present themselves, connected with e.g. the transmissions of data and communications to and from the vessel's steering systems etc.,. The central questions in case the vessel involved in the incident is operated by a land-based crew are: 1) from which location is the incident *caused*, and 2) *by whom* is it caused? The answers to both questions have ramifications for the analysis of the application of the unified maritime convention system.

If the land-based crew is within the owner's company structure, the place of operations of the land-based crew will qualify as venue for lawsuit against the owner.[21] Provided the control center is situated outside the flag

[21] See e.g. Brussels Regulation 2012, Art. 7(5), Danish Code of Civil Procedure, § 237, German ZPO, § 21.

state, the seat of the remote-controlling branch would therefore provide for an additional venue. If, on the other hand, the task is outsourced to a third party by the owners, the entity operating the land-based crew will provide an *additional or alternative defendant*, both for claims in contract and also for claims in tort connected with the operation of the vessel.

The answer to the question of the continued application of the maritime conventions in the case of a (fully) remotely controlled vessel will largely depend on: 1) if there are reasons that the land-based crew should be considered differently from the other servants of the carrier, and 2) in the case of outsourcing, whether the entity operating the land-based crew itself qualifies as an entity to which the maritime regulations apply.

3.1.c Autonomous vessels / vessels operating in autonomous mode at the time of the incident: A shift towards product liability?

The new autonomous/AI-based technologies have been argued as reducing or removing the human element from the chain of causation, thereby reducing the risk involved in the activity of shipping. Realistically, though, rather than making shipping risk-free, the new technologies will mean a shift in potential human errors from the incident-stage to the production, retrofitting or maintenance stage. Human errors must still be expected to occur regarding e.g. the coding of the automated/autonomous AI software; the production of the hardware it uses; its interaction with other systems; its installation into the vessel, in case it is retrofitted; its maintenance, including running the updating of the system, or as regards when to use it, in cases where the vessel is not fully autonomous, but is set to autonomous mode at the time of the incident. Maritime incidents may therefore occur, not because the vessel was operated incorrectly, but because of an inherent risk in the vessel as such. Those risks are generally better dealt with under rules aimed specifically at dealing with such issues, i.e. the rules on product liability.

The delimitation between what is a question of product liability and what is a question of the liability of the owner under the maritime

regime is not a clear one, and certain facts may – dependent on the circumstances – be covered by both regulations. Still, guidance may be given by considering whether the fact in question is most naturally placed within the producer's sphere of liability or within the owner's/carrier's sphere of liability. Below, in *Fig. 4.*, a rough grouping of such risks has been attempted.

Fig. 4. Examples of errors/technical malfunctions, grouped according to whether they fall under the producer's or owner's/carrier's sphere of liability respectively.

Product liability / producer's sphere of liability	Potential overlap between spheres of liability	Shipowners'/Carriers' sphere of liability
Coding of the automated/AI software	Interaction with other systems	Maintenance of the systems (seaworthiness)
Production of the necessary hardware	Installation into the vessel	Using the systems (management and operation of the vessel)

The original coding of software and production of the hardware required to run it are tasks that – together with the construction of a vessel in general – fall outside the sphere of application of the maritime conventions, as such tasks, considering their nature, do not fall "…within the shipowner's ordinary course of business or area of expertise."[22] Maintenance of AI-systems already installed in the vessel, on the one hand, as well as the day-to-day use of such systems, on the other hand, both seem to fall squarely within the owner's obligation to uphold the seaworthiness of the vessel and to operate her correctly. The integration of the AI system with other systems onboard or ashore, as well as the physical installation of the system onboard in cases of retrofitting, may however provide for overlap where both the rules of product liability and the owner's obligation of seaworthiness may be triggered. In such cases, the claimant will

[22] T. Solvang, "Shipowners' vicarious liability under English and Norwegian law", MarIus No. 571, p. 38f and 45ff.

normally be entitled to decide which regulation to rely on. As rules on product liability are not unified,[23] this may result in an increased number of incidents being dealt with outside the maritime unified system and may therefore challenge the robustness of the maritime convention system.

3.2 Is a remotely controlled or autonomous waterborne device a 'vessel' or 'ship'?

3.2.a "Vessels" or "ships"

Having reviewed the above provisions, even if the application of most of the conventions requires the activity in question to be connected to a ship or a vessel, they are less specific on how such an entity should be defined. Apart from the CLC Convention 1992, definitions found in the conventions are de facto void of any real content. The lack of a meaningful definition in the conventions tallies with the approach of other maritime regulations. As put by Falkanger/Bull & Brautaset regarding the term 'ship': "*[t]he term has a relatively well-established meaning and legislators typically do not concern themselves with an exact definition*".[24] Rather, the question of whether an entity is a 'vessel' or a 'ship' would tend to be determined on a case by case basis, considering the scope of application of the rule in question and, in case of doubt, the purpose and underlying rationale of such rule. This is not only the case for Scandinavian law. For example, even if U.S. law formally contains a definition, the definition does not take the reader much further, as 1.U.S. Code § 3 simply states that "*[the] word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of*

[23] V. Ulfbeck, "Produktansvarsskade i transportretten", DJØF 2007, p. 17 & 107.

[24] Falkanger, Bull, Brautaset, "Scandinavian Maritime Law, The Norwegian Perspective," 4th ed., Universitetsforlaget 2017, p. 50. Some legislators do provide for a little more guidance. The Swedish maritime code 1994 § 1-2, sub-sec. 1, laconically provides that if the vessel is not at least 24 meters long it is not a ship. It is a boat.

transportation on water".[25] Consequently, we must resort to general considerations of what is a ship/vessel, and some rules of thumb have indeed been established in practice and literature: 1) The device must be hollow (or at least able to float) and designed to move on or through water; and 2) The device must not be too insignificant. [26]

The question remains, however, if for our purpose it is possible to be somewhat more exact. As shown above, several of the conventions tie their application to whether the device in question is registered in the ships' register in a contracting state. One might therefore expect to find some guidance there on the definition of a ship or vessel. However, even such rules are limited in their definitions – and in any case will vary according to the flag state in question.

Using Scandinavian law as an example: Under Norwegian law, a ship must be registered if it is more than 15 meters long and may be registered if it is more than 7 meters long, see the Norwegian Maritime Code 1994, § 15, sub-sec. 2. Under Danish law the requirement is that the ship is more than 20 GRT, whereas a ship *may* be registered if it is more than 5 GRT, see the Danish Maritime Code 1994 § 10, sub-sec. 1 and sub-sec. 2. Finally, the Swedish Maritime Code 1994 § 1-2, sub-sec.1, cf. § 2-1, sub-sec. 1, requires that ships are registered if they are over 24 m in length.[27] In the same vein, under UK law, the Merchant Shipping Act 1995 does not concern itself with what is a vessel, but with what is a British and/or registrable vessel.[28] In this way, the focus in these rules is not on "what is a ship/vessel", but rather, on which sub-group of ships or vessels it is appropriate to register in the ships register. Consequently, the require-

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25 US Code, Title 1, Chapter 1, § 3. Chwedczuck puts it this way: *"U.S. law is relatively clear about the bare minimum needed to qualify as a vessel: it must be reasonably capable of transportation on water."* M. Chwedczuck, "Analysis of the Legal Status of Unmanned Commercial Vessels in U.S. Admiralty and Maritime Law", Journal of Maritime Law & Commerce, Vol. 47, No.2. April 2016, p. 123-169, on p. 130.

26 Falkanger, Bull, Brautaset, "Scandinavian Maritime Law, The Norwegian Perspective," 4th ed., Universitetsforlaget, 2017, p. 50; N. Krause, "Praxishandbuch Shiffsregister", de Gruyter, 2012, p. 4.

27 The Swedish Maritime Code § 1-2, sub-sec. 1, laconically continues to provide that if the vessel is not at least 24 meters long it is no longer a ship. It is a boat.

28 Merchant Shipping Act 1995, Chapter 21, sec. 1 and 2.

ments for registration presume an underlying understanding of what is a ship/vessel and therefore do not alleviate the lack of definitive criteria displayed in the convention texts and background law. Neither do they provide much assistance in determining whether a remotely controlled or autonomous vessel/ship will still be covered by the convention system.

Still, despite the vagueness in language, the private law maritime conventions do display common denominators. Firstly, as mentioned above, none of the conventions connect the concept of a ship or vessel to whether the construct has a crew onboard. Second, the definition of 'ship' or 'vessel' do not contain a requirement for either a specific structure in the decision-making process or a maximum level of technological advancement. Therefore, this writer suggests that the prima facie assumption should be that if the construction looks like a ship/vessel, it is a ship/vessel in the meaning of the maritime conventions – including if it is remotely controlled or autonomously operating.

The notion that unmanned/autonomous vessels do not challenge the term 'ship' or 'vessel' is shared by e.g. Chwedczuck and van Hooydonk; Chwedczuck concluding that it would be "*…safe to assume that there will be no dispute in courts about their vessel status under the law*[,]"[29] and van Hooydonk saying somewhat more cautiously that "*…it would appear that the existing conventions … would in principle continue to be functional in respect of these craft.*"[30] Indeed, it is hard to find reasons to negate this assumption. A purposive interpretation of the maritime convention system does not seem to indicate any real legal considerations that should entail the use of autonomous navigational systems or remotely controlled navigation putting a device outside the scope of the term ship/vessel, provided the device is "*…intended for, and capable of moving on or through water.*"[31] As put by Maraist, et al, with reference to the position under US (case) law: "*The essential judicial guideline is that the*

[29] Ibid. p. 131.

[30] E. van Hooydonk, "The Law of Unmanned Merchant Shipping", Journal of International Maritime Law (2014) 20 JIML, p. 403-423, on p. 409.

[31] Falkanger, Bull, Brautaset, "Scandinavian Maritime Law, The Norwegian Perspective," 4th ed., Universitetsforlaget 2017, p. 50.

determination of vessel status depends upon 'the purpose for which the craft was constructed, and the business in which it is engaged'."[32] For this writer, autonomous or remotely controlled navigation does not change the purpose of the device – as long as that device was originally intended for traditional maritime activities. This writer therefore concurs with the assessment that the ship/vessel criterion in the maritime convention system is not challenged by the use of remotely controlled (scenario 1) or autonomously operating ships (scenario 2).

3.2.b Other property at sea: ROVs, AUVs and drones

Turning our gaze away from the more traditional trades of transport of goods and passengers, the emerging technologies do provide for new possibilities at the small end of the spectrum: We already have remotely operated vehicles (ROVs), as well as autonomous underwater vehicles (AUVs) which are too small to qualify as vessels under e.g., the rules on registration of vessels or ships, being used in connection with e.g. mapping or the seabed, maintenance of pipelines or other underwater investigations, including participation in salvage operations. Nonetheless, the units are normally deployed from a vessel, and would be appurtenances of the (mother-) vessel. The ship or vessel criterion will therefore be satisfied if the criterion is satisfied as regards the mother-vessel.

ROVs, AUVs and underwater drones in general may also qualify independently under the conventions. As may be seen from *Fig. 3.,* the Salvage Convention 1989 and the YAR Rules 2006 on general average aim at ensuring that *property* at risk of being lost at sea is salvaged and that the cost of doing so is split between parties sharing the same peril. ROVs and AUVs etc. may be salvaged in their own right, irrespectively of whether they are connected with a mother-vessel. As mentioned above, several of the maritime conventions base their application on whether or not the device in question is registered in the ships' register of a contracting state. If the ROV or AUV is too small to satisfy the flag state require-

[32] Maraist, Calligan, Maraist & Sutherland, Cases and Materials on Maritime Law, 3rd ed., West Academic Publishers, 2016, p. 41f.

ments for size, it will therefore be outside the scope of those conventions. Still, aside from that, if the unit is large enough to *independently* carry goods or passengers against payment on an international voyage,[33] or to successfully engage in salvage operations, one should expect that it may be designated as a ship or vessel – even if not a registrable one. Indeed, when giving examples of what is too small to be a ship, Falkanger/Bull & Brautaset suggests rowing boats or kayaks.[34] It follows that also in this regard there does not seem to be any basis for outright rejecting the application of the maritime convention system. Instead, the application of the conventions must be individually assessed, based on the concrete criteria of the case. In this evaluation it is suggested that it is the size of the device and its use in the given situation which should be seen as central, rather than the level of autonomy or remote controlling applied in its navigation.

3.3 Is the dispute governed by a contract for carriage of goods or persons at sea, or even a 'bill of lading'?

3.3.a Ensuring the efficiency of the statutory transport liability

The application of the maritime conventions on contractual liability presupposes that it may at least be argued that a certain type of contract of carriage has been concluded. Using the Hague Visby Rules 1968 (HVR 1968) as an example, the rules will apply, if the bill of lading is issued in a contracting state, provided the goods are carried from a port in a contracting state, or the bill of lading contains a Clause Paramount, see

[33] Maersk has experimented with having air-drones delivering small packages to vessels (in the case cited: biscuits). See e.g. https://www.marineinsight.com/videos/drone-delivers-cookies-to-maersk-tanker/ (accessed 01.04.2022). or https://www.soefart.dk/article/view/272753/maersk_tankers_lofter_forste_test_af_droneleverancer_i_kalundborg_fjord (accessed 01.04.2022).

[34] Falkanger, Bull, Brautaset, "Scandinavian Maritime Law, The Norwegian Perspective", 4th ed., Universitetsforlaget 2017, p. 51.

HVR Art. X.[35] As such, the scope of application of the HVR 1968 is wide and does seem able to encompass both scenarios 1 and 2, rendering the owners' protection under the unified system intact, as long as at least a part of the carriage may be seen as being carried out by a ship/vessel used for the carriage of goods, and the contract contains a sea-leg.

To be efficient, however, the existing system must ensure that the convention-based rules are not circumvented, e.g. by the claimant suing the owner in tort, or suing an entity other than the owner, towards whom the owner is liable in recourse, thereby causing the de facto circumvention of the owner's contractual or statutory protection. This is not a novel problem, and the conventions offer some protection against this, either by indicating that no claim may be made apart from under the rules of the convention,[36] or alternatively by providing that if a claim is made in tort, the protective rules on limitation of liability etc. will still apply, both to claims against the carrier[37] and to claims against the carrier's 'servants' or 'agents', in cases where those entities are sued directly.[38] In the following, HVR Art. IV bis will be used as an example.

> **Hague Visby Rules Article IV bis *in extract***
> 1. The defences and limits of liability provided for in these Rules shall apply to any action against the carrier in respect of loss or damage to goods covered by a contract of carriage, whether the action be founded in contract or in tort.
> 2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules. […]

Looking at scenario 1, the remote controlling of the vessel performs a service directly linked to the performance of the contract of carriage,

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35 HVR 1958, Art. X. See above, section 2.3.

36 Athens Convention 2002, Art. 14.

37 HVR 1968, Art. IV bis (1); Hamburg Rules 1978, Art. 7(1).

38 HVR 1968, Art. IV bis (2); Hamburg Rules 1978, Art. 7(3); Athens Convention 2002, Art. 11.

indicating as a starting point that those provisions in the conventions should continue to be applicable. Certainly, if the entity performing the remote control is still a part of the owner's company structure, the fact that the service is rendered from ashore does not, to this writer, provide any rationale for a different approach. However, the provision indicates that the protection from circumvention of the convention by direct action in tort only applies to servants and agents, and not to independent contractors. It follows that if the navigation has been outsourced to an entity outside the owner's company structure, such independent contractor could in principle be left without the protection otherwise offered by HVR Art. IV bis (2). To this writer, the navigation of the vessel is such a fundamental part of the carrier's obligation towards the cargo interest that it would require very specific wording in the parties' contract to indicate that the entity navigating the vessel during the performance of the contract is not doing so on behalf of the carrier – as his/her servant or agent. This is also the starting point of the Danish and Norwegian Maritime Codes sec. 285(1) which indicate that the carrier is liable for the whole carriage even if the carrier has outsourced the journey or a part thereof to a sub-carrier. It follows further from sec. 285(2), that it would require specific wording in the contract indicating both the named sub-carrier and the part of the voyage carried out by same sub-carrier, for the Carrier to contractually exclude liability for incidents occurring while the goods are in the custody of the sub-carrier. Considering these strict criteria for outsourcing the liability for the carriage or part of it in its entirety, it must reasonably be assumed that the possibility for outsourcing the liability for the navigation itself is even narrower. From the contractor's point of view, this entails the advantage that the protection of the Hague Visby Rules would still apply to it. However, the wording does allow for independent contractors to be excluded from the protection of Art. IV bis (2), and the issue awaits settlement in case law.[39]

[39] The definition of who is the carrier and who is the sub-carrier and the legal issues connected with this is not finally settled in the HVR but must be decided taking into consideration as well the relevant rules of maritime and contract law in the applicable law. See further on these issues in Scandinavian law T. Falkanger in MarIus 502, SIMPLY 2017, p. 87-102.

3.3.b Ensuring or extending the protection of the maritime unified systems by contractual provisions

In addition to the protection provided by the conventions, carriers will often insert provisions into their standard conditions of carriage in order to maintain or strengthen the protection of the carrier and his/her servants/agents. In contracts of carriage of goods, the problem is normally solved by inserting both a Clause Paramount and a Himalaya Clause in the Bill of Lading. The Clause Paramount will direct any claim to be settled by the Hague Rules 1924[40] or Hague Visby Rules 1968.[41] The primary purpose of the Himalaya Clause, on the other hand, is – similarly to the above – to ensure that none of the carrier's 'servants' are sued due to the performance of the carrier's contract with the cargo owner/merchant,[42] and – if such 'servants' are sued nonetheless – to ensure that they are encompassed by the same bases, exclusions, and limits of liability as are offered to the carrier under the contract.[43] In the following it will be investigated whether those clauses are still appropriate when confronted with the novel technologies here discussed.

The latest standard version of the Himalaya Clause is from 2014, and defines the carrier's 'servants' in the widest possible terms to include realistically any direct or indirect contract helpers of which the carrier may have availed itself:

> **International Group of P&I Clubs Himalaya Clause 2014 *in extract***
>
> (a) For the purposes of this contract, the term "Servant" shall include the owners, managers, and operators of vessels (other than the Carrier); underlying carriers; stevedores and terminal operators; and any direct or indirect servant, agent, or subcontractor (including their own subcontractors), or any other party employed

40 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924, and International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1968.

41 See Conlinebill Cl. 3(a), Congenbill 2016, Cl. 2, 2nd sentence.

42 See International Group of P&I Clubs Himalaya Clause 2014, litra b.

43 International P&I Club Himalaya Clause 2014, litra c.

> by or on behalf of the Carrier, *or whose services or equipment have been used to perform this contract whether in direct contractual privity with the Carrier or not.* [My emphasis].

Looking at the wording of the clause, it will certainly cover a company or entity, remotely navigating or otherwise controlling the vessel (scenario 1). Such an entity might not be considered a "manager" or an "operator" in the traditional sense, as those terms have often been used to describe the technical or mercantile operation of the vessel in general, rather than the specific act of navigating/actually controlling it. Still, the addition of "*… any direct or indirect servant … or subcontractor …*" to the clause indicates that the clause does not limit itself to any specific type of servant or subcontractor. The clause must therefore also be expected to be effective in cases where the owner/carrier has outsources the navigation of the vessel to a land-based entity, remotely controlling the vessel. If a court were to find that the entity operating the land-based crew is not directly covered by the HVR 1968, Art IV bis (2), the operator might be able to claim the protection of the Himalaya Clause instead.

Turning to the last sentence of the Himalaya Clause, litra a, it is noteworthy that it extends the scope of the clause to cover also entities "… whose services or equipment…" are used by the carrier to perform the contract with the cargo owner/merchant. This applies even if the party providing the service or equipment is not in a contractual relationship with the carrier. Coding for AI-based autonomous vessels or autonomous devices integrated in the vessel (scenario 2), for which the producer may be liable on the basis of product liability or similar rules, could be covered by such wording. This is especially apt in cases of the running maintenance of such systems and may also be relevant in case of partial retrofitting. Seemingly, we still await specific case law on this issue, however it would be in keeping with the underlying principle expressed by the House of Lords in the Muncaster Castle[44] to include such service

[44] (1961) 1 Lloyd's Law Reports 57. In the case, the error of a shipyard during repairs caused the cargo to be damaged. The carrier was considered liable for the damage as towards the cargo interest.

to the vessel in the carrier's sphere of liability and, consequently, include the provider of such service within the protection offered by the Himalaya Clause. Still, the Himalaya Clause has its limitations, and the emphasis in the clause that the servant in question should assist the carrier in performing "*… this contract …*" would indicate that a 'servant' providing services that are disconnected from the everyday running of the vessel, such as the original design and development of an AI-system, is not covered by the clause.

Himalaya Clauses may of course be worded differently from the above example, which may lead to a different analysis.[45] Furthermore, the underlying rules on privity of contract in the applicable law may curb its application.[46] The Himalaya Clause will therefore give rise to different considerations in different jurisdictions and is rather frequently subject to challenge as to its scope and proper application in a given case.[47] Therefore, no wholesale analysis may be provided here. However, in keeping with what is stated above under section 3.1.c, it is suggested that here too, the point of analysis should be whether the act or omission giving rise to the claim must be considered to fall within the carrier's ordinary cause of business.[48]

[45] See for an overview of examples, N. Gaskell et all, Bills of Lading: Law and Contracts, Routledge 2014, p. 383 ff.

[46] For a comparative view see B. Zeller, "Himalaya v. Privity: Protecting Third Parties to Shipping Contracts, (2017) 20 International Trade and Business Law Review, 33-175.

[47] See further on this issue for an English perspective: N. Gaskell et all, Bills of Lading: Law and Contracts, Routledge 2014, p. 392 ff. For a US law-based perspective see e.g., M. Stando, "Clause for Concern? The Flawed Expansion of the Himalaya Clause and the Rise of the Circular Indemnity Clause in the United States", Tulane Maritime Law Journal 44, No. 2 (2020), 323-344, on p. 325 ff.

[48] See e.g T. Solvang, "Shipowners' vicarious liability under English and Norwegian law", MarIus No. 571, p. 38.

3.4 Is the person or legal entity claiming the application of the rule named as an entity covered by the regulation?

It has been pointed out in section 2.2 above that the main criterion for the application of the LLMC 1976 on limitation of maritime claims[49] is whether owners, charterers, managers, and operators of seagoing vessels, or salvors, wish to limit their liability, see Art. 1(1) and 1(2). Neither the navigational aids nor the process or company structure in which the operation of the vessel or decision-making processes are carried out seem particularly relevant, provided that 'a seagoing vessel' is involved in the situation at hand and the entity claiming is e.g. an operator of the vessel. Art. 1(4) of the convention extends the right to limitation to *"[…] any person for whose act, neglect or default the shipowner or salvor is responsible […]"*. Considering scenario 1, remotely controlled, land-based navigation is still done in the service of the seagoing vessel, and therefore from the outset is within the owner's sphere of liability.[50] If, on the other hand, the owner has outsourced the land-based crewing of the ship to an independent contractor, such entity might fall short of being a "[…] person for whose act […] the shipowner […] is responsible". In that case, arguably, the independent contractor might also fall short of being a manager or operator under Art. 1(2), as the overall economic and managerial responsibility that one would assume rest on such entities might not be present. Likewise, under scenario 2, the wording of Art. 1(2) would exclude e.g. a producer causing damage when erroneously coding the AI inbuilt in the vessel from the scope of application of the convention. Conversely, liability arising from the owner's inhouse IT-services/coding forms part of the general running and maintenance of the vessel, for which the owner is responsible – and thus within his right to limit under the LLMC 1976.

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49 Convention on Limitation of Liability for Maritime Claims 1976 with protocol of 1996.

50 See e.g., the Danish and Norwegian Maritime Code sec. 151.

3.5 Is the action which has led to the dispute a result of a decision-making process as indicated in the regulation?

It has been stated repeatedly above that the maritime convention system does not seem to concern itself much with company structures, outsourcing, or decision-making processes. As a caveat, therefore, it is only fitting to finish the discussion of the pitfalls of the unified maritime and transport regulations with some considerations regarding the York Antwerp Rules on general average Rule A(1). According to the provision, "[t]here is a general average act when, and only when, any extraordinary sacrifice or expenditure is *intentionally and reasonably* made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."[51] The provision does not seem to pose particular challenges with regard to remotely controlled vessels (scenario 1). Both intentional and reasonable decisions may be made from a distance. Also, it seems conceivable that an autonomous vessel may be coded so that it may evaluate potential outcomes and their negative economic impact and act accordingly. Thus, an autonomous vessel may well act 'reasonably' within the meaning of the provision. Still, the rule presupposes that a decision-making process is involved,[52] and even a fully autonomous vessel which e.g. beaches itself to avoid sinking, may hardly be seen to have done so 'intentionally'. Future owners of fully autonomous vessels should therefore ensure a fail-safe function, so that the vessel demands a confirmation form ashore before it performs a general average act. If this is done, the unified system of general average would seem to remain intact.

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51 My emphasis.

52 Falkanger, Bull, Brautaset, Scandinavian Maritime Law, The Norwegian Perspective, 4th ed., Universitetsforlaget 2017, p. 595.

4 Conclusions on the robustness of the maritime convention-based system towards new technological developments

Summing up the above discussions, it must be concluded that the existing unified system of maritime conventions seems robust and ought to be able to withstand the current development in new technologies. Essentially, the conventions have been drafted to be largely technology-neutral and this now serves them well. The new technologies may be disruptive regarding other parts of the relevant legal framework, but they leave the application of the current convention-based private law liability regime largely unscathed. In other words: this part of the law is not a barrier to further technological advancement.

Admittedly, new parties entering the scene, such as entities to whom land-based crew may be outsourced (scenario 1), do affect the legal analysis. They may challenge the application of certain rules and they enable the use of the venue or law of the jurisdiction in which they are placed, in particular if met with a direct claim under tort law rules. Likewise, the shift to higher levels of automation and ultimately to fully autonomous systems (scenario 2) will probably cause a shift towards a greater focus on the producer of the vessels and the AI-systems in question. The underlying analysis is not novel as such, but until the grey zones have been ironed out by firm case law, the unified system may experience a certain level of flux.

Still, it should be remembered that large parts of the unified maritime liability regime have survived the conversion from sails to fuel and from sextants to GPS. Seen in that light, the new technologies are not so daunting. Indeed, it seems that any difficulties in the continued application of the maritime convention system would probably be due to changing actors and business models caused by increased specialization and outsourcing, rather than to the technological developments in themselves. So, taking a helicopter view of the maritime convention system, this writer must conclude that the system as such seems rather

robust. Future case law will indicate whether this point of view stands to be corrected.

The role of navigation assessment and prediction in solving equivocal crossings in or at the entrance of narrow channels in light of The Alexandra I decision[1]

Ayoub Tailoussane[2]

[1] The Alexandra I, [2017] 1 Lloyd's Rep. 666 (Adm.), [2019] 1 Lloyd's Rep. 119 (CA), [2021] 1 Lloyd's Rep 299 (UKSC) & [2022] 1 Lloyd's Rep. Plus 56 (Adm.).

[2] Phd-candidate, Scandinavian Institute of Maritime Law, University of Oslo

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1 Introduction

Collision avoidance between vessels at sea is governed by the Convention on the International Regulations for Preventing Collisions at Sea of 1972, in force since July 1977 and better known as the COLREGS. Ratified by more than 160 member states,[3] and representing over 99% of the world's tonnage,[4] the COLREGS are almost universally applicable. They comprise a number of rules, some of which deal with very specific situations and apply under specific conditions. For instance, vessels following the course of a narrow channel are required by rule 9(a) to "*keep as near to the outer limit of the channel or fairway which lies on [their] starboard side as is safe and practicable*". When two power-driven vessels are within sight of each other, the rules of Part B – Section II (rules 11-18) apply, and the vessels must make an assessment of the situation in order to determine the nature of the encounter between them. If the vessels are approaching one another on reciprocal or quasi-reciprocal courses, the situation is described as a head-on encounter and might call for the application of rule 14. Overtaking encounters involve scenarios where one vessel is approaching another from the rear, or as described by rule 13 from an angle that is wider than 22.5 degrees abaft the beam. Rule 15 is reserved for encounters which fall into neither of the first two categories. The vessels are then said to be crossing.

Each of these rules will guide the behaviour of vessels, through a series of obligations, with the purpose being to prevent collisions. However, for the rules to achieve their potential, they must be applied appropriately by all vessels involved. After all, the duties under each of these rules are different, and the difference can be stark in some cases. It is undeniably dangerous for vessels to either apply the wrong rules, or apply the right rules at the wrong time. Vessels must therefore be mindful of the pre-

[3] Information on ratification collected from the IMO's reports on the status of conventions which can be consulted here: https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx; last visited 24 April 2022.

[4] Craig H. Allen Sr. and Craig H. Allen Jr., *Farewell's Rules of the Nautical Road*, 9th edition, 2020, p. 10.

vailing circumstances in their assessments and decision-making. This often requires not only being cognizant of the immediate environment, but also understanding what other vessels are doing, in order to determine in turn what your own vessel is required to do. In the words of the UK supreme court, *"the rules need to be applied by reference to what reasonably appears to those navigating one vessel to be being done on the other vessel"*.[5] However, predicting the navigation of other vessels is not straightforward. Circumstances can make it challenging, and two vessels may reach two different conclusions regarding the applicable rules as their respective assessments of the situation can themselves be different. Encounters between vessels leaving a narrow channel ("outbound vessels") and vessels approaching the entrance of the same channel ("approaching vessels") offer such a challenge.

Not all vessels approaching a narrow channel are intending to enter it. Vessels may be heading towards a destination which takes them across and in front of the entrance of a narrow channel but does not require them to enter it. A vessel may have the intention of entering a narrow channel, but not immediately upon reaching the entrance. A vessel entering a narrow channel and a vessel simply passing by will not behave in the same way. Outbound vessels need to distinguish between the former and the latter in order to know how to act appropriately to avoid a collision.

This problem is equally not unknown for encounters which take place within narrow channels. Even there, a vessel might not be intending to follow the course of the narrow channel. In certain circumstances, a vessel might be intending to cross from one side of the channel to the other. Different reasons might justify such actions. The vessel could be proceeding towards a wharf, or the destination might be a pier or a port which lies on the other side. Near areas where a narrow channel curves, vessels might also appear to be crossing. The vessels could actually be crossing, or they might instead just be rounding the bend while following the course of the channel. Determining which situation is which relies on making predictions of the future movements of each vessel, based on

5 The Alexandra I, [2021] 1 Lloyd's Rep 299, para 104.

contemporaneous factors. But until a certain point is reached, it might be difficult for a vessel to make that determination and the nature of the encounter may remain uncertain. The expression 'equivocal encounter' is thus used in this article to describe those situations where the prevailing circumstances may point towards two or more plausible courses which the navigation of a specific vessel can take. Equivocal encounters become particularly dangerous when the determining point, i.e. when the navigation of a vessel becomes clear, might come relatively late and only at a short distance away. In some areas, this risk is much more prominent, with narrow channels representing one of them.

In a recent collision case,[6] the UK supreme court was confronted with a collision incident that involved the type of uncertainty discussed above. An outbound vessel, the Ever Smart, was leaving a narrow channel at the same time as another vessel, the Alexandra I, was situated outside, but near to, the entrance. The Alexandra I was in the pilot boarding area waiting to get a pilot on board. During the 27 minutes preceding the collision, the Alexandra I was bearing on the port bow of the Ever Smart and was slowly moving, or, as described by the courts, drifting, on a general course that seemed to be crossing the course of the Ever Smart. From the point of view of the Ever Smart, the Alexandra I would thus have been seen on the port bow slowly moving in a direction which, if followed without change, would have taken her across and ahead of the Ever Smart's bow from port to starboard. Hence, the Ever Smart considered this to be a crossing encounter. The Alexandra I, however, was waiting for a pilot in order to enter the narrow channel, with no intention of crossing ahead of the Ever Smart. In her view, this was an encounter between one vessel entering and one leaving the same narrow channel, which called for the application of rule 9(a) only. This was therefore a case of equivocal crossing, where there was disagreement as to whether the vessel outside the entrance was crossing or entering the narrow channel.

This article focuses on the UK supreme court's methodology, as applied in The Alexandra I case, for assessing and predicting the navigation of a vessel as a precursor and necessary step for the proper

6 The Alexandra I, [2021] 1 Lloyd's Rep 299.

application of the rules. The decisions rendered by the English courts in The Alexandra I case seem to be predicated on exactly this premise: vessels involved in an equivocal crossing in or near the entrances of narrow channels need to determine whether they are actually crossing or just appear to be crossing. If they only appear to be crossing, for instance because one vessel is leaving a narrow channel and another is entering it, rule 9(a) will govern the encounter, while rule 15 can be dis-applied (*infra,* chapter 2). To make a distinction between when the situation might call for one rule or the other, the UK supreme court sought to clarify how one can assess and predict the navigation of an observed vessel that is approaching the entrance of a narrow channel. Taking an analytical look at this decision, I argue that the espoused assessment methodology relies principally on factors which can be detected, recognized and understood by an observing vessel without the need to be in privity to the particular intentions of the seafarers on board the observed target vessel (*infra,* chapter 3). However, the methodology followed in this decision does not in my opinion necessarily lessen the difficulty which vessels have to contend with in assessing the navigation of vessels encountered in or near narrow channels. In fact, an observing vessel may reach different, but equally plausible conclusions about the navigation of an observed target vessel, by following the very same approach as the UK supreme court. Confining our analysis to the case of equivocal crossings within or near narrow channels, we will consider examples of this problem in chapter 4. To mitigate the problem, however, this article proposes that the need for selecting between rule 15, the crossing rule, and rule 9, the narrow channel rule, might not be necessary (*infra,* chapter 5). The duties under both rules seem to be compatible, such as to make it possible for them to be applied concurrently in narrow channels or at their entrances. A concurrent application would circumvent the problems that arise when two vessels take contradictory actions because they have reached different conclusions about which rules are applicable after assessing the situation differently from one another.

This article is therefore an exploration of the UK supreme court's approach to the assessment and prediction of other vessels' navigations,

and a critical analysis of its usefulness for solving equivocal crossings in or near the entrances of narrow channels.

2 A closer look at The Alexandra I collision and the tension between the narrow channel rule and the crossing rule:

While we have established that different situations are governed by different parts of the COLREGS, it has yet not been clarified why the English courts needed to make a decision between the narrow channel rule and the crossing rule in this case. We must understand first and foremost the primary duties that stem respectively from each of the two aforementioned rules (*infra*, 2.1 & 2.2), before we take a look at the treatment The Alexandra I case received in each of the admiralty, appellate and supreme court (*infra*, 2.3).

2.1 Narrow channels and the keep-to-starboard requirement:

Narrow channels and fairways constrain the navigation of vessels by offering less space to manoeuvre and bringing vessels in closer proximity than what is usually desirable for safe navigation.[7] Shorter distances between vessels and the higher probability of denser traffic reduces the time available for vessels to assess situations and take appropriate actions. Moreover, the 'narrow' width of such channels, coupled with the often limited water depth, leaves vessels with fewer possibilities for course alterations, not forgetting that the effects of hydrodynamic interactions both between vessels, as well as between vessels and the physical characteristics of the channel, such as banks, can create an added layer

[7] Craig H. Allen Sr. & Jr., *Farewell's Rules of the Nautical Road*, p. 227.

of complexity and danger to navigation.[8] All of these factors contribute to an increase in the risk of collision.[9]

By way of organizing the flow of traffic, rule 9(a) of the COLREGS regulates the navigation of vessels in stretches of water where navigation is restricted by boundaries on each side, in order to mitigate the risk of collision.[10] In principle, the rule has the effect of dividing any such bordered stretches of water, which can qualify as a narrow channel or fairway, into two distinct lanes.[11] In each lane, vessel traffic is supposed to flow in a single direction only. The organization and direction of traffic in this way aims to mitigate or even eliminate, in theory at least, the risk of collision between vessels that are following the course of the narrow channel, but in opposite directions. Provided they remain in their respective lanes, the chances of vessels meeting end-on, i.e. on reciprocal or nearly reciprocal courses, are significantly reduced.[12]

The main duty of vessels navigating in narrow channels is thus fairly clear and straightforward. Rule 9(a) dictates that any "*vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lies on her starboard side as is*

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[8] Nicholas J. Healy, Joseph C. Sweeney, *The Law of Marine Collision,* (Centreville, Maryland: Press, Inc., 1998), 145-146.

[9] Craig H. Allen Sr. & Jr., *Farewell's Rules of the Nautical Road*, p. 227.

[10] The problem of defining what is a narrow channel is a complex one that deserves to be treated separately. Thus, it is not considered here.

[11] Certain channels or fairways are too narrow to accommodate bi-directional navigation. The flow of vessels in these areas will usually be restricted to a single direction. In certain cases, the question of whether navigation within the waterway is open to vessels proceeding in both directions may depend on the size and characteristics of the vessels transiting through the area. When required by the circumstances, both-ways traffic can be halted and the channel can be momentarily converted into a one-way waterway to allow vessels above a certain size to navigate safely. See Craig H. Allen, "Taking Narrow Channel Collision Prevention Seriously To More Effectively Manage Marine Transportation System Risk," *Journal of Maritime Law & Commerce* Vol. 41, No. 1 (2010): 6. Although also subject to a Traffic Separation Scheme, the Strait of Istanbul is a good example of such an organization. *See* Ece J.N, Sözen A, Akten N, Erol S, "The Strait of Istanbul: A Tricky Conduit for Safe Navigation," *European Journal of Navigation*, 5, 1 (2007): 46-55.

[12] Craig H. Allen, "Taking Narrow Channel Collision Prevention Seriously To More Effectively Manage Marine Transportation System Risk", *Journal of Maritime Law & Commerce* Vol. 41, No. 1 (2010): 30.

safe and practicable". In other words, vessels following the natural course of the narrow channel are required to keep to the starboard side. By remaining on their respective starboard side, a safe port-to-port passing is ensured with vessels proceeding in opposite directions. Moreover, by specifying that vessels should remain as close as possible to the outer edge of the narrow channel, the rule also aims to increase the passing distance between vessels. For the sake of simplicity and clarity, we shall borrow the appellation used by Craig H. Allen and refer to this obligation as the "keep-to-starboard" requirement.[13]

In The Canberra Star,[14] a decision of the English admiralty court, the keep-to-starboard requirement was applied so as to also affect the navigation of vessels that were entering a narrow channel. These vessels were said to have a duty to enter the narrow channel in such a manner so as to ensure that they find themselves on the starboard side of it upon entering[15] (Fig. 1). The idea is that a vessel which is entering a narrow channel that lies on her starboard side ("inbound vessel") would be able to pass safely port-to-port with any vessel which is leaving that same narrow channel ("outbound vessel"). The keep-to-starboard requirement is thus a concern for more than just those vessels which are within the confines of a narrow channel. The duty also affects the navigation of inbound vessels as they enter into the channel. Such extension[16] of the application of rule 9(a) to inbound vessels holds true at the very least as

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13 Craig H. Allen, "Narrow Channel Collision Prevention," 18.

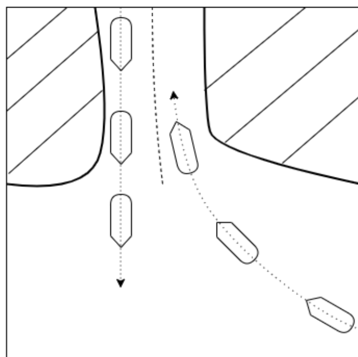
14 The Canberra Star, [1962] 1 Ll. Rep. 24.

15 The Canberra Star, [1962] 1 Ll. Rep. 24, 28 col. 2

16 In my opinion, a strict interpretation of the words in rule 9(a), or rule 9 in general, does not point towards the application of its provisions outside the narrow channel. This brings to the forefront an interesting discussion on the scope of application of rule 9(a) and the reasoning behind its extension to vessels which have not yet entered, but are in the course of entering. We will not discuss this point further in this article, but I would point out that the case law appears to indicate that compliance with rule 9(a) is a matter of good seamanship. See The Canberra Star, [1962] 1 Ll. Rep. 24, p. 28 col. 2; A. N. Cockcroft and J. N. F. Lameijer, A guide to the Collision Avoidance, 49. However, this solution does not really offer a good solution to encounters between outbound and inbound vessels when the latter is approaching an entrance which is on her port side. This was also pointed out by the UK supreme court in The Alexandra I. See The Alexandra I (SC), [2021] 1 Lloyd's Rep 299, para 144.

long as the entrance of the narrow channel lies on the starboard side of the said inbound vessels (Fig. 1). This therefore explains the position of the vessel Alexandra I. She intended to enter the narrow channel, and therefore in her view she was bound by rule 9(a) to keep-to-starboard, in the same vein as the Ever Smart which was leaving it. From this point of view, it may appear reasonable to hold the Ever Smart at fault after it was established that she was staying in the middle of the narrow channel and not keeping-to-starboard from at the very least 11 minutes before the collision. This view satisfied the admiralty court and the court of appeal, but failed to convince the UK supreme court as we shall see (*infra*, 2.3).

Fig. 1. Vessel entering the narrow channel while keeping to starboard



2.2 The crossing rule and the give-way/stand-on dichotomy:

Under rule 15, "*[w]hen two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way*". The vessel "which has the other on her own starboard side" is referred to as the give-way vessel. The give-way vessel has an active role in avoiding a collision, as she must take positive action in order to keep out of the way of the other vessel, i.e. the stand-on vessel. The duties of the give-way and stand-on vessels are governed

respectively by rules 16 and 17.[17] Rule 16 directs the give-way vessel to, "as far as possible, take early and substantial action to keep well clear", while the main duty under rule 17, found in paragraph (a)(i), requires the other vessel to "keep her course and speed."

Since the vessel Alexandra I had the Ever Smart on her starboard bow, the Ever Smart contended that this was simply and purely a crossing encounter which called for the application of rules 15, 16 and 17 above. In other words, it was the Alexandra I's duty to keep out of the way and in failing to do so, she was at fault for the collision. The UK supreme court agreed that indeed the crossing rule, rule 15, ought to have applied, instead of the keep-to-starboard requirement, rule 9(a).

2.3 The English courts divergent conclusions about the navigation of the vessel Alexandra I:

The two vessels could not agree on which rule governed, the collision took place and the courts had to determine if the situation called for the application of the narrow channel rule or the crossing rule. Application of both rules concurrently seemed to be out of the question as far as the admiralty court and the court of appeal were concerned. This possibility will be discussed later on (*infra*, chapter 5). For now, we will take a summary look at the position of the admiralty and appellate courts and contrast it with the decision of the UK supreme court, as that will pave the way towards discussing the UK supreme court's approach to assessing situations involving an encounter between an outbound vessel and a vessel approaching the entrance of a narrow channel.

One of the determining factors in the decisions of the admiralty court and the court of appeal was that the vessel Alexandra I was considered and treated as a vessel entering the narrow channel. This was held to be the case, despite the fact that she could not enter as a pilot had not yet boarded. But with that determination being made, the decision of the two courts was then a simple application of the principle introduced earlier

[17] Other rules also remain applicable, such as those found in Part B Section I of the COLREGS.

in The Canberra Star (*supra*, 2.1): The keep-to-starboard requirement should have been enough to ensure a safe port-to-port passing between the two inbound and outbound vessels. The court of appeal therefore concluded that *"[t]his was not a situation where it is necessary to apply the crossing rules to secure safe navigation – and if it is not necessary to apply the crossing rules it can fairly be said that it is necessary not to apply them, so as to avoid adding a layer of confusion"*. [18] In addition, these two courts found it difficult to accept a concurrent application of both the crossing and the narrow channel rules. In their analysis, they attempted to show that the stand-on vessel's duties under the crossing rule were incompatible with the keep-to-starboard requirement. In their opinion, the duty to keep course and speed stifled the stand-on vessel's ability to make the alterations necessary to keep-to-starboard of the narrow channel. This incompatibility is solved only if one of the rules is foregone. Both these reasons justified dis-applying the crossing rule[19] in favour of the narrow channel rule. This resulted in holding the Ever Smart 80% to blame for her failure to remain on the starboard side of the narrow channel.

Although the UK supreme court did not disagree with the idea that the crossing rule may need to be dis-applied in certain cases in favour of the narrow channel rule, it held that The Alexandra I collision did not represent such a case. To arrive at this conclusion, the court relied on making a distinction between three different groups of vessels which can be observed by an outbound vessel approaching the entrance of narrow channel: transiting vessels, inbound vessels and waiting vessels[20].

The UK supreme court defined transiting vessels as being vessels which are moving past the narrow channel's entrance without "*intending*

[18] The Alexandra I, [2019] 1 Lloyd's Rep. 141, at para 74(ii).

[19] The resolution of the case also depended on determining whether there is a built-in "steady course" condition in the crossing rule which must be fulfilled before the rule becomes applicable, which led the supreme court to tackle the question of risk of collision assessment. While these are interesting topics, which also involve a degree of situational assessment, the concept of 'risk of collision' is complex and deserves to be discussed separately.

[20] The UK supreme court refers to these as Group 1, Group 2 and Group 3 vessels respectively. For the sake of clarity, an appellation which describes the goal of each approaching vessel in these three groups will instead be used in this article.

or preparing to enter it at all".[21] Inbound vessels on the other hand do not only intend to enter the channel but are also *"on their final approach to the entrance, adjusting their course to arrive at their starboard side of it"*.[22] For transiting vessels, the UK supreme court reiterated that the keep-to-starboard duty is irrelevant as they are not proceeding into the narrow channel, where the duty would apply. On the contrary, the supreme court found, albeit in obiter dicta, that it was necessary for inbound vessels to follow rule 9(a) in order to be on the starboard side of the narrow channel upon entering:

> *"… the necessity to disapply the crossing rules [i.e. rules 15, 16 and 17] arises because, once she [i.e. the inbound vessel] is shaping and adjusting her course to enter the narrow channel, the approaching vessel is already having her navigation determined by the need to be in compliance with rule 9(a) when she reaches the entrance, that is, to arrive at her starboard side of it, on a course which enables her to continue on her starboard side of the channel."*[23]

However, the vessel Alexandra I was distinguished by the UK supreme court from both transiting and inbound vessels. The Alexandra I reached the pilot boarding area approximately half an hour before the collision, where she remained until the collision. At no point had she made an attempt to enter the channel, since she could not do so without a pilot. Hence, the UK supreme court saw it fit to treat her as a waiting vessel. Vessels in a similar position to the Alexandra I are "*also intending and preparing to enter, but waiting to enter rather than entering…They may be stationary, or moving, although still waiting to enter"*.[24] Here the duty to keep-to-starboard was held to be ineffective in solving the encounter with an outbound vessel, since it should not yet apply to the waiting vessel. Only vessels which are discernibly already manoeuvring to shape their course in order to enter the narrow channel, i.e. inbound vessels,

[21] The Alexandra I, [2021] 1 Lloyd's Rep 299, para 134.
[22] The Alexandra I, [2021] 1 Lloyd's Rep 299, para 134-135.
[23] The Alexandra I, [2021] 1 Lloyd's Rep 299, para 138.
[24] The Alexandra I, [2021] 1 Lloyd's Rep 299, para 134.

were said to be concerned with this duty. As the narrow channel rule became inapplicable, the reasons to potentially set aside the crossing rule also disappeared in the eyes of the UK supreme court. The decision of the court of appeal was thus reversed,[25] and the crossing rule was held applicable instead of the narrow channel rule. The supreme court did not however venture into deciding the apportionment of liability.[26]

Beyond the differences in the conclusions of the courts with regard to the applicable rules, what is of interest for us in this case is the different ways in which the vessel Alexandra I was treated and classified throughout the case. The admiralty court and the court of appeal gave significant weight to the fact that the Alexandra I intended to enter the narrow channel. At no point before or at the moment of the collision did the Alexandra I attempt to enter, but her intention was indeed to do so as soon as she had a pilot on board. This was enough for both the admiralty and the appellate court to consider her an inbound vessel and apply the narrow channel rule. The UK supreme court however gave no heed to those intentions. It focused almost exclusively on what a vessel in the position of the Ever Smart could infer about the Alexandra I's navigation, based on an ongoing observation of her manoeuvres. Because there was no sign of entry, she was considered a waiting vessel with no

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25 As mentioned earlier (*supra,* note 17), the decision of the UK supreme court hinged upon a determination of the actual conditions of application of rule 15. The UK supreme court rejected the notion of a 'steady course' requirement and held that the application of rule 15 depended on only three conditions: (i) the vessels must be in-sight, (ii) must be on a course, and (iii) such course must be so as to involve a risk of collision. This led the court to discuss the role of rule 7(d) in the determination of the risk of collision. However, these points will not be discussed in this article.

26 The parties did not request the liability apportionment to be re-considered as they preferred that point to be re-visited by the admiralty court. See The Alexandra I, [2021] 1 Lloyd's Rep 299, para 147. After it was remanded, the Ever Smart's share of liability was reduced, but only from 80% to 70%. The admiralty court, following the UKSC's decision, recognized that the Alexandra I's failure to keep out of the way under the crossing rule created a situation of danger. However, taking into account the causative potency and the degree of blameworthiness of the faults of each vessel, the faults of the Ever Smart (i.e. a defective look-out, not keeping-to-starboard, failure to take action under rules 17(a)(ii) and 17(b), unsafe speed) were still considered to be more causative and blameworthy. See The Alexandra I [2022] 1 Lloyd's Rep. Plus 56, para 150-151, 163, 171, 176-177, 185.

duty to comply with the narrow channel rule. Different approaches lead to different results. Chapter 3 explores the supreme court's approach to situational assessment.

3 The UK supreme court's approach to situational assessment and its consequences for the proper application and understanding of the narrow channel and crossing rules:

The decision of the UK supreme court was partially built on a classification exercise. The UK supreme court attempted to classify the navigation of the Alexandra I within a certain category to then draw conclusions about the possible applicable rule(s). The classification was predicated on an assessment of the Alexandra I's navigation, which was itself mainly reliant on observation of her movements (*infra,* 3.1). This seemingly mono-factorial approach stands in stark contrast to how the UK supreme court sought to prove that alterations made by a stand-on vessel are not necessarily in violation of the duty to keep course and speed (*infra,* 3.2). Stand-on vessels are said to be permitted to alter their courses and/or speeds, as long as these alterations are justified by what is referred to in the decision of the UK supreme court as the 'navigation goals', the 'goals-in-mind' or the 'readily apparent nautical manoeuvre' of the stand-on vessel in question. To identify these navigation goals, factors such as the location, the traffic, an assumption of proper knowledge and application of the regulations, were held to inform the assessment of the situation, in addition to the observation of the stand-on vessel's manoeuvres. In the latter of the two situations, the range of factors which seems to have an influence over the assessment of the situation is much broader than just observation of manoeuvres. Nonetheless, it is in my opinion clear that both approaches share similar features. They both rely

on factors which are discernible, or in other words, which are detectable, recognizable and intelligible without special knowledge of the intentions of the observed target vessel (*infra,* 3.3).

3.1 Distinguishing between an inbound vessel and a waiting vessel:

This part attempts to answer a simple question: do the actual intentions or goals of the vessel approaching the entrance of the narrow channel ("approaching vessel") matter in determining the applicable rule(s) for the encounter with an outbound vessel? A fortiori, the answer is no.

Both an inbound vessel and a waiting vessel were recognized by the UK supreme court as having the intention to enter the narrow channel. Yet, in the court's view the keep-to-starboard requirement influences the navigation of the former, but not of the latter. The reason may have to do with the ability of the outbound vessel to infer from the manoeuvres of the approaching vessel her intentions. It is implied that the navigation of a waiting vessel lacks the clarity in manoeuvring of a vessel that is already making the necessary course and/or speed alterations to enter the channel. In the latter case, the outbound vessel can rely on both visual and equipment-assisted observation to surmise the navigation of the approaching vessel. If the manoeuvres indicate that the approaching vessel is going into the narrow channel, then the outbound vessel can deduce that keeping-to-starboard is sufficient to ensure a safe port-to-port passing, since the inbound vessel will be subject to the same rule. To put it simply, the crossing rule can be dis-applied only if the observable manoeuvres of the approaching vessel qualify her as an inbound vessel:

> *"The second reason for preferring the appellant's case is that the test for the occasion when, of necessity, the crossing rules should be over-ridden must be a clear one, clear that is to those navigating both the vessels involved.* ***Fundamental to the construction of the Rules is the need to apply them by reference to what is reasonably apparent to those navigating each vessel about the conduct of the other****. On that basis of assessment, the test propounded by the appellant is*

> *the clear winner.* ***The crossing rules are overridden only when the approaching vessel is shaping to enter the channel, adjusting her course so as to reach the entrance on the starboard side of it, on her final approach. That can be determined from the vessel leaving the channel by visual (or radar) observation of the approaching vessel's course and speed****."(Added emphasis).*[27]

In contrast, the manoeuvres of a waiting vessel, or lack thereof, would put the outbound vessel in a position where they cannot make any reasonable inferences about the future movements of the vessel outside the narrow channel. The difference between a waiting vessel and a transiting vessel (see *supra,* 2.3) basically becomes difficult to discern.

The reasoning of the UK supreme court on this point is interesting when considering the particular facts of the case. The Ever Smart either had or was in a position to have actual knowledge of the Alexandra I's preparatory actions in view of her entering the narrow channel. The admiralty court pointed this out:

> *"Ever Smart was or ought to have been aware that Alexandra 1 was proceeding towards the channel intending to embark the pilot and then proceed down the channel. Certainly the pilot was aware of that when on board Ever Smart."*[28]

However, the UK supreme court did not pursue this line of inquiry. It did not address the question of whether the Ever Smart knew or ought to have known of that intention, even though a reasonable argument could have been made in my opinion in favour of requiring the Ever Smart to have taken into consideration the special situation of the Alexandra I.

In my view, the circumstances left little doubt that the Alexandra I was waiting for a pilot. While the Alexandra I was moving, she was moving so slowly that she barely covered one mile during a period of 21 minutes.[29] Moreover, the presence of a pilot boarding area near the entrance

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[27] The Alexandra I, [2021] 1 Lloyd's Rep 299, para 141.

[28] The Alexandra I, [2017] 1 Lloyd's Rep. 666, para. 74.

[29] The Alexandra I, [2017] 1 Lloyd's Rep. 666, para. 70.

should have been known to the Ever Smart. If anything, the Alexandra I's navigation and the locality should have tipped the scale more in favour of classifying her as a waiting vessel and away from a classification as a transiting vessel. Furthermore, the Ever Smart was carrying the pilot who was intended to guide the Alexandra I through the narrow channel. The Ever Smart was thus arguably in a position to inquire about the pilot's next destination. This same pilot had also warned the Ever Smart about the presence of the Alexandra I, as he was disembarking around 6 minutes before the collision.[30] It is therefore fair to say that the Ever Smart was in a position to have or acquire actual knowledge of the intentions of the Alexandra I. By knowing that the Alexandra I was waiting for a pilot, the Ever Smart could have surmised that she was not intending on crossing from one side of the entrance to the other. Therefore, if the Ever Smart had kept-to-starboard, the collision might have been avoided. The reason why the Ever Smart did not do that is probably because she was unaware of the Alexandra I's presence altogether. From the accounts of the facts in the UK supreme court's decision, it is quite clear that the Ever Smart was not keeping a proper look-out:

> *"Less than two minutes after the collision the master of Ever Smart said (apparently to the officer of the watch and helmsman) "both of you … have you seen it or not?" He then said "how come you didn't see it?""*[31]

The statements of the Ever Smart's master shows that the presence of the Alexandra I went completely unnoticed. Nonetheless, none of these factors were really taken into account in the UK supreme court's approach to assessing the situation and classifying the navigation of the Alexandra I. In light of this, the UK supreme court's position may be telling of a desire to set an objective test of general application independent of the special facts of the case; a test which can arguably be reproduced by vessels navigating in or near a narrow channel to determine when the

30 The Alexandra I, [2021] 1 Lloyd's Rep 299, para 13(vii).

31 The Alexandra I, [2021] 1 Lloyd's Rep 299, para 13(x).

crossing rule may give way to the narrow channel rule, notwithstanding any special circumstances which may give the outbound vessel insight into the actual intentions of the approaching vessel.

It is certainly not irrational to rely on what is being depicted through manoeuvres to assess the navigation of a vessel, since actual intentions may remain hidden and difficult to ascertain. Indeed, unlike the Ever Smart which was in a position to know of the Alexandra I's actual intentions, not every single outbound vessel would necessarily have or be in a position to acquire that knowledge. However, one can certainly argue that if an outbound vessel is aware of the actual intentions of the vessel outside the narrow channel, as in The Alexandra I case, reliance on the observation of manoeuvres should no longer be necessary to predict movements. This knowledge can, for example, be acquired through VHF communication. It is not uncommon for vessels to contact one another through VHF to exchange information about their destinations and upcoming manoeuvres. In fact, when the court of appeal put to the Elder Brethren (i.e. nautical assessors) the hypothetical scenario of an inbound vessel that is entering a narrow channel which bears on her port bow (i.e. opposite case of the Alexandra I), the nautical assessors had this to say about how the outbound vessel and inbound vessel could approach the situation:

> "*The prudent mariner in the outbound vessel in such circumstances would:*
>
> *(…)*
>
> - *consult the onboard pilot and Jebel Ali VTS/port control re[garding] the subject vessel's identity and intentions*
> - *make contact with the other vessel on VHF at an early stage to advise own ship's constraints in a narrow channel and his intentions when dropping his pilot.*
> - *(…)*
> - *The prudent mariner in an incoming vessel approaching from the east would:*
> - *acquire information from Jebel Ali VTS/ port control regarding own pilot boarding time and position, ensuring that when mano-*

euvring to pick up his pilot he stays clear of the channel mouth and lines up to enter on his starboard side of the channel

- *acquire the outbound vessel as an ARPA target at an early stage and keep a close watch on the vessel's bearing to determine the risk of collision*
- *identify and make early contact with the outbound vessel on VHF (identify via AIS or Jebel Ali port) in order to ensure that collision risk is avoided and agree to keep clear of the vessel navigating under Pilotage in a narrow channel."*[32]

Seeking information about the intentions of the vessel outside the narrow channel and the use of VHF are in their opinion part and parcel of what a prudent mariner on board the outbound vessel would do to assess the situation. It is therefore quite curious that the UK supreme court focused solely on the observable manoeuvres of the approaching vessel. But I propose two distinct reasons for this.

One reason could be the general reluctance of the English courts to condone the use of VHF as a primary tool for collision avoidance. A number of decisions warn of the danger of this practice. The risk of miscommunication being for instance one of them,[33] or indeed the temptation to use VHF to agree on manoeuvres which violate the COLREGS.[34] In both cases, VHF may lead the vessels involved in the encounter to take contradictory and self-cancelling actions. The position of the UK supreme court could be seen as a logical continuation of this adverse attitude towards the use of VFH. It is also important to note that the advice of the nautical assessors does not involve contacting the approaching vessel through VHF to inquire about her intentions. Instead, they recommend using VHF for informing the target vessel of the constraints that are imposed on your own vessel. VHF would in that case be used to provide the other vessel with a more thorough picture of the circumstances that

32 The Alexandra I, [2019] 1 Lloyd's Rep. 119, para 80.

33 The Maloja II [1993] 1 Lloyd's Rep. 48 at page 52 col. 2.

34 The Nordlake and The Seaeagle [2016] 1 Lloyd's Rep 656 at para 76; The Aleksandr Marinesko v Quint Star [1998] 1 Lloyd's Rep. 265 at page 278.

affect one's own navigation, and not to communicate the actions that one is intending on taking.

The second reason is directly tied in with the degree of trustworthiness that can be placed on any information obtained regarding the actual intentions of the approaching vessel. Apart from the ever present risk of miscommunication, any information obtained about the intentions of a vessel is unlikely to be binding on that vessel, even if communicated directly by her. A vessel may say one thing and end up doing something completely different. The discrepancy between words and actions may not necessarily be due to a misrepresentation, although that is also possible. An inbound vessel might communicate to an outbound vessel that she is intending on entering the narrow channel. However, a previously undetected obstruction or danger close to the entrance (e.g. a kayaker which could not have been observed from a distance) might require the inbound vessel to change her immediate goals. There might not be enough time to communicate this new information, or the distances might be so close that the outbound vessel might not be able to react to the sudden change. The inbound vessel might also simply omit some information, due to wrongly assuming that it is self-evident. For instance, an inbound vessel might neglect to communicate that she is going to stop at a pilot pick-up station before entering, after she presumes that the outbound vessel would be able to deduce that fact from their knowledge of the local regulations. These two example should illustrate that even if a vessel becomes aware of the actual intentions of a target vessel, this does not necessarily guarantee that the navigation of the target vessel is going to abide by those intentions. There can always be a discrepancy between the actual intentions of a vessel and their discernible navigation, a point we will explore again later (*infra,* chapter 4).

So, we could say that the Ever Smart being in a position to be aware of the actual intentions of the Alexandra I was immaterial, because these intentions were not discernible from the manoeuvres of the latter. The UK supreme court concluded that a drastic measure, such as disapplying an otherwise applicable rule, cannot be justified when the discernible

navigation of the vessel outside the narrow channel leaves doubt as to whether or not she intends on entering the narrow channel:

> *"Picking up a pilot before entering a river or a harbour entrance is clearly not a sufficient act of preparation to displace the crossing rules: see The Ada; The Sappho and The Albano. Merely being in a pilot boarding area cannot of itself be decisive, since vessels may be proceeding in that area for other reasons, eg because they are leaving the narrow channel, or merely passing its entrance en route to a completely different destination, as was the tug Zakheer Bravo in the present case."*[35]

We can draw two conclusions from the above: First, it is clear from the UK supreme court's decision that an outbound vessel has to rely on observation of the manoeuvres of the approaching vessel in order to deduce whether it is an encounter with a transiting, a waiting or an inbound vessel. Only in the last case might the keep-to-starboard requirement be sufficient to resolve the encounter between the two vessels as they can pass each other port-to-port while the inbound vessel is entering, and the outbound vessel is leaving.[36] The crossing rule in this scenario might then not be necessary. In the Alexandra I's case, however, her navigation as she was drifting with little control over her heading and course, did not clearly show that she was entering the narrow channel. Thus, there was no reason to disapply the crossing rule.

Secondly, there is an implication in my opinion that the approaching vessel needs to keep in mind that major reliance is going to be placed on her observable manoeuvres by the outbound vessel. Therefore, the approaching vessel should strive to ensure that her manoeuvres clearly communicate her intentions. And if there is discrepancy between the two, she should be aware that preference would be given to what is inferable

35 The Alexandra I, [2021] 1 Lloyd's Rep 299, para 141.

36 It must be stressed that the keep-to-starboard requirement performs well as a solution for the encounter as long as the inbound vessel is bearing on the port side of the outbound vessel. In the opposite scenario, the crossing rule

from her discernible manoeuvres, even though the outbound vessel might know of her, i.e. the approaching vessel's, actual intentions.

3.2 The proper construction of the duty of the stand-on vessel to keep course and speed:

The UK supreme court placed great focus on the manoeuvres of the approaching vessel in order to classify the nature of her navigation for the purpose of determining whether the narrow channel rule might justify disapplication of the crossing rule. This section shows a similar but broader approach to situational assessment; such an approach goes beyond observation of manoeuvres, to take into account other factors which can be detected, recognized and understood independently by an observing vessel. This approach was relied on by the UK supreme court to help identify when an alteration made by a stand-on vessel would not represent a violation of her duty to keep course and speed.

Let us start by observing that the duty of the stand-on vessel to keep her course and speed should not be interpreted so rigidly as to be equated with an absolute and categorical prohibition of any sort of course or speed alterations from the stand-on vessel. It cannot be reasonably expected of vessels to freeze in time their navigation, maintaining without any deviation under all circumstances whichever course and/or speed they were proceeding with at the time when they find themselves under the ambit of rule 17(a)(i). The UK supreme court also made this point very clear:

> *"… Nor is the stand-on vessel's obligation to keep her course and speed necessarily an obligation strictly to maintain her precise heading, course, or even her precise speed. If the nautical manoeuvre upon which she is visibly engaged when she becomes the stand-on vessel involves altering her heading or course, or slowing down, she may do so without undermining the obligation of the give-way vessel to keep clear."*[37]

[37] The Alexandra I, [2021] 1 Lloyd's Rep 299, para 62.

This interpretation of the duty to maintain course and speed is well accepted under English Law,[38] and can be traced back at least to the decision of the court of appeal in The Windsor-Roanoke case.[39] As reported by A. N. Cockcroft and J. N. F. Lameijer,[40] this particular collision occurred when the similarly-named vessel, the Roanoke, stopped her engines to take on board a pilot from the Rotterdam pilot boat. The Roanoke was on a crossing course with another vessel bearing on her port bow, making the Roanoke the stand-on vessel which must keep her course and speed. The decision to stop the vessel in order to take on the pilot was a contributing cause to the collision and was contended to be a violation of the duty to maintain course and speed. The court of appeal however exculpated the Roanoke from any fault flowing from this decision and clarified that:

> *"'[C]ourse and speed' mean course and speed in following the nautical manœuvre in which, to the knowledge of the other vessel, the vessel is at the time engaged. It is not difficult to give many instances which support this view. The 'course' certainly does not mean the actual compass direction of the heading of the vessel at the time the other is sighted."*[41]

By the same token, this flexible construction, first espoused in The Roanoke, was applied later on in The Taunton:[42]

> *"[w]hen the rule talks about keeping course and speed it means the course you were going to take for the object you had in view- not the course and speed you had at any particular moment. So you keep your speed although you stop, and you keep your course although you alter it 16 points. You keep your course if you are going round the*

[38] The position does not diverge U.S. Law either. See US v SS Soya Atlantic, 330 F.2d 732, 1964 A.M.C. 898, at 737; Commonwealth & Dominion Line v. US, 20 F.2d 729, 1927 A.M.C. 1690 reversed on other grounds by 278 U.S. 427, 49 S.Ct. 183, 73 L.Ed. 439.

[39] The Roanoke [1908] 4 WLUK 19 (1908), [1908] P. 231.

[40] A. N. Cockcroft and J. N. F. Lameijer, *A Guide to the Collision Avoidance*, 79.

[41] A. N. Cockcroft and J. N. F. Lameijer, *A guide to the Collision Avoidance,* 79 citing Lord Alberstone in The Roanoke (1908) 11 Asp. 253, at p. 239.

[42] The Taunton, [1928] 31 Lloyd's Rep. 119, p. 120 col. 2.

> *bend of a river although you are altering it to follow the bend. You keep your speed though you stop to pick up a pilot. It follows that if you are crossing the tide your course is to keep diverging; and, therefore, according to the authorities, you are keeping your course although you are continually porting.*"[43]

What these three cases (The Alexandra I, The Roanoke and The Taunton) tell us, is that the duty of the stand-on vessel to maintain course and speed has to be assessed in light of the navigational requirements imposed by the circumstances, as well as the navigation goals which the stand-on vessel has in mind. It does not refer to a specific speed, heading or course measured at a specific point in time. A stand-on vessel constantly porting or starboarding to follow the natural curvature of a channel is maintaining her course and speed.[44] It would also not be a violation of her duty if the vessel were to reduce her speed, stop or reverse to avoid some navigational hazard.[45] A vessel slowing down to pick-up a pilot,[46] or accelerating after dropping a pilot, could likewise be in compliance with the meaning of the rule.[47] Presumably, however, this flexibility cannot be unqualified. Not every 'object' that the stand-on vessel has in mind, can or should, for that matter, justify an alteration of course and/or speed under rule 17(a)(i).

This freedom of movement is tempered by the requirement that the object-in-mind, or, that is to say, the intentions of the stand-on vessel,

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43 The Taunton, [1928] 31 Lloyd's Rep. 119, p. 120 col. 2.

44 J. W. Griffin, *The American Law of Collision,* (New York, N.Y.: The Hela Press, 1949),143; The Taunton, id.

45 The Dona Myrto, [1959] 1 Lloyd's Rep. 203, p. 211 citing a passage from The Roanoke (1908) 11 Asp. 253, at p. 239.

46 The Roanoke (1908) [1908] P. 231, at p. 241-242.

47 (American case) US v SS Soya Atlantic, 330 F.2d 732, 1964 A.M.C. 898, p. 737. Although in an English case, The General VII, [1990] 2 Lloyd's Rep. 1, the 'putative' stand-on vessel would have been held at fault for picking up speed after the pilot had disembarked and such action would have been considered in violation of the duty to maintain course and speed, if the overtaking rule was applicable to the collision, since the court considered that the "ordinary and proper manoeuvre" in which the overtaken vessel was engaged ended when she slowed down to pick up her pilot.

be made apparent to the give-way vessel.[48] In The Roanoke, it was made clear that for an alteration not to violate the duty to keep course and speed, it had to be justified by "*the nautical manœuvre in which, **to the knowledge of the other vessel**, the vessel is at the time engaged"(Added emphasis).*[49] Commenting on The Roanoke's construction of the duty to maintain course and speed, the UK supreme court added in The Alexandra I decision that:

> *"First the "object you had in view" **must be reasonably apparent to the give-way vessel**, if the purpose of the obligation to keep course and speed, as explained in The Roanoke, is to have effect. Secondly, **the "object … in view" must include, or take account of, the stand-on vessel's obligation to comply with the other provisions of the Rules**. This may include avoiding a collision with a third vessel, which may be approaching the stand-on vessel head-on, or comply-*

[48] In my view, there are practical reasons for requiring the object-in-mind of the stand-on vessel to be apparent. The dichotomy of duties between the give-way and stand-on vessels solves the problem of having two vessels taking diametrically opposite and cancelling actions. In a crossing scenario for example, the most instinctive approach for avoiding collision is for one vessel to alter course in order to pass astern of the other vessel. Altering course towards the direction in which the other vessel is located seems to be a "natural" response among subjects both with and without any knowledge of the COLREGS. See John Kemp, "Behaviour Patterns in Crossing Situations", The Journal Of Navigation (2009), 62, 443–453. Without the give-way/stand-on distinction, the vessel which has the other on her starboard bow will naturally prefer to alter course to starboard to ensure that she passes astern. Likewise, the other vessel having her on the port bow will want to alter to port in order to achieve the same goal. These two actions cancel each other out perfectly, leading the two vessels to move closer and closer to each other. By ensuring that only one vessel has the active role of taking positive actions, this problem can be avoided. The give-way vessel stands a better chance at predicting the future positions and keeping out of the way of the stand-on vessel if the latter maintains course and speed. The duties of the two vessels work in tandem. If the stand-on vessel's manoeuvres lose predictability, the give-way vessel's job becomes more difficult to carry out. This explains very well why the give-way vessel must have 'knowledge' of the stand-on vessel's manoeuvres under the duty to maintain course and speed. When the stand-on vessel has in mind an object which requires some form of course alteration, knowledge thereof by the give-way vessel is necessary for maintaining predictability. And predictability can be achieved only if the give-way vessel is capable of understanding, one way or another, what the stand-on vessel is doing.

[49] A. N. Cockcroft and J. N. F. Lameijer, *A guide to the Collision Avoidance,* 79 citing Lord Alberstone in The Roanoke (1908) 11 Asp. 253, at p. 239.

> *ing with the narrow channel rule in rule 9(a) to keep to the starboard side of the channel, as is implicit in Scrutton LJ's example of turning to follow a bend in a river." (Added emphasis).*[50]

There is little doubt here that the UK supreme court is not narrowing down the test to only what is inferable from observing the contemporaneous manoeuvres of the stand-on vessel. A multi-factorial approach, which takes into account external factors, such as the locus of navigation, surrounding traffic or the applicable regulations, is favoured. All of this information, in combination with the visually- and/or radar-observable manoeuvres, help inform the give-way vessel in her efforts to predict the intentions of the stand-on vessel. Our second observation is therefore that determining the object-in-mind of the stand-on vessel requires a multi-factorial approach.

This multi-factorial approach can be read in a couple of ways. On the one hand, it tells us that the location of navigation and the applicable regulations in that area are equally important sources of information. In an area where pilotage is compulsory, incoming or outgoing vessels should be expected to be making their way to the designated area(s) for dropping off or picking-up pilots.[51] A vessel proceeding in a narrow channel should be expected to make adjustments to her course in order to follow the shape of a curving channel while keeping-to-starboard. Observation of only the visible manoeuvres of the stand-on vessels might not show at a given time that the vessel is intending on altering course. At a sufficiently faraway distance from where a narrow channel curves, the visible manoeuvres of a stand-on vessel may suggest a straight course. Yet, the upcoming bend ought to let the give-way vessel know that the stand-on vessel might be altering course to negotiate the turn. In other words, the manoeuvre in which a vessel is engaged at a given time might not correspond to the manoeuvre in which they will be engaged at a future point in time. If the give-way vessel is to understand what is being

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50 The Alexandra I, [2021] 1 Lloyd's Rep 299, para 64.

51 E.g. of cases involving collisions taking place under such circumstances include The Albano [1907] UKPC 11 (27 February 1907), The Alcoa Rambler [1949] UKPC 11 (14 February 1949).

done on the stand-on vessel, reliance on observing the manoeuvres of the stand-on vessel as the sole source of information is not enough. The observed manoeuvres must be analysed side-by-side with factors which can affect the navigation of the observed stand-on vessel.

On the other hand, it also indicates that the manoeuvres of the stand-on vessel must be legitimate and not opportunistic in nature. A manoeuvre made for the sake of getting the vessel faster to her destination or serving a similarly self-interested goal is arguably not enough. The stand-on vessel can manoeuvre only if the reasons behind it are intelligible and comprehensible to the give-way vessel. The examples in the passage above all share this feature. The manoeuvres are made necessary by a fact which is or should be known to the give-way vessel, e.g. the presence of a third vessel or the keep-to-starboard requirement under the COLREGS. Therefore, the leeway granted to the stand-on vessel can be read to carry the opposite duty for the stand-on vessel to make only those manoeuvres which are motivated by reasons of which the give-way vessel can or ought to be aware, based on the immediate and apparent circumstances.[52] Our third observation therefore is that the factors which inform the assessment of the situation are those which are discernible to the give-way vessel without it being privy to what those on board the stand-on vessel might have in mind in terms of subjective navigation goals.

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52 Certain external factors that can affect the navigation of one or both vessels in an encounter might not be equally apparent or discernible to both of them. There is always a risk that the give-way vessel will, for instance, simply not be in a position to have the full picture of the circumstances which might, from the perspective of the stand-on vessel, justify an alteration of speed and/or course. Obstacles or hindrances that are too small to be detected from a distance, small vessels without a radar reflector, sea conditions of which the give-way vessel is not yet aware, etc. A number of circumstances which have little to do with the intentions or the goals of the seafarers on board the stand-on vessel, but which are not discernible to the give-way vessel, might legitimize alterations of course and/or speed. Although the (over-)use of VHF has been discouraged by a number of English courts, there might be no other option in such situations than to communicate with the give-way vessel to inform them of the necessity to make a certain manoeuvre. We will not go further into a discussion of this possibility and whether or not it might amount to good seamanship, but it is worth pointing it out to encourage further reflection.

Our conclusions are in this part threefold. First, the duty to keep course and speed does not translate into a prohibition on any alterations by the stand-on vessel from the moment the crossing rule is engaged. But although the duty of the stand-on vessel might not be so rigid so as to be immutable, a coherent and consistent navigation is still to be expected. For this, only those alterations which are justified by the goal the stand-on vessel has in mind do not violate the duty to keep course and speed. Secondly, it is not enough for the alterations of the stand-on vessel to be in line with her navigation goals, the reasons behind the alteration must also be discernible to the give-way vessel. Thirdly, the reasons are deemed to be discernible if the give-way vessel is capable of recognizing them and understanding their implications for the stand-on vessel's navigation from the prevailing circumstances. The prevailing circumstances include only those which are discernible to a give-way vessel without any special knowledge of the actual intentions of the stand-on vessel. These circumstances include factors such as the location of navigation, surrounding traffic, knowledge of the applicable regulations, and they must inform, alongside information obtained from observation of the stand-on vessel's manoeuvres, the give-way vessel's assessment of the situation.

Applied to The Alexandra I collision, we know the Ever Smart was following the course of the narrow channel proceeding towards the sea. Her presence within the narrow channel would *ipso facto* entail application of the keep-to-starboard requirement. Therefore, the discernible navigation in which the Ever Smart was engaged was to proceed along the course of the narrow channel while making any course and/or speed alterations necessary for keeping-to-starboard. A vessel within or outside the narrow channel, like the Alexandra I, should reasonably expect the Ever Smart to alter her course to starboard in order to maintain or regain navigation on the starboard side of the narrow channel where she ought to be. This was the conclusion of the UK supreme court and thus the risk of inconsistency between the keep-to-starboard requirement and the duty to keep course and speed was resolved, since the stand-on vessel could potentially comply with both simultaneously.

3.3 Common features in the approach of the UK supreme court to situational assessment:

The range of factors taken into account by the UK supreme court in its approach to the assessment of the situation/navigation of another vessel can seem to be broader in the context of the construction of the duty to maintain course and speed. When classifying the navigation of the vessel Alexandra I, focus was plainly on inferences drawn from observation of her manoeuvres without much taking into account, or at least not explicitly, other factors, such as the location of the vessel or the requirement for compulsory pilotage, the latter of which was the main reason for the presence of the vessel in front of the entrance.

This may have been justified by the fact that an understanding of the reasons behind the presence of the Alexandra I near the entrance of the narrow channel would not have changed the end result under the analysis of the UK supreme court. Indeed, the decision gave the same treatment both to vessels that are passing by the entrance and to vessels that are waiting to board a pilot. Neither vessel is bound by the keep-to-starboard requirement. Making a distinction between the two was thus unnecessary.

Moreover, it might not be entirely accurate to say that assessing the navigation of the approaching vessel does not take into account other factors than the observed manoeuvres. The reasoning behind why the crossing rule can be dis-applied when the approaching vessel is already shaping her course to enter the narrow channel is predicated on an understanding of the implication of the application of the keep-to-starboard requirement. Indeed, upon noticing that an approaching vessel bearing on the port bow is clearly on her way to enter the narrow channel, an outbound vessel can deduce, by applying the keep-to-starboard requirement, that the approaching vessel will be altering and keeping-to-starboard, thus ensuring a safe port-to-port passing. Therefore, it is by combining information drawn from where the approaching vessel is coming from, her apparent manoeuvres and knowledge of the applicable rules, that the outbound vessel infers useful conclusions about the approaching vessel's

navigation. This might not have been made explicit by the UK supreme court simply because it is assumed to be self-evident.

Whatever factors were omitted by the UK supreme court in classifying the navigation of the Alexandra I, e.g. possibility to acquire knowledge of the actual intentions of the Alexandra I, I would argue that it is because they fail to be independently discernible. In other words, they require the outbound vessel to inquire about, or otherwise acquire, special knowledge of the intentions of those aboard the approaching vessel. The focus of the UK supreme court is however on what can be discerned by a competent mariner, with proper knowledge of the regulations, keeping a proper look-out. And this is not dissimilar to how the court decided which types of alterations do not violate the stand-on vessel's duty to keep course and speed. The determining factor is that the reasons behind the alterations have to be apparent to the give-way vessel. It seems therefore that the UK supreme court's general approach to the assessment of navigation is characterized by a dominant feature: the assessment should be based on sources of information which are available to any vessel subject to the COLREGS that is in a similar position to the one under scrutiny, without having or seeking to obtain some special knowledge outside of what can be deduced or inferred from keeping a proper look-out and being aware of the characteristics of the locus of navigation (e.g. water depth, marked wrecks/obstructions, sea and weather conditions, VTS communications, applicable regulations and so on and so forth).

The UK supreme court's use of or reference to a varied range of expressions/concepts, such as 'observable manoeuvres', 'object-in-mind', 'apparent nautical manoeuvre' in different parts of the decision, is not necessarily indicative of a change in the approach. It is rather in my opinion an attempt by the court to focus on those aspects that seem to have the most pertinence for the specific issue under scrutiny. The test remains the same. When the UK supreme court says *"the rules need to be applied by reference to what reasonably appears to those navigating one vessel to be being done on the other vessel"*,[53] my proposed understanding is based on the following:

[53] The Alexandra I, [2021] 1 Lloyd's Rep 299, para 104.

(i) The assessment is not about simply observing the manoeuvres that a vessel is undertaking during a specific length of time.

(ii) The predictions must be informed by other factors apart from pure observation of the manoeuvres, such as the characteristics of the location and the requirements imposed by the applicable regulations.

(iii) Only those factors which are susceptible of being detected, recognized and understood without special knowledge of the actual intentions of the observed vessel are to be taken into account. However, special circumstances might require vessels to establish VHF communication in order to inform one another of exceptional factors that might not be readily apparent to the other vessel through visual and/or equipment-based observation.

(iv) The assessment does not entail uncovering or discovering the actual intentions of the observed target vessel. It is what can be reasonably inferred from what is shown and done on the target vessel, rather than what is thought or said, that should prevail. Even if knowledge of the actual intentions of a target vessel is acquired, preference should be given to what can be observed being done by that vessel.

(v) Vessels ought to be aware of any potential discrepancies between what they intend on doing and what their actions might communicate to other vessels regarding those intentions. In the case of a stand-on vessel, for instance, one could even argue that she has a duty to confine any changes in course and/or speed to those that would be reasonably expected by other vessels observing her manoeuvres under the given circumstances, giving special attention to factors such as the locus of navigation, the applicable regulations, traffic, weather and/or sea conditions.

For the sake of simplicity and ease of writing, we will continue referring to this methodology wherever necessary as the discernible navigation test.

With that said, the next couple of chapters will contemplate the usefulness of the UK supreme court's approach to predicting and/or classifying the navigation of vessels in or near narrow channels for the purpose of determining the applicable rule(s).

4 The inability of the discernible navigation test to completely solve the inherent difficulty in assessing and predicting the navigation of vessels in or at the entrances of narrow channels:

Collision avoidance is reliant on the ability of vessels to foretell the movements of other vessels, in order to take the correct measures. As we have previously seen, these predictions can be based on different factors. Of course, the frequent and continuous observation over time of the manoeuvres of a vessel is a primary source of information. This was a major point of focus for the UK supreme court in The Alexandra I. But the location of navigation is equally important. Again, The Alexandra I decision touched on this factor when determining whether a change of course made in order to keep-to-starboard within a narrow channel would be incompatible with the duty of a stand-on vessel to maintain course and speed. The answer was in the negative. Due to the location of the stand-on vessel within a narrow channel, such course alterations are to be expected and they are not in violation of rule 17(a)(i). The applicable regulations are also a major source of information for predicting the navigation of other vessels. In a narrow channel, the keep-to-starboard requirement applies, and alterations made towards achieving that goal are to be expected. All of these factors play a role in predicting the inten-

tions of nearby vessels. The problem arises when two or more of these sources can lead you to different conclusions.

This chapter argues that the risk of reaching conflicting, but equally plausible, predictions in regard to the navigation of an observed vessel may be higher in or near areas such as narrow channels, where vessels are expected to be in close-quarters. These uncertain scenarios are what we dubbed earlier equivocal encounters.

The Heranger[54] illustrates reasonably well a situation where the expectation of one vessel, based on the locus of navigation and regulations applicable to that area, do not conform with the discernible navigation or even the actual intentions of another vessel. It therefore deserves some attention (*infra,* 4.1). The pervasiveness of the problem with equivocal encounters in cases involving narrow channels casts some doubt over the practicality of the UK supreme court's approach to the assessment and prediction of other vessels' navigation (*infra,* 4.2).

4.1 The Heranger collision – An example of a difficult navigation to predict:

The Heranger was proceeding along the Long Reach channel down the river Thames, keeping to starboard at all times. Where the Long Reach channel ends, another channel by the name of St. Clement's Reach begins. This point is marked by the Stone Ness Light. This navigational mark also coincides with a bend in the river and the narrow channels running along it. As the Heranger was navigating towards the Stone Ness, she could see behind the bend on her port bow another vessel, the Diamond, about a mile distant, proceeding up river. Due to the curvature of the river, the Heranger could only see the masthead and the green starboard light of the Diamond. Outside a narrow channel, this would be a clear telltale sign of a crossing encounter. However, because the vessels were in a narrow channel, the Heranger expected the Diamond to follow the curvature of the channel and open up her red port side light

[54] The Heranger, [1938] 62 Ll.L.Rep. 204.

in due time. Indeed, the Heranger "kept her course and speed in the expectation that the Diamond would open her red light as she rounded Stone Ness under starboard wheel and would pass the Heranger port-to-port",[55] as the keep-to-starboard requirement would entail. However, the Diamond was heading towards a wharf which lay across and on the other side of the river and thus was not actually intending to round the bend by starboarding, but rather altered her course to port, in order to cross to the opposite bank of the river. This brought the Diamond ahead of the bow of the Heranger when they were about two cables apart and the collision could not be avoided. By the time the Heranger realized that there was a danger of collision, at about four cables distance or two minutes before collision, she stopped her engines and when the distance reduced to two cables, or one minute before collision, she put them full astern. However, these actions proved to be insufficient.

The dispute did not revolve around whether or not the Diamond was at fault, as she clearly was, due to her decision to make a port alteration and cross ahead of the bow of the Heranger at a very close distance. It was rather about whether or not the Heranger should also bear a portion of the blame for not reversing her engines earlier.[56] In deciding the matter, the then House of Lords noted that there existed "no rules which apply to the particular facts. Deciding which action should be taken can only depend on the requirements of good seamanship and the application of the ordinary principles of the law of negligence."[57] Any reference, even by analogy, to the duties under the crossing rule was discarded.[58] The Heranger was ultimately held partly at fault for waiting until the vessels were two cables apart to put her engines full astern, when as a matter of good seamanship, she ought to have done so at a distance of four cables, when the danger of collision was identified.

55 Id., at p. 205 col. 1.

56 The Heranger did bear 1/3 of the liability in the end, even though it was recognized that the collision was mainly caused by the completely unforeseen actions of the Diamond.

57 Ibid., at p. 210 col. 2 – 211 col. 1.

58 Ibid., at p.211 col. 1.

In any case, what interests us in this case is not so much whether the crossing rule ought to have applied to this situation or not[59], but rather how the Heranger's expectations were based on a valid assumption, the application of the keep-to-starboard requirement, and yet, those expectations proved to be wrong. It was quite clear from the case that the Heranger's reluctance to reverse the engines earlier, which was described as a drastic measure for a vessel of her size, was motivated by the false conviction that the Diamond was following the course of the narrow channel and was therefore not a crossing vessel. She maintained this belief even when the vessels were only four cables apart. With the benefit of hindsight, one can criticize the Heranger for not realizing, based on the Diamond's observable manoeuvres, especially once the latter had reached and passed Stone Ness where the channel bends without turning to starboard, that this was a crossing situation. However, it is important to remember that the increased proximity between vessels in narrow channels often leaves vessels with little time to assess in the first place, and perhaps no time at all to reassess their prior conclusions. The Heranger assumed that the Diamond would abide by the keep-to-starboard requirement and was in a way justified in not assuming she would cross ahead. Based on the location of navigation and the applicable bylaws[60] in the river Thames, expecting that the Diamond would keep to her starboard side of the channel was legitimate. It is an accepted principle under English Law that between two vessels proceeding in opposite direction along the same narrow channel, the narrow channel rule applies even though the vessels might appear to be on a crossing

[59] Although the case was not treated as such, it is my opinion that the two vessels were clearly approaching each other on a crossing course. A risk of collision was deemed to have existed at least from the moment the vessels were four cables apart, and it can be argued that the risk was there even before that point. All the elements of the crossing rule were met, and the rule could have been reasonably held to apply. Its application would not have necessarily affected the fault-apportionment but would have grounded the decision on less esoteric rules than the 'principle of good seamanship'.

[60] Navigation in the river Thames is subject to specific rules incorporated in the bylaws which are established by the Port of London. This case was judged under the bylaws which were in force between 1914 and 1934.

course due to bends and curves in the channel.[61] Nonetheless, in this case, it led the Heranger to mis-predict the intentions of the other vessel. One can argue that the presence of a wharf on the other side of the river should have alerted the Heranger to the possibility that the Diamond might have been aiming towards it. Nonetheless, before the Diamond reached the Stone Ness without changing course to starboard in order to turn into the Long Reach channel, both possibilities would have been valid. Once that point was reached, the distances were already so close that there was no time for further assessment and only immediate action could have avoided a collision.

4.2 The difficulty of discerning navigation in spite of proper situational assessment:

The Heranger incident happened within a narrow channel, but a similar problem can easily be imagined at the entrance of a narrow channel. An outbound vessel can experience quite some difficulty in predicting the navigation of a vessel approaching the entrance of a narrow channel. Observing the manoeuvres of a vessel approaching the entrance of a narrow channel might not say much about whether said vessel is intending to enter or to simply pass by the entrance until the vessel is perhaps much too close to the entrance. Other discernible factors might not be of much help either. Depending on the side, the angle and place of origin from where the approaching vessel is coming, one and the same manoeuvre could be made to achieve various goals. Figures a, b & c below show an example of a starboard alteration made by an approaching vessel for different purposes. The outbound vessel may have a hard time settling on one conclusion among all the possibilities before the approaching vessel is much too close. This is perhaps why the nautical assessors' advice in The Alexandra I, on the proper way to solve the hypothetical encounter between an outbound vessel and an approaching vessel bearing on her starboard bow (i.e. coming from the opposite side than the vessel in Fig.

[61] The Empire Brent, (1947) 81 Ll.L.Rep. 306, p. 312 col. 1.

a, b and c), involved ascertaining the intentions of the approaching vessel from VTS and using VHF communication.

Fig. a Vessel B altering to starboard to stop at the pilot boarding area

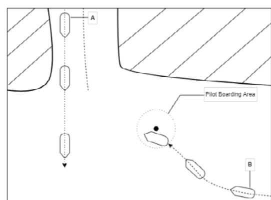


Fig. b Vessel B altering to starboard to keep out of the way of vessel A

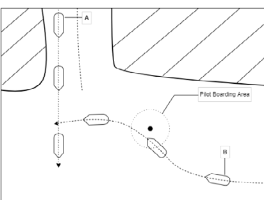
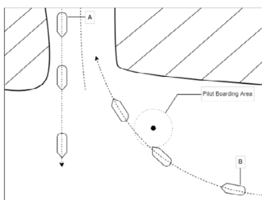


Fig. c Vessel B altering to starboard to enter the narrow channel



Whenever a conclusion is reached about the navigation of another vessel, there are three possible outcomes. The conclusion can be correct, or it can be wrong in either of two ways. The decision could be a 'false positive' where one assumes that something is correct when it is not, or a 'false negative', meaning that a certain thing is deemed untrue when it is actually true.[62] Relying on the ability of vessels to predict each other's navigation might be necessary, but it is also dangerous. As such, reliance on it should perhaps be kept to a minimum whenever possible.

5 The compatibility of the crossing rule and the narrow channel rule reduces the role of prediction in determining the applicable rules:

An often ignored objective of the COLREGS is to eliminate guesswork by coordinating the actions of vessels that encounter one another. Through interpretation, it is possible to conciliate between the crossing rule and the narrow channel rule, so as to minimize the risk of collision

[62] Craig H. Allen, *Farewell's Rules of the Nautical Road*, 2020, p. 180.

without having to dis-apply either one of them. It also lessens the role that prediction of intentions or navigation plays in determining the applicable rules in equivocal crossing encounters in or near narrow channels. Marsden and Gault cites a number of cases,[63] decided before The Alexandra I, which have recognized the possibility for both the narrow channel rule and the crossing rule to be simultaneously applicable,[64] although they note that one of the two rules may still be dis-applied.[65] The hypothesis which this chapter explores is that the duties imposed by each of the narrow channel and the crossing rule are not inconsistent and, in some cases, are exactly the same. In most crossing situations involving narrow channels, the duties of the non-crossing vessel will quite often remain unaffected, regardless of whether or not the crossing rule applies (*infra,* 5.1 & 5.2). This is the case because in the majority of cases, the crossing vessel will also be the give-way vessel. The non-crossing vessel as the stand-on vessel will thus be required only to keep the course and speed that allows her to keep-to-starboard. As for the crossing vessel, complying with the crossing rule will often result in compliance with the narrow channel rule as well, since the duties under the two sets of rules are consistent with one another (*infra,* 5.3).

5.1 Crossings or equivocal crossings at the entrance of a narrow channel:

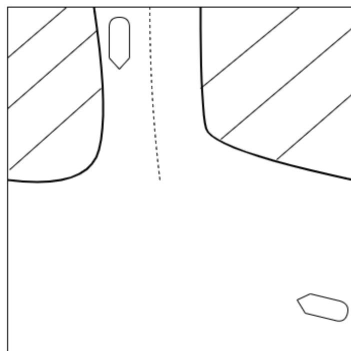
As long as the vessel approaching the entrance is on the port bow of the outbound vessel (Fig. 2), the navigation of the latter remains virtually unaffected.

[63] Cited cases in Marsden and Gault: The Leverington (1886) 11 P.D. 117; The Ashton [1905] P. 21; the State of Himachal Pradesh [1985] 2 Lloyd's Rep. 573, affirmed [1987] 2 Lloyd's Rep. 97, CA.

[64] Andrew Tettenborn, John Kimbell, *Marsden and Gault on Collisions at Sea*, 15th edition, para 7-243, 7-244.

[65] Cited case in Marsden and Gault: The Jaroslaw Dabrowski [1952] 2 Lloyd's Rep. 20.

Fig.2 Vessel approaching an entrance which lies on her starboard side



If the crossing rule applies, as is the case when encountering transiting (Fig. 2.1.) and waiting (Fig. 2.3.) vessels, the outbound vessel is under a duty to maintain course and speed as the stand-on vessel, which we determined comes down to maintaining the course and speed necessary to keep-to-starboard. If the crossing rule does not apply, for example when meeting an inbound vessel (Fig. 2.2), the narrow channel rule still obliges the outbound vessel to keep-to-starboard. The importance of determining to which group the approaching vessel belongs is limited to the approaching vessel itself, for whom the duties will vary depending on which rule applies.

Fig. 2.1 Approaching vessel passing in front of the entrance in a crossing with outbound vessel

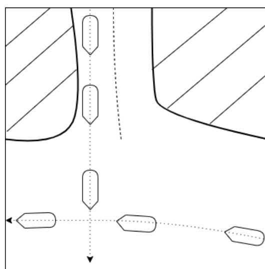


Fig. 2.2 Approaching vessel shaping her course to enter the narrow channel

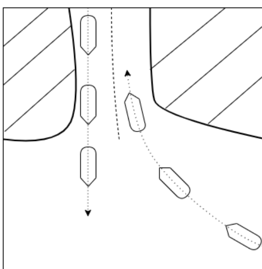
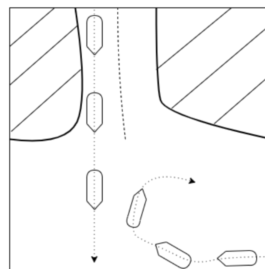


Fig. 2.3 Approaching vessel waiting near the entrance until she is ready to enter



Under the crossing rule, the approaching vessel will have the obligation, as the give-way vessel in this situation, to keep out of the way of the outbound vessel. While under the narrow channel rule, the vessel must enter the narrow channel while keeping-to-starboard. Therefore, it seems that there is a higher emphasis on the ability of the vessel that is approaching the entrance of the narrow channel, while bearing on the port bow of outbound vessels, to determine which of the narrow channel or the crossing rule applies. Viewed under this lens, the focus on even the discernible navigation of the approaching vessel seems unnecessary. On the one hand, the outbound vessel has the same duties regardless of the applicable rule. On the other, the approaching vessel is *de facto* aware of her actual intentions. By extension, the approaching vessel ought to be aware of the discrepancy between her actual intentions and her discernible navigation, if such discrepancy exists. The Alexandra I collision is a perfect example. While the vessel had the intention of entering the narrow channel, the vessel would have also been aware that her navigation before and at the moment of the collision neither conveyed those intentions, nor were they intended to do so. The Alexandra I was not in a position to enter the narrow channel and thus would have been cognizant that (i) the narrow channel rule did not yet apply to her and (ii) an outbound vessel would not be able to forecast her future intention to enter from her discernible navigation at the time when she was near the entrance.

Equally, discerning the navigation of the approaching vessel is no more useful when we consider the situation where the approaching vessel is bearing on the starboard bow of the outbound vessel, making the latter the give-way vessel under the crossing rule (Fig. 3). A similar scenario to the one in Fig. 3 was considered as a hypothetical in The Alexandra I decision and the UK supreme court favoured, albeit in obiter dicta, the application of the crossing rule instead of the narrow channel rule.[66] The distinction between the three groups therefore once again has no bearing on the duties of the outbound vessel, or, for that matter, on those of the approaching vessel. In all three scenarios, the approaching vessel will

[66] The Alexandra I, [2021] 1 Lloyd's Rep 299, para. 143-145.

be on a crossing course with the outbound vessel, regardless of whether the former is entering the narrow channel (Fig. 3.1) – or not (Fig. 3.2.). The duties of the approaching vessel, as the stand-on vessel, will also not change. They will still be to maintain course and speed. If the vessel were entering the narrow channel, then 'course and speed' would correspond to those required to enter it while keeping-to-starboard.

Fig. 3 Approaching vessel bearing on the starboard side of an outbound vessel

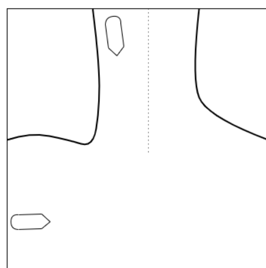


Fig. 3.1 Approaching vessel entering the narrow channel

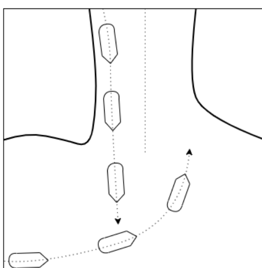
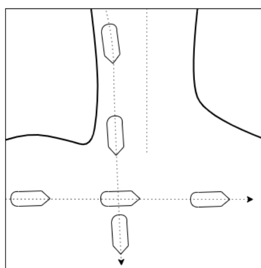


Fig. 3.2 Approaching vessel passing in front of the entrance



The crossing rule might however not always be an optimal solution in this case. The channel vessel may have limited ability to take early and substantial action to keep out of the way. Insufficient water depth outside the narrow channel can hinder the give-way vessel's ability to make evasive manoeuvres. Speed alterations might still be possible, but they can also in some cases be undesirable, as they can affect the manoeuvrability of some vessels.[67] This is why the narrow channel rule, and more specifically rule 9(d), may still be necessary.

Rule 9(d) prohibits vessels from crossing a narrow channel, when doing so would embarrass the navigation of a vessel which can safely navigate only within that channel. A similar view can be gleaned from

[67] As the size of a ship increases, the speed at which the ship can be manoeuvred and kept on course also increases. Rudder action and increasing the propeller's RPM can improve manoeuvrability, but it may still not be enough to compensate against the effects of wind and currents. See IR.J. P. HOOFT, IR. M. W. C. OOSTERVELD, "The Manoeuvrability Of Ships At Low Speed", Netherlands Ship Research Centre TNO, report no. 138 S (May 1970), S2/141.

The Canberra Star,[68] where the court pointed out that "[t]he rule of good seamanship for a vessel entering a main channel is that she should do so with caution and not hamper traffic already navigating in it."[69] While the court could not have been referring to paragraph (d) of rule 9,[70] the duty is effectively the same. At the very least, it seems that good seamanship also requires an inbound vessel to refrain from entering a narrow channel, when doing so would require her to cross the bow of an outbound vessel if the crossing would hamper the latter's navigation.

When a vessel is directed to not impede the passage of another, rule 8(f)(i) states that the vessel must "take early action to allow sufficient sea-room for the safe passage of the other vessel". This obligation, alongside the one in rule 9(d), is usually read as requiring an inbound vessel to take early action not only to avoid a crossing which would otherwise impede the safe passage of an outbound vessel that can only navigate within the narrow channel, but also to actually preclude the risk of collision from arising.[71] Absent a risk of collision, the application of the crossing rule may also be eliminated. However, it does not entirely remove any possibility of it applying. Rule 8(f) does not exonerate vessels from following other rules which may be applicable under the circumstances, as stated in subparagraphs (ii) and (iii):

> *(ii) A vessel required not to impede the passage or safe passage of another vessel is not relieved of this obligation if approaching the other vessel so as to involve risk of collision and shall, when taking action, have full regard to the action which may be required by the Rules of this Part.*

68 The Canberra Star, [1962] 1 Ll. Rep. 24.

69 The Canberra Star, [1962] 1 Ll. Rep. 24, p. 28 col. 2.

70 The Canberra Star case was decided under the 1948 version of the COLREGS which did not contain a provision similar to the one found in rule 9(d). During the 1960 amendment of the COLREGS, a narrower version of the current duty not-to-impede was introduced. Under rules 20(b) and 25(c) of the 1960 COLREGS, a duty to not hamper the navigation of a vessel that can navigate safely only inside a given narrow channel was imposed on respectively sailing vessels and power-driven vessels of less than 19.80 meters (or 65ft).

71 Craig H. Allen, "Narrow Channel Collision Prevention," 21.

> *(iii) A vessel, the passage of which is not to be impeded remains fully obliged to comply with the Rules of this part when the two vessels are approaching one another so as to involve risk of collision.*

The reference to the "Rules of this Part" includes rules 4 to 19, and therefore the crossing rule (rule 15) as well. The duty not-to-impede does not prima facie exclude the crossing rule from applying.[72] The effect that paragraph (f) has, however, is to make it the obligation of both the give-way and the stand-on vessel to take action in order to avoid a collision.[73] Under rule 8(f)(ii), the stand-on vessel cannot avail herself of the obligation to maintain course and speed under rule 17(a)(i) to justify not taking early action under rule 8(f)(i).[74] But at the same time, it does not exonerate the give-way vessel from keeping out of the way just because she is a vessel whose passage should not be impeded.

The rules could thus be read to impose a duty on the crossing vessel to take early action to prevent a risk of collision from arising with a channel vessel. However, if such a risk develops, whether because of the inaction of the crossing vessel or the inefficacy of her action, and the crossing rule is engaged, the channel vessel is required to take the appropriate actions under the crossing rule as well, notwithstanding the fact that her passage should not be impeded. And at all times, and even though the crossing rule may start applying, the crossing vessel is not exonerated from her duty not-to-impede.

The important thing to note is that the ability of the outbound vessel to identify the approaching vessel's discernible navigation, based on the circumstances, serves little purpose in determining the applicable rules and accompanying duties in any of these cases. The onus of identifying which rule applies to encounters at the entrances of narrow channels seems to be more or less on the vessel that is approaching the entrance, rather than the outbound vessel. As such, it is not so much the ability of the outbound vessel to identify the approaching vessel's discernible

[72] Nicholas J. Healy, Joseph C. Sweeney, *The Law of Marine Collision*, 150.

[73] Craig H. Allen, "Narrow Channel Collision Prevention," 21.

[74] Harry Hirst, *Collisions at Sea Volume 1: Liability and the Collision Regulations,* (United Kingdom: Xilbris, 2019), 193.

navigation that is important, as it is the approaching vessel's ability to differentiate between her actual intentions and the ones that she is making public through her manoeuvres and navigation as they can be observed by other vessels. Indeed, one can argue that it ought to be up to the approaching vessel to make sure that her manoeuvres clearly illustrate her actual navigation goals. If the approaching vessel intends on entering the narrow channel, then she ought to approach the entrance in such a manner as to clearly indicate such intent, for instance by adjusting her course early to show that she is adopting a curving course meant to take her into the narrow channel. On the contrary, if the approaching vessel is incapable of entering the channel, as was the case in The Alexandra I, she ought to be aware that her navigation will not indicate an intention to enter the narrow channel and if she is on a crossing course with an outbound vessel, she ought to apply the crossing rule. And in all cases, the approaching vessel should keep in mind the potential application of the not-to-impede duty.

5.2 Crossings or equivocal crossings in narrow channels:

In narrow channels, the most common scenario where two vessels may appear to be on a crossing course is when they meet near a bend. At that point, it is rather difficult for vessels to tell whether it is an actual crossing (Fig. 4.1.), where one vessel (Vessel B) does not intend on rounding the bend, or simply an equivocal crossing caused by the channel's curvature, but which will resolve with a port-to-port passing, thanks to the keep-to-starboard requirement (Fig. 4.2.).

Fig. 4.1 Actual crossing in a narrow channel

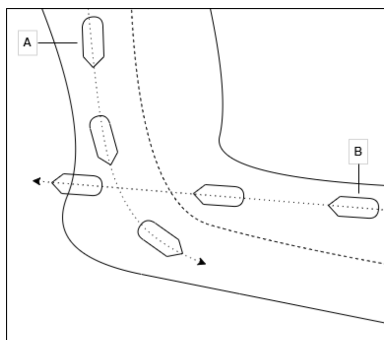
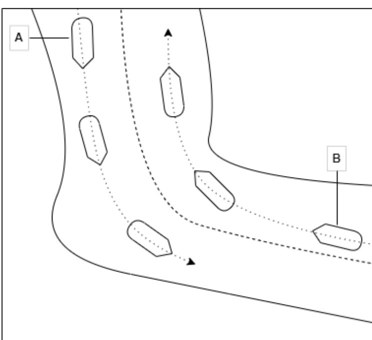


Fig. 4.2 Appearing crossing while wessels are following the curvature of the narrow channel



Interestingly, the risk of collision is much higher when the vessel that has the other on her starboard side (Vessel B) intends on crossing the narrow channel from one side to the other (Fig. 4.1.). If the putative stand-on vessel (Vessel A) under the crossing rule decides to go outside the boundaries of the narrow channel, it usually causes no hindrance to the other vessel (Fig. 4.3.). The crossing rule would apply only in the scenario where vessel A alters to port with the intention of crossing mid-channel to the other side (Fig. 4.3-bis), in which case vessel A would be the give-way vessel under the crossing rule.

Fig. 4.3 Vessel A not following the course of the narrow channel

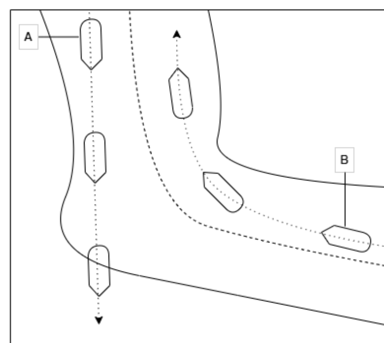
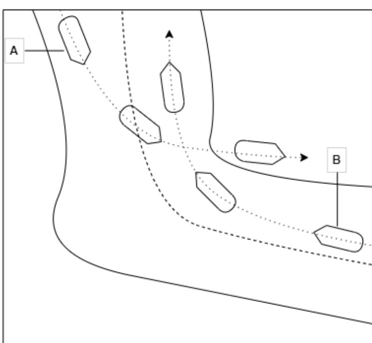


Fig. 4.3-bis Vessel A crossing the mid-channel towards the other side of the narrow channel



Similarly, when a vessel crosses a narrow channel outside of the situation involving a natural curving narrow channel, the crossing vessel will in most cases be the give-way vessel under the crossing rule (Fig. 5.1. and 5.2.). Only in a case where the crossing vessel is crossing from the same side as the vessel following the course of the narrow channel (Fig. 5.3.), will the give-way vessel not be the crossing vessel.

Fig. 5.1 Vessel A crossing in a straight stretch of a narrow channel. The crossing vessel is the give-way vessel

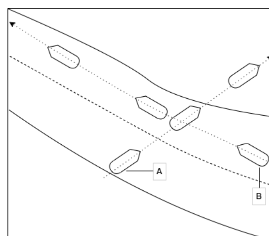


Fig. 5.2 Vessel B crossing in a straight stretch of narrow channel. The crossing vessel is the give-way vessel

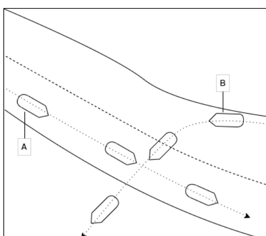
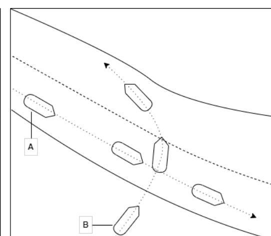


Fig. 5.3 Situation where the crossing vessel is the stand-on vessel



As we can see, and with the exception of the encounter in Fig. 5.3., where two vessels appear to be on a crossing course, regardless of whether one or both vessels intend on actually crossing or not, the crossing vessel happens in most cases to be the give-way vessel. For the non-crossing channel vessel, application of the crossing rule has little effects on her duties once again, similarly to the different scenarios at the entrance of narrow channels. As the stand-on vessel, the duty will simply be to maintain the course and speed necessary to keep-to-starboard of the narrow channel. It is mostly the duty of the potentially crossing vessels, which may change depending on whether or not the crossing rule applies. However, even in a case where the crossing rule applies, it can be argued that the duties imposed on the give-way vessel by the crossing rule are capable of producing the best results when applied concurrently with the narrow channel rule.

5.3 The synergy between the give-way vessel's duty under the crossing rule and the narrow channel rule:

While rule 9(a) only requires vessels to keep-to-starboard, under the crossing rule, the give-way vessel has at least three different possible options to consider, with two being preferable and more likely. The compatibility of each of these options with rule 9(a) deserves to be explored:

(i) **A starboard alteration** – The duties under rule 9(a) and rule 15 turn out to be essentially one and the same for the give-way vessel in this case. An alteration to starboard will in most cases, with the exception of the one illustrated in Fig. 5.3., ensure that the crossing vessel is also keeping-to-starboard, which means that an alteration to starboard to keep out of the way of the stand-on does not lead to violation of rule 9(a). They are virtually the same action (Fig. 6.1(a), 6.1(b) and 6.1(c)).

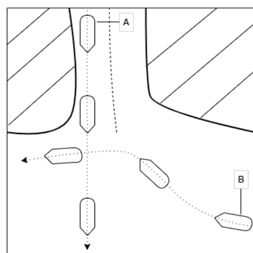


Fig. 6.1(a) Crossing vessel (B) altering to starboard an passing astern to keep out of the way

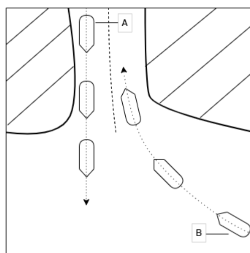


Fig. 6.1(b)Vessel B shaping her course by altering to starboard to enter the narrow channel

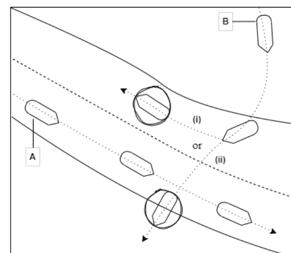


Fig. 6.1(c) Upon reaching the channel, Vessel B can turn to starboard either (i) to keep-to-starboard, if she is following the course of the channel, or (ii) keep out of the way of Vessel A, if she is crossing

An alteration to starboard under the crossing rule does not appear all that different from one that is meant to ensure entry

into the narrow channel, round a bend in a curved narrow channel or simply join the traffic on the correct side of the channel while following the keep-to-starboard requirement.

(ii) **Speed reductions, stopping or reversing** – As long as the give-way vessel stays on the starboard side, adjusting speed for example to wait for the stand-on vessel to pass before proceeding is not incompatible with rule 9(a) either. (Fig. 6.2(a), 6.2(b))

Fig. 6.2(a) Vessel B slowing down before crossing

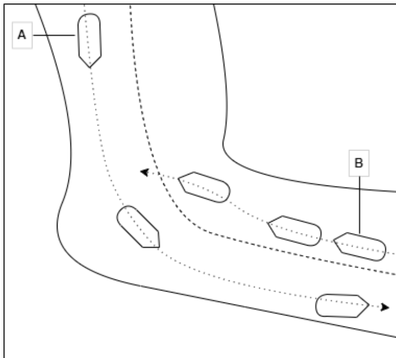
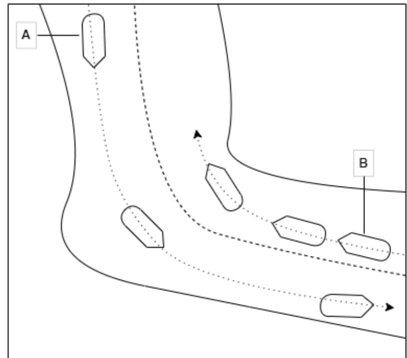


Fig. 6.2(b) Vessel B slowing down before making the turn



(iii) **Porting** – This option is the most likely to be problematic. First, in a narrow channel, an alteration to port would usually bring the give-way vessel across the bow of the stand-on vessel (Fig. 6.3(a) and 6.3(b)). Such action would be contradictory to the warning for the give-way vessel not to cross ahead of the bow of the stand-on vessel in rule 15. Secondly, it would entail abandoning the keep-to-starboard requirement of rule 9(a). Thirdly, it may also be in violation of the not-to-impede duty when the non-crossing vessel can safely navigate only within the narrow channel. The fact that the give-way vessel has access to two other means in this case which are better suited to

avoiding the collision with the stand-on vessel render this third course of action quite unreasonable and potentially dangerous.

Fig. 6.3(a) Vessel B altering to port while on a crossing with vessel A

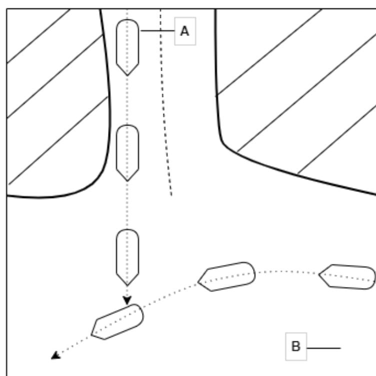
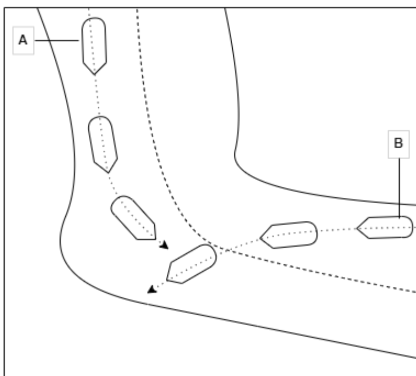


Fig. 6.3(b) Vessel B intending to cross the narrow channel and altering to port thus crossing ahead of Vessel A



Where the crossing vessel is the give-way vessel under the narrow channel rule, the onus on the non-crossing vessel to identify whether the narrow channel rule or the crossing rule applies to the encounter is greatly diminished. If the non-crossing vessel ("NCV") assumes a crossing situation, and the crossing vessel ("CV") ends up not crossing, there are no negative consequences. The NCV's duty is to simply keep-to-starboard and by doing the same, the CV ensures that they pass each other safely port-to-port. If the NCV's assumption is correct and the crossing rule applies, her duty will be to maintain the course and speed which allows her to keep-to-starboard, while the CV has to keep out of the way. And as we have seen, with the exception of an alteration to port, actions taken by the CV to keep out of the way would be compatible with the narrow channel rule.

Therefore, the necessity for the non-crossing vessel to be able to determine the intentions of the other vessel is somewhat diminished, since the obligations of the stand-on vessel remain more or less unaffected

regardless of which rule applies, and the give-way vessel can comply concurrently with the duties under both the crossing rule and the narrow channel rule. Simply put, if both vessels always apply both the crossing rule and the narrow channel rule in every equivocal crossing scenario, the need for predicting navigation would be greatly diminished. Compliance with the rules ought then to be encouraged.

6 Conclusion:

Regardless of whether or not one has nautical training, it should be apparent that it is no easy task to predict the intentions or the navigation of other vessels. Yet, it is a major component of the collision avoidance rules as discussed in both chapters 2 and 3. The stand-on vessel's duty to keep course and speed is assessed in light of her discernible navigation. Whether the crossing rule or the narrow channel rule applies at the entrance of a narrow channel is partly dependent on what can be deduced from the discernible navigation of the vessel approaching the entrance. However, predicting navigation is a challenging exercise fraught with risks, as seen in chapter 4. Discernible navigation can be misleading and not representative of the vessel's actual intentions. Circumstances may be confusing, as two or more assessments of the same situation may be equally plausible. We have therefore to wonder if we can lessen the role that assessment and prediction of navigation plays in determining the applicable rules in equivocal crossing within or near narrow channels.

One possible solution is to recognize that the crossing rule and the narrow channel rule are not mutually exclusive, and that vessels need not choose and follow only one of the two. The rules tend to be clear on what determines their application.[75] Overriding an otherwise applicable rule should be approached with caution, especially when the COLREGS do not envisage such an effect. If the conditions of application of the crossing rule are fulfilled, the presence of a narrow channel should have

75 The Alexandra I, [2021] 1 Lloyd's Rep 299, para. 83(ii) and (iii).

little effect. In most scenarios, the duties under the two sets of rules are far from being incompatible, whether it is from the point of view of the stand-on or the give-way vessel. But above all, admitting that both rules can apply concurrently reduces the role that intentions communication and understanding play in determining the applicable rules. Two vessels approaching the entrance or the bend of a narrow channel in what appears to be a crossing course ought to assume that the crossing rule applies. If the crossing rule does not apply and the two vessels pass each other port-to-port by keeping-to-starboard, no risk is created by the earlier assumption. The duties of both vessels remain essentially the same. If both rules can apply simultaneously, then it becomes unnecessary to distinguish between all the various encounter configurations. This is what we sought to resolve in chapter 5.

Moreover, we have seen that because in most cases the crossing vessel tends to be also the give-way vessel under the crossing rule, there ought to be a bigger onus on the crossing vessel to (i) ensure that her manoeuvres indicate her intentions to cross (or not) and to (ii) be aware when her discernible navigation does not reflect her actual intentions. The goal is to put more focus on clear intentions-communication, and less on intentions-prediction. For instance in sub-chapter 3.2, we determined that a stand-on vessel keeps her course and speed if her manoeuvres are justified by her readily apparent navigation goals or discernible navigation as proposed by this article. However, a different reading of the same duty could be proposed instead in the following manner:

> "The stand-on vessel shall restrict her manoeuvres under the duty to maintain course and speed to those which are made necessary by the ostensible circumstances. Ostensible circumstances include factors such as the location of the vessels, applicable regulations that have an effect on navigation, surrounding traffic, weather, sea conditions, of which a vessel in the same position as the give-way vessel can or ought to be aware."

The purpose is to make vessels more aware of the message their navigation communicates to other vessels and how that may affect the latter's

assessment of the situation, and with it their perception of the applicable rules. The stand-on vessel is aware of her own navigation goals and ought therefore to (i) endeavour to make these intentions ostensible and intelligible to the give-way vessel, while (ii) avoiding any alterations of course and/or speed when they cannot be reasonably expected by other vessels given the ostensible circumstances.

By focusing more on intentions-communication, we put more emphasis on the responsibility of each vessel to be conscious of how their navigation influences the other vessel's decisions regarding which rules to apply and what actions to take. And by recognizing the possibility that both the crossing rule and the narrow channel rule can apply concurrently, we eliminate the possibility for vessels to disagree on which rules actually apply. Thus, vessels may still be required to show their intentions, but the effect it has on the applicable rules is kept to a minimum when it comes to equivocal crossings in or near narrow channels.

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ISSN: 0332-7868

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